

# THE CURE FOR YOUNG PROSECUTORS' SYNDROME

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*Although legal scholars treat prosecutors like interchangeable parts, we argue—based on interviews and surveys of over 200 state prosecutors in eight offices—that scholars should be alert to the differences among them, because new prosecutors experience their professional role differently than their veteran colleagues do. This divergence happens because, as new prosecutors gain experience, their professional identities shift—they become more balanced over time. This Article explores the prosecutor’s professional transformation and the possible catalysts for that change.*

*When experienced prosecutors describe their career trajectories, they regret the highly adversarial posture they adopted earlier in their careers. While the constant quest for trials and aggressive posturing with defense attorneys may help new prosecutors build trial skills, they also cause real harm. A rookie might aggravate overcrowded trial dockets and subject defendants, victims, and witnesses to unnecessary courtroom drama and delay. Such a prosecutor might feel tempted to skirt the edges of disclosure obligations or might use overly broad categories for sentencing purposes, when more individualized judgment could accomplish more.*

*Seasoned prosecutors embrace a more proportional, pragmatic approach to the job, an approach we call balance. They see the true variety of cases on their dockets and calibrate their responses in individual cases, saving the most costly and severe responses for a handful of defendants. Moreover, they appreciate the value that defense attorneys add to the criminal justice system. Our interviewees offered several explanations for this transformation: increasing confidence, a legacy of past mistakes, the ability to distinguish small crimes from large, and life experience.*

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*Because the institutional features of the prosecutor's office can facilitate or impede a new prosecutor's professional transformation, we offer suggestions for chief prosecutors who want to prioritize balance in their workforces. These measures include hiring prosecutors with a mix of experience levels, exposing new prosecutors to case studies of situations that most often lead to regrettable prosecutor choices, and organizing attorneys into units that place senior and junior prosecutors alongside one another on the same teams. We also explain how law schools can plant the seeds of balance before graduation.*

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## INTRODUCTION

I think new prosecutors need to understand it's not a game. This is not, "We get to go to war and we get to be mean and we get to hammer the law." . . . I think when you boil prosecution down, that's what

prosecutors need to learn. It's not about ego. It's not about getting one over . . . It's about justice, and what is right, and that's what our duty is.<sup>1</sup>

Everywhere you look in United States criminal justice systems, it's all about the prosecutor. American prosecutors are the de facto adjudicators in criminal courts; their charging decisions largely determine sentencing outcomes, and these decisions are mostly unreviewable by courts.<sup>2</sup> Because criminal prosecutors control much of the court machinery, reformers and scholars have learned quite a lot about prosecutors' decisions and habits. Unfortunately, even though we understand much about *what* prosecutors do, we know remarkably little about *why* they do it.

This blind spot remains in place because we treat prosecutors like widgets, one the same as the next. In reality, prosecutors are individuals with their own priorities and commitments. Each prosecutor develops a professional identity that defines what it means to be a "good prosecutor," and this professional identity changes during a prosecutor's career, just as it does with other lawyers.<sup>3</sup> In this Article, we investigate how that identity changes with experience on the job. We ask, in what ways do prosecutors change their views and values, including their assumptions about defendants and criminal punishment, over the course of their careers?

We begin to assess prosecutor identity transformation in Part I, by considering what we know about the development of careers and expertise in other fields, such as medicine, business, and policing. Professional socialization typically leads veterans to think of themselves differently than newcomers do. For example, rookie police officers enter the job with ideals about helping the community and transforming lives, but veteran officers are more cynical about criminal suspects and the justice system.<sup>4</sup> Expert firefighters, military strategists, and business leaders tend to be more sophisticated than novices in their thinking, more deeply grounded in the big picture, and more targeted in their use of resources.<sup>5</sup>

Which of these changes in professional identity, noted across other fields, can be found in the prosecutor's career trajectory? Like a police officer, a prosecutor regularly encounters people in the middle of crises, atrocities, tragedies, bad luck, and errors of judgment—some events small, some life-changing. Do prosecutors become more negative about the defendants they encounter, more aggressive in their

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1. Interviews with Prosecutors (January 2010–April 2013) (on file with author) (Gill mid-level 224) [hereinafter Prosecutor Interviews].

2. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009).

3. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 84 (John M. Conley & Lynn Mather eds., 2008) (discussing the transformation of professional identity among conservative cause lawyers).

4. See P.A.J. WADDINGTON, *POLICING CITIZENS: POLICE, POWER AND THE STATE* 134 (1999); John Van Maanen, *Observations on the Making of Policemen*, in *ORDER UNDER THE LAW: READINGS IN CRIMINAL JUSTICE* 64–66 (Robert G. Culbertson & Mark R. Tezak eds., 1st ed. 1981).

5. See LINDA A. HILL, *BECOMING A MANAGER: MASTERY OF A NEW IDENTITY* 69 (1992); GARY KLEIN, *STREETLIGHTS AND SHADOWS: SEARCHING FOR THE KEYS TO ADAPTIVE DECISION MAKING* 84–89 (2009).

filings or plea bargain strategies, and more resistant to defense requests for mercy? Do experienced prosecutors resemble professionals in other settings, becoming less categorical in their assessment of problems and more realistic in their allocation of resources?

We explore this collection of questions by drawing on interviews and surveys of over 200 state prosecutors in eight offices across the southeast and southwest United States, conducted during the period 2010–2013.<sup>6</sup> This methodology, as described in Part II, is modeled on the “rich tradition of socio-legal research” that relies on “in-depth, qualitative studies of lawyers.”<sup>7</sup> Our data show that experienced state prosecutors resemble experts in other fields, in that they rely more on intuition than on formulas, perceive important differences among cases, express concern about proportional use of resources, and focus on the big picture rather than individual pieces of the criminal justice puzzle. We describe this collection of attributes as becoming more balanced in their approach to the job. 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. 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 is a condition that we label “Young Prosecutors’ Syndrome.”<sup>8</sup>

The effects of Young Prosecutors’ Syndrome can distort the outcomes in high-volume state criminal courts. About half of the 25,000 prosecutors who work in the state systems are the “junior” prosecutors that we discuss here.<sup>9</sup> They handle less serious cases at the start of their careers, but fast turnover typically means that relatively inexperienced prosecutors also handle more serious crimes. Prosecutors

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6. This data will ultimately support a multipart exploration of prosecutor culture. An earlier article based on a subset of this data examined the relationship between the prosecutor’s professional identity and the social architecture of the office where she works. See generally Kay L. Levine & Ronald F. Wright, *Prosecution in 3D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012). This research is also profiled in Ronald F. Wright et al., *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL’Y 27 (2014).

7. Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 655 (2012); see also Austin Sarat, *Between (The Presence of) Violence and (The Possibility of) Justice: Lawyering Against Capital Punishment*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 317 (Stuart Scheingold & Austin Sarat eds., 1998); Anthony Paik et al., *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883 (2007); Marina Zaloznaya & Laura Beth Nielsen, *Mechanisms and Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited*, 36 LAW & SOC. INQUIRY 919, 922 (2011).

8. This label is inspired by the dozens of comments received from veteran prosecutors describing the behavior of “young” prosecutors, and it draws specifically on the language of Dean senior 1255, who admitted that in her early career, she suffered from “Young Lawyer Syndrome.” Prosecutor Interviews, *supra* note 1 (Dean senior 1255).

9. See STEVEN W. PERRY & DUREN BANKS, U.S. DEPT. OF JUST., PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES, at 4, tbl. 2 (2011) (estimating 24,937 assistant prosecutors); Ronald F. Wright, *Persistent Localism in the Prosecutorial Services of North Carolina*, 41 CRIME & JUST. (PROSECUTORS AND POLITICS: A COMPARATIVE RESPECTIVE) 211, 247 (2012) (reviewing personnel statistics from one state showing only 52% of prosecutors have more than five years’ experience).

who lack judgment about which cases to try, or who are inclined to goad defendants into trials to prove their professional worth, aggravate already overcrowded trial dockets. They subject defendants, victims, and witnesses to unnecessary courtroom drama and delay<sup>10</sup> just to test their skills. Junior prosecutors who distrust defense attorneys may be more inclined to skirt the edges of their disclosure obligations, in violation of their constitutional and statutory duties.<sup>11</sup> Lastly, inexperienced prosecutors might also press for overly broad categories in their sentencing recommendations, when more individualized judgments could produce more proportional and economical sentencing.<sup>12</sup>

The cure for Young Prosecutors' Syndrome appears to be experience. Our interview data, as recounted in Part III, suggest that, like experts in other fields, many prosecutors mature over the years in their professional self-image and embrace a more pragmatic, individualized approach to the job. As a result, seasoned prosecutors see the true variety of cases on their docket and are able to calibrate their responses in individual cases. The experienced prosecutors we met said that, even though they feel the effects of cynicism at times, they reserve trials and harsh consequences only for a small subset of defendants; 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, in contrast to the begrudging and abstract descriptions of the defense attorney role that junior prosecutors are likely to offer.

The dark side of prosecutorial discretion dominates most academic portrayals of prosecutors, which treat discretion as a source of race, class, or gender discrimination.<sup>13</sup> We do not mean to diminish the risk that discretionary behavior poses, but this Article treats prosecutorial discretion as a mixed bag of effects, a combination that changes over the life cycle of a prosecutor's career. While some experienced prosecutors' behavior might reflect laziness or unwarranted sympathy for defendants who seem familiar to the prosecutor, veterans believe that their maturity serves the public well. They emphasize that a tempered approach produces more substantive justice, balancing the competing interests of victims, defendants, and society. According to our data, that belief is largely absent among new prosecutors, which leads us to wonder why such a disparity exists.

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10. See generally MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

11. See *Brady v. Maryland*, 373 U.S. 83, 89 (1963); N. C. GEN. STAT. § 15A-903 (2011).

12. See *infra* Part III.A.2; Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 331 (2012) (advocating use of grand juries to provide equitable counterbalance to prosecutorial decisions dominated by legal categories).

13. See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity, Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 5 (2013); but see Christopher L. Griffin, Jr., Frank A. Sloan & Lindsey M. Eldred, *Corrections for Racial Disparities in Law Enforcement*, 55 WM. & MARY L. REV. 1365, 1365–66 (2014) (arguing that prosecutorial treatment of driving under the influence cases seems to correct for law enforcement racial discrimination at the arrest stage).

In Part IV, we develop several explanations for the transformation toward balance during a prosecutor's career. The first source of balance is confidence based on past success. Fortified by their past experiences, veteran prosecutors can resist manipulation and ignore criticism dished out by defense attorneys and judges; they can also deliver disappointing news to police officers, crime victims, and supervisors without fearing that they appear weak. The second source of balance is pragmatism based on a legacy of past mistakes. Because they have been burned by witnesses, police errors, and unexpected defense techniques in the past, experienced prosecutors approach witness evaluation and trial preparation with a skeptical eye, stemming from the intuition that a prosecutor's success depends on separating half-truths from reliable evidence. The third influence on balance is an increased ability to distinguish small crimes from large crimes. As prosecutors move up the career ladder, their caseloads become packed with very serious crimes, causing the less serious ones to drop from view; they learn to look for some proportionality between the seriousness of a case and the resources they devote to that case. Lastly, we consider the effects of life experience. Many of our interviewees emphasized the link between their personal experiences and their sense of compassion and restraint as a prosecutor. A prosecutor who lives alongside human frailty—as a parent or a community member—tends to become more grounded, more just, and more careful in her use of criminal justice resources.

Many of the prosecutors we interviewed told us that years of experience guided them towards a more pragmatic and individualized approach to the job. But does their decision-making actually change over the years? Do they in fact decide cases differently than their less experienced counterparts? In Part V, we review survey data relevant to this question. It appears that prosecutors do change their plea offer practices, becoming more pragmatic and proportional as they gain more experience. Those changes in practice, however, seem to be more muted than the emphatic shifts in prosecutors' self-images might suggest.

If the cure for Young Prosecutors' Syndrome is experience, is there anything that senior prosecutors can do to make the cure take effect more quickly and completely? In Part VI, we discuss the ways that chief prosecutors can structure their offices to speed the transformation of their individual prosecutors. These measures include the hiring of prosecutors with a mix of experience levels and the use of training programs designed to simulate the lessons that experience will inevitably teach. We also discuss the role that office organizational schemes play in promoting balanced prosecution. Junior prosecutors who frequently interact with their senior counterparts tend to learn more quickly the lessons that experience can offer. For this reason, office arrangements that place senior and junior prosecutors alongside one another on the same teams, in the same courtrooms, and in the same trials, are likely to speed up the development of expertise. Finally, we address the role of law schools in producing the adversarial mentality that new prosecutors bring into their early years, and suggest how law schools can modify the academic curriculum to plant the seeds of balance before graduation.

Promoting balance for young prosecutors could be the most important single step our criminal justice system can take to improve its health and sustainability. Because of the absence of functional checks and balances in criminal charging and sentencing, prosecutor decisions are central to any effort to restore

balance to a bloated and expensive prison system that is far out of proportion to historic and international comparison points.<sup>14</sup> If we can get this right—increasing the maturity of prosecutors earlier in their careers—we can transform the individual attorneys involved, improve the lives of individual defendants, and further the goals of reasoned judgment and rough equality.

### I. THE QUESTION OF PROSECUTOR CAREER EFFECTS

Although we expect prosecutors to follow the law, nobody believes that prosecutors in the United States *only* follow the law—discretionary application of criminal law is central to the prosecutor's role.<sup>15</sup> Every prosecutor should routinely ask two questions: what does the law *allow* me to do, and what *should* I do to achieve justice for the community and for all of the individuals most affected by this alleged crime?<sup>16</sup> The answer to this second question calls for the prosecutor to predict the future behavior of defendants and to set enforcement priorities.

A prosecutor's individual character traits, family background, and religious faith may all play a part in her decision-making. But organizations also matter;<sup>17</sup> for instance, some prosecutors' offices and court systems are arranged in ways that encourage prosecutors to think of themselves as team members, while other offices

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14. See John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program*, 13 AM. L. & ECON. REV. 491, 495 (2011) (noting the role of prosecution choices to file felony charges as a key source of prison growth); cf. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (noting that prosecutorial decisions have no effect on the bloated prison population).

15. See FRANK W. MILLER, *PROSECUTION—THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1969); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 697 (2006).

16. See NAT'L DIST. ATTORNEYS' ASS'N, NATIONAL PROSECUTION STANDARDS 65 (3d ed. 2009), available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>; AM. PROSECUTORS RESEARCH INST., *PROSECUTION IN THE 21ST CENTURY: GOALS, OBJECTIVES, AND PERFORMANCE MEASURES 2–3* (2004), available at [http://www.ndaa.org/pdf/prosecution\\_21st\\_century.pdf](http://www.ndaa.org/pdf/prosecution_21st_century.pdf); BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING 2* (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240335.pdf>. Cyrus Vance, Jr., the District Attorney of Manhattan, recently wrote on this point: “The answers to these questions are not found in the law, or even in our rules of ethics. Instead, they are defined by the values of conscience and culture, and a healthy skepticism about what it means to do justice in any given case.” Cyrus R. Vance, Jr., *The Conscience and Culture of a Prosecutor*, 50 AM. CRIM. L. REV. 629, 631 (2013).

17. The importance of organizational context is well-recognized in the sociological literature. See, e.g., Stanton Wheeler, *The Structure of Formally Organized Socialization Settings*, in *SOCIALIZATION AFTER CHILDHOOD – TWO ESSAYS* 54 (Orville Brim, Jr. & Stanton Wheeler eds., 1966); PAUL BERMAN, *REVOLUTIONARY ORGANIZATION* 152 (1962). It applies in the prosecution context as well. Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 53, 59–80 (1981) (exploring how office policies constrain individual prosecutor decisions); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 424–26 (2008) (examining use of internal regulations to control plea bargaining).

are organized to inspire the prosecutor to think of herself as an autonomous professional, not tightly linked to others in the office.<sup>18</sup> Thus, the exercise of discretion may differ—systematically and predictably—as one travels from office to office, and from prosecutor to prosecutor.<sup>19</sup>

Are there universal features of the prosecutorial experience, distinct from the effects of personality or organizational context, that shape the way prosecutors view their work? More specifically, do veteran prosecutors share attitudes about defendants, judges, defense attorneys, and the efficacy of criminal courts that differ from the attitudes of new prosecutors? There are many plausible answers to questions about the influence of experience on prosecutorial identity and behavior. Because empirical evidence is quite scarce, it is difficult to contradict any of them.

The working but unarticulated assumption of most scholars seems to be that the experience of serving as a prosecutor does not change the individual's view about the prosecutor's role or the proper exercise of discretion.<sup>20</sup> That is, experience has no systematic effects on a prosecutor's professional self-image or performance. Much of the scholarly literature dealing with prosecutorial discretion proceeds from this starting point, treating prosecutors within an office as fungible representatives of the elected head of the office ("the Elected").<sup>21</sup> If that is the case, it should not matter much which prosecutor in an office handles a file, because his decisions will largely mirror the decisions made by any of his coworkers. Under this view, the prosecutor, whether a veteran or a rookie, is a figure in the criminal courtroom but is not a distinct person unto himself.

There is no rigorous empirical work to confirm this essentialist view of prosecutors. Prosecutorial memoirs, for example, tend to treat individual moral character and consistency as key ingredients in prosecutorial decision-making.<sup>22</sup> Some of the prosecutors who spoke with us said that prosecutors usually possess

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18. See Levine & Wright, *supra* note 6, at 1146–1157; see also Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice after Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS 913, 932 (2012) (emphasizing the effects of organizational culture on *Brady* compliance).

19. See PAMELA UTZ, SETTLING THE FACTS (1979) (comparing the use of plea bargaining in two counties in California); Mellon et al., *supra* note 17, at 56 (comparing prosecutorial practices in ten jurisdictions across the United States); Yaroshefsky, *supra* note 18, at 932 (emphasizing the effects of organizational culture on *Brady* compliance).

20. See, e.g., Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813 (2009); cf. Ellen Yaroshefsky & Bruce A. 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, even though ethics practice, per *Brady*, varies greatly).

21. See Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135 (2009).

22. See, e.g., JOHN W. SUTHERS, NO HIGHER CALLING, NO GREATER RESPONSIBILITY: A PROSECUTOR MAKES HIS CASE 78–80 (2008) (people who make ideal prosecutors are intelligent, excel at verbal communication, and possess a sense of righteousness).

certain character traits, and these traits drive their behavior.<sup>23</sup> In a less flattering light, defense attorneys sometimes treat flawed character as most prosecutors' defining feature. For instance, Abbe Smith conducted an informal survey of public defenders, who generally opined that most prosecutors are smug, self-important, unimaginative people.<sup>24</sup>

Another possibility is that time matters, but not experience, because many people who start out as prosecutors choose not to become career prosecutors. While a wide variety of lawyers might join a prosecutor's office initially, only certain people remain in the office after the first few years.<sup>25</sup> According to this account, senior prosecutors as a group might approach the job differently than junior prosecutors as a group, but only because of selection effects. Therefore, time removes some individuals from the office without changing those who remain.<sup>26</sup>

In contrast to these static views of the individual prosecutor, we think the experience of working as a prosecutor can change an individual lawyer's professional self-image and behavior. Professionals in other settings, such as business, politics, and medicine, evolve over the course of their careers; there is a rich literature in sociology documenting these changes.<sup>27</sup> Taking medicine as just

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23. See, e.g., Prosecutor Interviews, *supra* note 1 (Harris mid-level 1130) (certain personality types, most notably Type A personalities, that are probably going to be on the prosecution side, rather than the defense side); *id.* (Harris senior 1085) (being "organized [and] semi-obsessive compulsive . . . tends to be more of a prosecutor trait."); *id.* (Harris mid-level 1097) (prosecutors are "rule followers" by nature); *but see id.* (Gill junior 215) ("This office has a lot of different personalities and a lot of different people. And I don't think you can put the prosecutor hat on just any one person and say that is the typical prosecutor.").

24. See Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943, 953 (2012) (approximately 50 survey respondents opined that only 2–15% of prosecutors are *not* smug, self-important, or unimaginative); *see also* MARK BAKER, DA: PROSECUTORS IN THEIR OWN WORDS 133 (1999) (defense attorneys and judges describing "big-headed" prosecutors as self-righteous, consumed with power, swayed by their own propaganda, and "God's designated hitter[s] in the World Series of Life"). There is some evidence of this sense of righteousness among our interviewees, to be sure. See, e.g., Prosecutor Interviews, *supra* note 1 (Everly mid-level 790) ("[T]his is going to sound terribly self-righteous and again kind of corny, but . . . I think [we have] a great moral advantage over the defense bar: their job is to win, our job is to do what's right."). This same prosecutor admitted that prosecutors are more likely "than your standard segment of the population" to have big egos. *Id.*

25. See Richard T. Boylan et al., *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005). See also Prosecutor Interviews, *supra* note 1 (Flatt senior 500) (commenting on the turnover rates of a neighboring jurisdiction's prosecutor's office).

26. We certainly heard stories of people who couldn't cut it, and then got pushed out or decided to leave, but most of those stories involved people who couldn't emerge from Young Prosecutor's Syndrome to become more balanced. See *infra* Part III.B. For that reason, even this story about selection effects tends to provide evidence of the maturation cycle we describe here.

27. See, e.g., Herminia Ibarra, *Provisional Selves: Experimenting with Image and Identity in Professional Adaptation*, 44 ADMIN. SCI. Q. 764, 764–91 (1999); Herbert Asher, *The Learning of Legislative Norms*, 67 AM. POLITICAL SCIENCE REVIEW 499–513 (1973); Brenda L. Beagan, "Even If I Don't Know What I'm Doing I Can Make It Look Like I Know What I'm Doing": *Becoming a Doctor in the 1990s*, 38 CANADIAN REV. OF SOC. &

one example, Howard Becker and Blanche Geer explain that as medical students become doctors, early-stage idealism yields some ground to cynicism about the limits of what medicine can accomplish, although traces of idealism remain in some settings.<sup>28</sup> Likewise, Ester Apesoa-Varano observed that young nurses must learn to reconcile conflicting visions of what nursing is about, accommodating their original goal of caregiving with the professionalism goals of modern nursing programs.<sup>29</sup>

A prosecutor's professional identity transformation might take one of several different forms. Experience might mellow the prosecutor, creating a lawyer with a greater sense of pragmatism and proportionality over time. This would be consistent with the observations of Milton Heumann, in his classic study of prosecutorial, judicial, and defense attorney adaptation to plea bargaining.<sup>30</sup> It would also be consistent with the development of expertise cutting across many different professions, as documented in popular nonfiction works.<sup>31</sup> Professionals as diverse as pilots, firefighters, business managers, and military strategists all learn over time to pay attention to subtle cues that inexperienced people miss and to rely on intuitions that stem from years of experience with complex situations.<sup>32</sup> Veterans in these fields are more refined and confident than rookies with their use of resources and rules: because they can "make discriminations and recognize connections," veterans are less likely to turn to procedures and formulas when problems arise. Because they "understand the system," experienced professionals have "richer mental models" than people who are new to the job.<sup>33</sup>

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ANTHROPOLOGY 275–92 (2001). We considered this literature in more detail in our prior work, Levine & Wright, *supra* note 6.

28. Howard S. Becker & Blanche Geer, *The Fate of Idealism in Medical School*, 23 AM. SOC. REV. 50, 50–56 (1958).

29. Ester Carolina Apesoa-Varano, *Educated Caring: The Emergence of Professional Identity Among Nurses*, 30 QUALITATIVE SOC. 249, 252 (2007).

30. MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS (1977) (offering results of a study of Connecticut state courts in the 1970s). Similar trends seem to describe the professionalization of judges. See Martin Schneider, *Performance Management by Culture in the National Labor Relations Board's Division of Judges and the German Labor Courts of Appeal*, 14 J. PUB. ADMIN. RES. & THEORY 19 (2004).

31. See KLEIN, *supra* note 5; MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005) (especially Chapter 4 and accompanying notes).

32. See HILL, *supra* note 5, at 5 (becoming a manager is not limited to "acquiring competencies and building relationships"; individuals must "learn to think, feel and value as managers"). As one authority on managerial learning and development has observed, "A person does not gather learnings as possessions but rather becomes a new person with those learnings as part of his or her new self." *Id.* at 8 (quoting Warren Bennis). See also PATRICIA BENNER, *FROM NOVICE TO EXPERT: EXCELLENCE AND POWER IN CLINICAL NURSING PRACTICE* 13–34 (1st ed. 1984) (describing the five levels of proficiency through which a person passes to get from novice to expert).

33. KLEIN, *supra* 5, at 23. Klein aptly explains this as the difference between knowing how to interpret a map versus needing to follow specific directions to find a new location. *Id.* at 30. See also BENNER, *supra* note 32, at 13–34 (1984) (over time, reliance on rules decreases while the formation of principles and maxims increases, finally yielding to intuition).

Alternatively, experience might be a calcifying influence, making the once-idealistic lawyer generally more cynical about the perceived evils of the defendant population and skeptical about the value of the defense bar. This would be consistent with the literature documenting the risk that prosecutors will succumb to “conviction psychology” the longer they stay on the job.<sup>34</sup> If this does happen to prosecutors, they would not be alone in the legal profession. For example, experience does seem to harden the attitudes of “poverty lawyers,”<sup>35</sup> leading to emotional detachment and complacency.<sup>36</sup>

Police officers’ cynicism also increases as their careers progress. They might be the closest (yet still imperfect) analog of the prosecutor, given their work with criminal suspects and crime victims. Studies of police from the 1960s–1980s reported that police regularly become more cynical and suspicious of the populations they patrol, due to the danger that police face in their daily encounters, their regular (often sordid) interactions with people at their worst, and the social isolation that comes with the job.<sup>37</sup> Police recruits begin as idealists about their role but soon learn to adopt a hardened stance, even if it is not their natural inclination, in order to succeed on the force.<sup>38</sup> Even though indoctrination begins in the academy, it does not really take hold until the early months spent with the field training officer, when

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34. See, e.g., George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U.L.REV. 98, 111 (1975); ARTHUR LEWIS WOOD, CRIMINAL LAWYER 207 (1967); see also Aviva Orenstein, *Facing the Unfaceable; Dealing with Prosecutorial Denial in Post-Conviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 423 (2011) (noting that prosecutors get tired of dealing with defendants, whom they perceive as liars and whiners).

35. This phrase designates lawyers who work for poor populations, whether on civil or criminal matters.

36. See Zaloznaya & Nielson, *supra* note 7, at 941; Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1250 (2004); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1289–90 (1993).

37. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 42–67 (1st ed. 1966); WILLIAM A. WESTLEY, *VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY* 49 (1970); BETHAN LOFTUS, *POLICE CULTURE IN A CHANGING WORLD* 6 (2009). For an example of the cynical attitude, see ROBERT REINER, *THE BLUE-COATED WORKER: A SOCIOLOGICAL STUDY OF POLICE UNIONISM* 175 (1978) (“I had a particularly rotten beat, a rough area of town, full of dogs, yobs and kids. And they’re all on to you. It’s bred into them from the time they’re so high. Not all of them, obviously. But 90% of them. Well over 90%, I should say. It’s soul-destroying, it really is.”). To be fair, there have not been any recent studies of police to provide a more current portrait, and some anecdotal evidence suggests that police officers today are more balanced than their counterparts were 50 years ago. See, e.g., Charles H. Ramsey, *The Challenge of Policing in a Democratic Society: A Personal Journey Towards Understanding*, NEW PERSPECTIVES IN POLICING, June 2014, at 5 (NCJ 245992), available at <https://www.ncjrs.gov/pdffiles1/nij/245992.pdf> (Philadelphia police chief asserting that officers need to guard against the risk that zero-tolerance policing becomes zero tolerance for the population).

38. See WADDINGTON, *supra* note 4, at 1; Van Manaan, *supra* note 4, at 51–70; LOFTUS, *supra* note 37, at 9. One officer admitted that in his early years, “I think I was too friendly with people. . . . I didn’t develop the police attitude toward people [until later].” REINER, *supra* note 37, at 175.

a member of the older generation takes a rookie under his wing to teach him how things really are.<sup>39</sup> That more experienced colleague “interprets” the rookie’s experiences for her, teaching by example what attitudes she should hold about police work.<sup>40</sup> The rookie also hears war stories from veteran officers that tend to glorify excitement and action<sup>41</sup> and to “signal and create mutually held perspectives” toward certain classes of people and places.<sup>42</sup> After a while, the rookies’ “minds are dyed blue.”<sup>43</sup>

Having considered these research findings about professionals in other fields, this Article examines what sort of transformation happens to prosecutors. Do prosecutors become more cynical on the job through exposure to defendants and the lessons their more experienced colleagues teach them? Do they develop expertise that prizes individualization, a sense of proportion, and attention to the realistic limits of the system? Do they develop core intuitions about how to do the job well?

## II. METHODOLOGY OF THIS STUDY

In an effort to study state prosecutors’ professional transformations, we interviewed prosecutors in eight offices in the American Southeast and American Southwest during the period 2010–2013.<sup>44</sup> Some of the offices, which we call “County Attorneys” offices, handle only misdemeanors. Some handle only felonies

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39. Van Manaan, *supra* note 4.

40. *Id.* at 59.

41. Maureen Cain observed that police officers tend to focus on the crime-fighting aspect of their role, when in fact crime fighting comprises only a small percentage of the officer’s job. This disparity between image and reality creates a dilemma for the police officer’s self-esteem. Officers achieve an “authentic police experience,” she says, by focusing on petty crimes, making marginally legitimate arrests, and creating action where none is really necessary. MAUREEN CAIN, *SOCIETY AND THE POLICEMAN’S ROLE* (1973). Other scholars have similarly noted that police have a “narrow conception” of their role as being about crime fighting, rather than about community service, despite the reality of how their time is spent. REINER, *supra* note 37, at 214; LOFTUS, *supra* note 37, at 91.

42. Van Manaan, *supra* note 4, at 57; LOFTUS, *supra* note 37, at 97 (war stories are discourses of violence and action).

43. David Alan Sklansky, *Seeing Blue: Police Reform, Occupational Culture, and Cognitive Burn-in*, in *POLICE OCCUPATIONAL CULTURES: NEW DEBATES AND DIRECTIONS* 19, 20 (Megan O’Neill et al. eds., 2007). Arthur Niederhoffer took these observations one step further, articulating a “cynicism scale”—with four stages—to account for the evolutionary development of this trait among police officers. ARTHUR NIEDERHOFFER, *BEHIND THE SHIELD: THE POLICE IN URBAN SOCIETY* (1967). Later scholars attempted to establish the robustness of Niederhoffer’s scale, without much success, but most still agreed that cynicism tended to grow over time, and to be rewarded by the organizational hierarchy. See Richard H. Anson et al., *Niederhoffer’s Cynicism Scale: Reliability and Beyond*, 14 J. CRIM. JUST. 295 (1986). Notably, we found no study examining whether senior police officers also develop expertise of the sort found in these other professions; we suspect they do.

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 semi-structured format was used and the Authors did all coding and analysis from these transcripts.

(designated here as “State’s Attorneys” offices), and still others handle a mixture of felonies and misdemeanors (labeled here as “District Attorneys” offices).

We selected offices for this research based on a variety of factors, including size, docket diversity, and political climate. All but one of the offices represent urban and suburban areas; we did not include many rural offices in our study because they tend to have very small staffs, making it difficult to maintain the confidentiality of interviewees. We also generally sought offices with stable leadership to minimize the anxiety our research might have caused for the administration. We list the eight pseudonymous offices here, from smallest to largest, and note how many interviews we conducted in each location:<sup>45</sup>

**Atkins District Attorney.** This office of 15 attorneys handles both felonies and misdemeanors for a rural county in the Southwest. Entry-level attorneys begin their careers in the misdemeanor unit before moving to different crime-specific felony trial units. The elected District Attorney had been in office for over 10 years at the time of our interviews. We conducted 15 interviews in this office.

**Brooks County Attorney.** This office of approximately 20 attorneys prosecutes misdemeanors in a suburban county, just outside a city center, but an integral part of a major metropolitan area in the Southeast. The elected County Attorney had been in office for less than five years at the time of our interviews. We conducted 14 interviews in this office.

**Cline County Attorney.** This office of about 25 attorneys prosecutes misdemeanor charges in a suburban county in the Southeast, one that includes some well-established areas and some more recent development. The elected County Attorney had been in office for approximately 20 years at the time of our interviews. We conducted 23 interviews in this office.

**Dean State’s Attorney.** This office of about 35 attorneys prosecutes felony charges in an exurban county, part of a major metropolitan area in the Southeast. With very few exceptions, all prosecutors serve on general trial teams. The elected State’s Attorney had held office for over 20 years at the time of our interviews. We conducted 19 interviews in this office.

**Everly State’s Attorney.** This office of about 40 attorneys prosecutes felony cases in a suburban county in the Southeast, one that includes some well-established areas and some more recent development. Most prosecutors work on general trial teams, but some serve in specialized units. The elected State’s Attorney had held office for approximately 15 years at the time of our interviews. We conducted 28 interviews in this office.

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45. Given the location of these offices in the Southeast and Southwest, we drew inspiration for names from the Country Music Hall of Fame. See *Inductees List*, COUNTRY MUSIC HALL OF FAME, <http://countrymusichalloffame.org/full-list-of-inductees/> (last visited Sep. 22, 2014).

**Flatt State's Attorney.** This office of about 55 attorneys prosecutes felonies in a well-established suburban county, outside the downtown area but inside the ring of exurban development in a metropolitan area in the Southeast. Most prosecutors are part of general trial teams, but some serve in specialized units. The elected State's Attorney had held office for several years at the time of our interviews. We conducted three interviews in this office.

**Gill District Attorney.** This office of about 80 attorneys prosecutes all felonies and misdemeanors in a county in the Southeast that includes a major city, suburbs, and rural areas. Entry-level attorneys begin work on misdemeanors, and progress through felony units that handle crimes of increasing seriousness. The elected District Attorney had held office for over 30 years at the time of our interviews. We conducted 76 interviews in this office.

**Harris District Attorney.** This office of about 85 attorneys prosecutes all felonies and some misdemeanors in a Southwest county that contains a major city and suburban areas. Entry-level attorneys begin their careers in the misdemeanor unit before moving to different crime-specific felony trial units. The elected District Attorney had held office for approximately 15 years at the time of our interviews. We conducted 39 interviews in this office.

Our outreach to the offices varied by location. In some cases, we met the Elected (the State's Attorney, County 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 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—those actually involved in handling cases—about their professional development and their views about the prosecutor's role, not to audit their files or to scrutinize their decision-making in individual cases. Responses ranged from highly enthusiastic to cautiously supportive, although in one office, enthusiasm dried up soon after the project began,<sup>46</sup> 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.<sup>47</sup> Ultimately, we interviewed 217 attorneys in these eight offices, following a semistructured format that produced interviews lasting, in a majority of

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46. As it was reported to us, some of the attorneys in Flatt County read some of our published scholarly works; on that basis, some prosecutors in the office feared that we would use this project to cast the office in a negative light. Despite our efforts to address these concerns, we decided to withdraw.

47. 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 the decision to participate was theirs alone, and that their supervisors would not receive any information about our data until the project was over.

cases, 60–90 minutes.<sup>48</sup> With the permission of the interviewees, all interviews were audio-recorded and transcribed.<sup>49</sup>

Among the 217 interviewees, 101 (47%) were women and 36 (17%) were racial minorities. To maintain confidentiality, we deleted information that would identify the interviewee personally as the source of a comment (such as hometown or college), except where necessary to make sense of the quote.<sup>50</sup> Because the questions addressed in this Article relate to the prosecutor's level of experience, the interviewees were divided into four categories: entry level (0–1 years as a prosecutor), junior level (2–4 years), mid-level (5–9 years), and senior level (10 or more years). This scheme placed 8% of the interviewees in the entry level, 30% at the junior level, 33% at the mid-level, and 29% at the senior level.<sup>51</sup>

Our interviews covered many aspects of the prosecutors' educational and professional development.<sup>52</sup> For example, we asked our respondents to tell us why they became prosecutors, how office policies influence their day-to-day work, and how they perceive 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, using a grounded theory approach.<sup>53</sup>

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48. In almost all instances, we conducted the interviews in face-to-face format in the prosecutor's office or conference room in the prosecutor's building; we conducted a few of the interviews by Skype due to travel difficulties.

49. One Author conducted all interviews in Atkins, Gill, and Harris; the other conducted all interviews in Brooks, Cline, Dean, Everly and Flatt. The Authors equally divided the coding and analysis for interviews from each location.

50. We also do not identify participants in this Article by race or ethnicity, although we do signify gender where relevant. Sometimes we switch the gender of the speaker when relating a quote (in situations that do not bear directly on gender, in our judgment) to better protect the speaker's identity.

51. The experience levels of all interviewees are summarized in an Appendix. Many of our interviewees had experience as attorneys or in other careers before becoming prosecutors. While our experience variable accounts only for years spent as a prosecutor (either in the current office or elsewhere), we note in the text where experience in other careers seemed relevant to the interviewee's comment.

52. Several years ago, Alafair Burke conducted an informal survey of current and former prosecutors, seeking information about the factors that influence their prioritization of cases during plea bargaining. That survey allowed her to draw some tentative hypotheses about the effects of prosecutor experience that are consistent with our finding. See Alafair Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 189–90, n.24 (2007).

53. Because this is predominantly a qualitative study, we report those themes that emerged from our transcripts in notable ways; each of the points we discuss do not necessarily reflect a majority of our respondents' comments, but they occurred frequently enough in our data to constitute a recognizable pattern. For a description of the grounded theory approach to interview-based research, see L. Lingard et al., *A Certain Art of Uncertainty: Case*

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.<sup>54</sup> 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.”<sup>55</sup>

### III. PROFESSIONAL BALANCE AMONG PROSECUTORS

When prosecutors talk about their years in the profession, they typically say that they have changed their approach to prosecution. “You should always keep developing,” one interviewee said. “You [should] have 20 years of experience and not one year 20 times over,” he advised.<sup>56</sup> When describing their professional development over the course of a career, prosecutors frequently point to a growing sense of proportionality or balance, based on an appreciation for the larger context of criminal prosecution.

Individual prosecutors typically do not perceive any lack of balance in their own *current* approach to the work. The most fruitful interview moments occurred, instead, when mid-level and senior prosecutors reflected *back* on their younger selves. In hindsight, they recognized that their earlier approach to the prosecutor’s role was immature, idealistic, or simplistic,<sup>57</sup> lacking the qualities that we describe below. It is important to note that seasoned prosecutors have not become, and do not regard themselves as, soft on crime or criminals. Rather, they have become *more restrained and proportional* than they were at the start of their careers—a change we describe as more balanced.

In the pages that follow, we reveal the changes in professional self-image and behavior that our interviewees articulated. In Subpart A, we present the components of the experience–balance connection that emerged consistently in our interview data and indicate where our survey data supported the prevalence of these

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*Presentation and the Development of Professional Identity*, 56 SOC. SCI. & MED. 603, 606–07 (2003); Ibarra, *supra* note 27, at 767, 771–72 (1999).

54. The attitudinal survey instrument consisted of a subset of questions employed by FREDERICK & STEMEN, *supra* note 16. We draw here on a set of 204 survey responses, obtained from prosecutors in Brooks, Cline, Dean, Everly, and Gill Counties. In addition, the survey responses include prosecutors from “Northern” County and “Southern” County in Frederick and Stemen’s study; Southern County is the same as Gill County in our study.

55. The simulation survey instrument also tracked the work of FREDERICK & STEMEN, *supra* note 16, after adjusting for state-to-state differences in the charges available under the relevant criminal code. While we have included findings from this survey data where relevant, this Article predominantly presents the results of qualitative research. We did not take a randomized sample and do not purport to make statistically generalizable claims about the incidence of these attitudes.

56. Prosecutor Interviews, *supra* note 1 (Everly senior 805).

57. *Id.* (Everly senior 715) (“immaturity” among new hires); *id.* (Gill junior 167) (new prosecutors “are very vanilla and kind of wide-eyed”); *id.* (Cline mid-level 555) (describing herself as “very naive” when she first started); *id.* (Everly mid-level 720) (“idealism”); *id.* (Gill mid-level 227) (“overly simplistic”); *id.* (Dean senior 1225) (“naive” view of victims).

viewpoints. Subpart B identifies the crosscurrents, or exceptions to this dominant narrative, that we observed.

#### A. *The Experience–Balance Connection*

Veteran prosecutors differ from their junior colleagues in both professional identity and behavior. Their image of the prosecutor's role is more textured than the one rookies possess. They are more cognizant and accepting of the limits of the criminal justice system and are more willing to venture beyond the pure advocacy role to achieve results. Having adapted their self-image to the social and situational realities of practice, more balanced prosecutors say they do the job differently, in three important ways.

First, balanced prosecutors endorse and practice proportionality; that is, they calibrate their decisions to produce lenient outcomes in some cases and severe outcomes in other cases, rather than severe outcomes in all cases. Consistent with that approach, they are comfortable seeking no criminal punishment at all, or a less severe criminal punishment than the law would allow, in cases where defendants do not seem like genuine threats. Moreover, they embrace this responsibility as one of the most important dimensions of the prosecutorial role.

Second, a sense of balance inspires a prosecutor to economize, based on a pragmatic view of those times when a criminal sentence could add the most benefit for the public. This prosecutor focuses resources on exceptional cases, acknowledging that very few cases actually need to be tried for the criminal justice system to get results. The fullest possible investigation, trial, and sentencing for each criminal suspect would not be desirable or cost-effective.

And finally, balanced prosecutors accept that defense attorneys routinely make concrete and valuable contributions to the quality of criminal justice. They do not treat the defense role as an abstraction, an obstruction, or a needed check on the power of police and prosecutors in *other* places. Rather, the balanced prosecutor embraces the positive effects of defense counsel, even in her own cases.

##### 1. *Changes in Role Imagery*

Prosecutors with a few years of experience look back, oftentimes with some combination of fondness, regret, and amusement, and generalize about the worldview of entry-level prosecutors. We call this worldview—and the actions it produces—the “Young Prosecutors’ Syndrome.”

This early-career self-image places the prosecutor in a simple but intensely competitive world, with the forces of good aggressively taking on the forces of evil. “[W]hen I first started, I’m all bright-faced, and fresh-faced, and everything is just simple. [T]here’s the bad guy, and there’s the good guy . . . and we prosecute the bad guy.”<sup>58</sup> The prosecutor in this tableau dresses like a superhero. As one mid-level prosecutor in Harris County put it, when she first became a prosecutor, “I had sort of that romantic popular idea of what . . . a prosecutor did, which is, ‘I’m going to

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58. *Id.* (Gill mid-level 227).

put on my cape, and I'm going to go join the crusade and fight for right.”<sup>59</sup> According to this view, the prosecutor puts on “the adversarial face and the adversarial suit” and goes to battle.<sup>60</sup> Clothed in this way, the prosecutor acts aggressively in pursuit of justice for the community and the victim. Seasoned prosecutors describe their early view of the proper role as “hardass,”<sup>61</sup> “balls-to-the-wall,”<sup>62</sup> and “gung-ho, got to lock them up!”<sup>63</sup> The prosecutor heads to court with “guns-a-blazing,”<sup>64</sup> “full of righteousness and vinegar.”<sup>65</sup>

There are plenty of motives for taking this posture. First, the new prosecutor is trying not to appear weak or scared to his peers and supervisors.<sup>66</sup> Second, he seeks to establish “street cred with the defense bar.”<sup>67</sup> Third, all defendants seem to be bad guys<sup>68</sup> and the stakes in each case appear to be high—“everything is a crime against the nation.”<sup>69</sup> Responding to these stressors, the

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59. *Id.* (Harris mid-level 1079). Taking the metaphor to the next level, one junior prosecutor spontaneously identified Batman as the superhero he would like to be, due to Batman’s brains, skills, and dedication to ridding the world of bad guys. This prosecutor had several action figures and posters of superheroes in his office and referred to them during the interview.

60. *Id.* (Gill mid-level 242); *id.* (Cline senior 570) (once thought of herself as the “light in the darkness, . . . fighting the good fight [against] defense attorneys and [evil] criminals”). Others describe the costume less flamboyantly as “wearing the white hat.” See, e.g., *id.* (Brooks mid-level 915); *id.* (Cline mid-level 530); *id.* (Cline mid-level 610); *id.* (Dean senior 1205); *id.* (Dean junior 1210); *id.* (Dean junior 1210); *id.* (Everly senior 710); *id.* (Everly senior 725); *id.* (Everly junior 740); *id.* (Everly senior 770); *id.* (Everly senior 780); *id.* (Everly senior 785); *id.* (Gill mid-level 194); *id.* (Gill mid-level 296); *id.* (Gill mid-level 299); *id.* (Harris senior 1065); *id.* (Harris mid-level 1111); *id.* (Harris junior 1128); *id.* (Harris mid-level 1129).

61. *Id.* (Gill mid-level 242); *id.* (Cline senior 570) (“hardcore” and “intense”); *id.* (Gill mid-level 158) (“super tough”); *id.* (Everly junior 795); *id.* (Harris junior 1101).

62. *Id.* (Dean senior 1250).

63. *Id.* (Gill mid-level 293).

64. *Id.* (Gill mid-level 299).

65. *Id.* (Atkins mid-level 1007).

66. *Id.* (Dean senior 1250); *id.* (Cline junior 615); *id.* (Gill junior 167). Everly senior 785 said new prosecutors manifest feelings of insecurity in two primary ways: they seem “scared to death” or very “gung-ho” about trials. *Id.* (Everly senior 785). Dean senior 1220 surmised that new prosecutors’ fear of losing at trial is also based on their history of success in life up until that point: most new prosecutors have “never failed in anything” and a not-guilty verdict could prove “devastating.” *Id.* (Dean senior 1220).

67. *Id.* (Dean senior 1250); *id.* (Harris junior 1126); *see also infra* Part IV.A (development of confidence to deal with defense attorneys).

68. Prosecutor Interviews, *supra* note 1 (Dean mid-level 1245) (“At first it was everybody is guilty, I don’t care; if they are here they are going to jail.”); *id.* (Gill senior 142) (“willingness to [] prosecute everybody, regardless of the evidence”); *id.* (Cline senior 605) (admitted to being an “jail everybody type of person” when he first started; speculated that this attitude stemmed from the job title, when new prosecutors say to themselves, “I am prosecutor”).

69. *Id.* (Gill mid-level 227); *see also id.* (Dean junior 1270).

rookie prosecutor too often “goes for the jugular”<sup>70</sup> or acts like a “bully.”<sup>71</sup> In one of the most evocative descriptions we heard, prosecutors start out too “angular.”<sup>72</sup>

In contrast to the combative approach taken by new prosecutors, veteran prosecutors arbitrate among the interests of the defendant, the victim of the crime, and society at large. For example, one Gill prosecutor observed that while she was a “victim’s rights advocate” in law school, she saw herself differently now. “Because each of the other players in a case is biased in some way,” (the police officer looks only at society’s interest, victims look at their own interests, and the defense attorney considers the defendant’s best interests), “my job as the prosecutor is to weigh all of those” and to figure out, “alright, well, how can I make this work?”<sup>73</sup> Another put it even more succinctly: “If you had a perfect prosecutor you wouldn’t need a court system. You wouldn’t need defense attorneys.”<sup>74</sup>

These comments suggest that over time, prosecutors change their professional self-image, moving from an “overly simplistic,”<sup>75</sup> “black and white” view of the world to an ability to see “shades of gray” in their cases and in the people who are involved in those cases.<sup>76</sup> There is no single point in time in which this change happens, no Rubicon that gets crossed. Rather, prosecutors “drift” into a new

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70. *Id.* (Gill mid-level 266); *id.* (Cline senior 605).

71. *Id.* (Everly junior 740); *id.* (Everly senior 830) (young prosecutors have an adversarial responsibility but “I don’t think you have to eat the carcass after you’ve killed”).

72. *Id.* (Gill mid-level 221). While the young prosecutor personality emerges in all sorts of offices, it is likely to be more egregious or entrenched in certain institutional settings. An office that prompts its employees to deal aggressively with defense attorneys, or one that bases its promotions exclusively on trial success, promotes the angular image of young prosecutors depicted here. We discuss in Part VI ways that an office can hedge against the young prosecutor’s syndrome and cultivate a balanced approach right from the start. Here, however, we focus on the apparent universality of this behavior among rookies across offices.

73. *Id.* (Gill junior 206); *see also id.* (Gill junior 239) (“My responsibilities are different from the people who are in the audience watching, different from the judge, different from the defense attorney, different from somebody reading the newspaper about it the next day.”); *id.* (Everly mid-level 720) (“[Y]ou get to be an advocate for the system, and sometimes that entails doing something good for the defendant and sometimes it entails doing something good for the community.”). Prosecutors taking this approach have become “adjudicator[s] as well as adversar[ies].” HEUMANN, *supra* note 30, at 118.

74. Prosecutor Interviews, *supra* note 1 (Gill mid-level 143); *see also id.* (Cline senior 545) (being prosecutor and defense attorney at the same time); *id.* (Atkins senior 1017) (prosecutor and defense attorney “are essentially the same job”).

75. *Id.* (Gill mid-level 227); *id.* (Atkins junior 1053) (“I really bought into the whole ‘Law and Order,’ it’s an hour from start to finish. Well, you see, it was a very clean process with few pitfalls.”).

76. This “black and white” language was one of the most common descriptions of the young prosecutors’ landscape that we heard. *See, e.g., id.* (Cline senior 525); *id.* (Cline mid-level 555); *id.* (Cline junior 565); *id.* (Cline senior 570); *id.* (Cline senior 575); *id.* (Cline senior 605); *id.* (Cline mid-level 625); *id.* (Cline senior 635); *id.* (Dean senior 1255); *id.* (Dean junior 1265); *id.* (Dean junior 1270); *id.* (Everly mid-level 800); *id.* (Everly senior 805); *id.* (Gill junior 110); *id.* (Gill mid-level 227); *id.* (Gill junior 302); *id.* (Gill junior 263). Some prosecutors see this as a continuing challenge, or identify themselves at core as “black and white” people. *See, e.g., id.* (Atkins mid-level 1049); *id.* (Brooks junior 950); *id.* (Cline senior 575); *id.* (Everly senior 725); *id.* (Flatt mid-level 505); *id.* (Harris junior 1101).

way of thinking about their professional role and its obligations.<sup>77</sup> As a result, seasoned prosecutors say that they treat prosecution less like a game with winners and losers, getting beyond questions of “ego” in order to resolve cases according to realistic assessments of evidentiary strength as well as substantive justice concerns.<sup>78</sup> This quote from an Everly senior prosecutor captures the shift from needing to “rack up victories” and making sure every defendant gets “stuffed away” to recognizing that there are “two sides to every story”:

[As a] young prosecutor, I suppose you are out to impress people and see how many victories you can rack up and how many years of prison you can rack on people, stuff ‘em away. But as you get older, especially if you get some experience on the defense side, you see there is [sic] always two sides to every story, and not everybody needs to get stuffed away for as long as humanly possible.<sup>79</sup>

## 2. Leniency, Individualized and Institutional

While some of the differences between neophyte and experienced prosecutors relate to their general attitudes, others involve specific conduct in handling cases. Young Prosecutors’ Syndrome often leads an attorney to ignore the human dimension of many cases, approaching each file with a standardized view, focusing on the need to punish everyone.<sup>80</sup> “They are here, they are guilty, they wouldn’t be here if they weren’t guilty, . . . and our job is to go after them,” one prosecutor in Atkins recalled thinking when she first joined the office.<sup>81</sup> A Gill prosecutor likewise admitted, “When I first started out, it was ‘conviction, conviction, conviction.’”<sup>82</sup> This perspective creates a corresponding reluctance to dismiss charges or to request lesser punishments unless the defendant can demonstrate some flaw in the evidence or make a viable legal argument that would affirmatively block a conviction.<sup>83</sup> Such a prosecutor wants to “slam everyone”<sup>84</sup> or

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77. We adopt the verb “drift” from Milt Heumann, from his study of prosecutorial adaptation to plea bargaining. HEUMANN, *supra* note 30, at 117.

78. Prosecutor Interviews, *supra* note 1 (Everly junior 740) (get past ego, get past winning); *id.* (Gill mid-level 107); *id.* (Gill mid-level 224); *id.* (Everly senior 745). We acknowledge that this portrayal might stem from senior prosecutors flattering themselves, or at least valorizing their present selves in contrast to their earlier selves. As our friend and colleague Richard Myers aptly put it, people have a tendency to declare, “The current Me is the best possible Me.”

79. *Id.* (Everly senior 805).

80. *Id.* (Flatt mid-level 510); *cf. id.* (Atkins junior 1053) (hopes to develop skills as “humanist”).

81. *Id.* (Atkins junior 1053).

82. *Id.* (Gill junior 152).

83. *Id.* (Everly junior 700) (“I’m not going to dismiss cases or reduce cases just because of volume.”); *id.* (Harris entry level 1089) (“[T]he facts are generally on my side[, so I can] tak[e] the high road.”).

84. *Id.* (Gill junior 308); *id.* (Dean junior 1270) (saying her supervisor needs to rein her in because “I want to give the death penalty when somebody steals a bag of potato chips!”); *see also id.* (Atkins junior 1053) (at start of career, “it was very much a sense that we are here to punish people”).

to “prosecute the hell out of everyone.”<sup>85</sup> Consider this reflection by a mid-level prosecutor from Gill, who regrets that she used to fight with defense attorneys over distinctions in relatively minor offenses:

[W]hen I was in traffic court and very, very new, . . . I can think of specific choices that I made back then and fights that I got into with defense attorneys . . . I can’t believe that I was arguing over reckless versus an unsafe movement. [T]o me everything [was] bad, . . . you don’t have the ability to see things clearly.<sup>86</sup>

Moreover, the newly-hired prosecutor often believes her role is simply to apply the provisions of the criminal code to the evidence in the case at hand. If she does so, the right outcome will result: “I always follow the statute. I always follow case law. You can’t go wrong if you have legal backing for your decisions and the things that you do.”<sup>87</sup> This prosecutor’s confidence that the answers can always be found in the codebook—divorced from any human context or uncertainty in the facts—is eye-opening.

In contrast, more mature prosecutors recognize that consulting the codebook is only the starting point for weighing a defendant’s case, and that “following procedures is the opposite of skill.”<sup>88</sup> Prosecutors need to understand that they have a diverse caseload that calls for a variety of criminal justice responses, not just full conviction and punishment.<sup>89</sup> In expressing this perspective, experienced prosecutors seem to substitute, or at least add in, a sense of system efficiency for what was previously a stark sense of legal sufficiency. Using this more nuanced approach, they see that while some defendants are hardened, dangerous actors, others are just “normal working people that have made mistakes.”<sup>90</sup> Those in the latter group are “people who commit crimes, not criminals.”<sup>91</sup> This ability to

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85. *Id.* (Cline junior 565); *see also id.* (Cline junior 585) (“don’t want to come off like you are some kind of hot head, just ‘hang them high’ type prosecutor”); *id.* (Dean senior 1255) (“[W]hen you come out of law school and are new prosecutors, you want everyone to do the max.”).

86. *Id.* (Gill mid-level 266).

87. *Id.* (Gill junior 305) (also commenting that, when “you first get on a team, [you] go straight by the book”); *accord id.* (Harris mid-level 1061) (going “by the book” regarding the rules of disclosure in the beginning, which meant not giving over anything that wasn’t strictly required); *see also id.* (Brooks junior 950); *id.* (Everly senior 755).

88. KLEIN, *supra* note 5, at 17 (discussing TIMOTHY GALLWEY, THE INNER GAME OF TENNIS (1974)). The seasoned prosecutor “learns that the statutes fail to distinguish adequately among guilty defendants, [and] that they ‘sweep too broadly.’” HEUMANN, *supra* note 30, at 109. Additionally, new prosecutors have to learn that the law that matters is the law as the judge understands it, which might not match the codebook or the cases. Prosecutor Interviews, *supra* note 1 (Gill senior 326); *id.* (Harris junior 1117); *id.* (Cline junior 565).

89. Prosecutor Interviews, *supra* note 1 (Gill senior 200); *id.* (Everly senior 805) (“[N]ot everyone needs to get stuffed away for as long as humanly possible”).

90. *Id.* (Cline junior 585); *id.* (Everly senior 785). The realization sets in earlier for some prosecutors than others; consider this observation from Harris entry level 1107, who said that defense attorneys were starting to influence him: “[Y]ou start seeing that these aren’t necessarily bad guys; they are just people with problems and everybody makes mistakes and these people make criminal mistakes.” *Id.* (Harris entry level 1107).

91. *Id.* (Atkins mid-level 1007); *id.* (Brooks mid-level 945).

appreciate a criminal act in the context of a larger human life leads mature prosecutors to accept, in appropriate cases, less punishment than a strict application of the criminal law might support.<sup>92</sup> Having “redefine[d] his professional goals,”<sup>93</sup> the prosecutor might even strive to help rather than to punish.<sup>94</sup> This mid-level Flatt County prosecutor emphasizes the difference between the junior prosecutor who thinks of cases as simply a source of paperwork and the more experienced prosecutor, who sees the faces behind the paper:

I think that as a young prosecutor you kind of walk in and think, “Oh, they committed a theft, they need to go to jail.” . . . When you look at it as a young prosecutor, you look at it as a piece of paper, as a file. You don’t ever put a face behind it. And I think when you evolve, you kind of start . . . understanding how everything can affect a community, economy, background, family history, things of that nature. You do start taking . . . other things into consideration, other than just what the file says.<sup>95</sup>

The prosecutor’s willingness to step away from the most severe charges or punishment in light of “community, economy, background, [and] family history” often reflects the hard-won insight that the criminal law has its limits: “The people that I’ve met are already damaged. And I can’t undo what they’ve done or what they’ve experienced. I mean, I don’t even come close to putting a Band-Aid on some of these people.”<sup>96</sup> It also flows from the realization that other actors, especially juries,<sup>97</sup> might not share the prosecutor’s views about the best outcome.<sup>98</sup>

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92. *Id.* (Cline senior 605) (“[Y]ou can learn black law rules and . . . maximum, minimums . . . But sitting down with the case and . . . deciding something, that comes with time.”); *id.* (Everly senior 770) (he became “softer” over time). The tendency to distinguish the basically good (“normal working people”) from the basically bad (the “hardcore dangerous”) might spill over to victims too, but with unfortunate consequences. Prosecutors taking this view run the risk of normalizing or downplaying bad things that happen to bad people; that is, they might fail to see or to validate the seriousness of crimes that occur against marginalized persons. Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC’Y REV. 531 (1997); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, in CRIME AND JUSTICE IN SOCIETY 308–35 (Richard Quinney ed., 1969).

93. HEUMANN, *supra* note 30, at 109.

94. Prosecutor Interviews, *supra* note 1 (Atkins junior 1053) (“able to go from just punishing people to helping them”); *id.* (Gill junior 128) (“more fair for this person to get some help, get some treatment . . . instead of trying to convict this person.”). In adopting this open stance toward leniency, fostered by an appreciation for the larger context of the crime, American state prosecutors may be more similar to the Japanese prosecutors studied by David Johnson than he realized. DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 190–92 (2001).

95. Prosecutor Interviews, *supra* note 1 (Flatt mid-level 510); *accord id.* (Gill junior 152).

96. *Id.* (Dean junior 1210).

97. See HEUMANN, *supra* note 30, at 111 (prosecutors remarking on jury unpredictability).

98. Prosecutor Interviews, *supra* note 1 (Dean mid-level 1245) (“[Y]ou become more realistic as to not everyone feels the same way that I do. Juries sometimes are much

For these reasons, the balanced prosecutor gives structured proportionality an institutional home. She locates the responsibility for these decisions primarily in the prosecutor's office, and does not leave this duty entirely to the legislature or to the sentencing judge.<sup>99</sup> As Milton Heumann observed almost four decades ago, “[T]he prosecutor comes to feel that if he does not develop these standards, if he does not make these professional judgments, no one else will.”<sup>100</sup> Regarding defendants as individuals—as “faces” rather than as “paper,” and their crimes as embedded in context and history—is, therefore, built into the role of the prosecutor.<sup>101</sup> It is not simply an individual quality that some prosecutors bring to the job.

The theme of individualized treatment and openness to proportionate outcomes recurred often in our interviews of senior and mid-level prosecutors, and there is reason to believe that these quotes represent a common shift in beliefs among the prosecutors we contacted. Our survey of prosecutor attitudes that some study participants completed as a supplement to the interviews asked about the importance of obtaining “high rates” of guilty pleas to the “most serious charges filed.” Entry-level and junior prosecutors were more likely than their experienced colleagues to say that it is important to stick with the most serious charges during plea

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more lenient, and so now the philosophy is more, what is the right thing to do? [Justice tempered with mercy and realism] would be a good way to put it.”). Another interviewee lamented, “Juries are king. They can do whatever they want.” *Id.* (Dean junior 1210). Recent research suggests juror lack of support for the prosecution may be due in part to jurors’ lack of trust and confidence in the police. Amy Farrell et al., *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773, 786 (2013).

99. Compare Prosecutor Interviews, *supra* note 1 (Atkins mid-level 1049) (“I’m not the one that made the decisions about what is legal, what is illegal. What the sentencing scheme is for a certain offense. There are a lot of people, including the entire community of the state . . . that voted on these laws, and it’s not my job to say, ‘That’s wrong.’”), and *id.* (Harris junior 1121) (“We have a legislature that’s decided what the punishment is going to be for certain crimes. And if I were to try to change that, I would be overstepping my balance.”), with *id.* (Gill junior 206) (“I have an ethical obligation to [balance things.] . . . You hope that the judge does that. I’ve learned that judges don’t do that.”).

100. HEUMANN, *supra* note 30, at 109.

101. The benefits to treating defendants in a balanced way do not hinge on the defendant ultimately receiving an acquittal or a light sentence, as the procedural justice literature has demonstrated. Defendants who feel they have been respected and treated fairly perceive the court system as more legitimate. See generally Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 LAW & SOC’Y REV. 51 (1984).

negotiations.<sup>102</sup> Further, entry-level prosecutors rated “fair treatment of defendants” as a less important measure of success than more experienced attorneys did.<sup>103</sup>

### 3. *Economizing on Trials*

Many prosecutors enter the profession because of the appeal of trial work, and they are anxious to prove and improve their litigation skills.<sup>104</sup> One entry-level prosecutor from Cline put it like this: “I want to try cases; it’s very important to me; it’s what I am in the job for.”<sup>105</sup> Trials are an energizing and exciting centerpiece of the prosecutor’s work.<sup>106</sup>

The preference for trials over guilty pleas also reflects the idealistic views of young prosecutors about the power of the criminal law and their own roles as guardians of community safety.<sup>107</sup> They view jury trials as the natural state of the criminal courts, and, therefore, treat guilty pleas as painful compromises forced on them by limited resources and the demands of other actors.<sup>108</sup> An entry-level

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102. On a five-point scale of importance, the less experienced prosecutors (entry level and junior) gave an average response of 3.5, while the veterans (mid-level and senior) gave an average response of 3.1. The difference between the groups is significant, with a Student’s T-test producing  $p = 0.02$ . Ronald F. Wright & Kay L. Levine, Technical Report on Attitudinal Survey Data: To Accompany “The Cure for Young Prosecutor’s Syndrome” Volume 56, Issue 4 of the Arizona Law Review, at 2 (November 2014) (unpublished Technical Report) (on file with authors & Arizona Law Review) [hereinafter Technical Report]. Heumann’s observations of Connecticut state prosecutors learning to accept plea bargaining were in accord. HEUMANN, *supra* note 30, at chapter 5.

103. On the five-point scale of importance, entry-level prosecutors scored 4.6, while other prosecutors averaged a response of 4.8; the difference is statistically significant, with  $p = 0.03$ .

104. Prosecutor Interviews, *supra* note 1 (Harris senior 1109) (“[M]y [original] goals and objectives were trial stats, ambition, moving up the ladder”). One junior level prosecutor, Dean junior 1260, when asked to describe her philosophy of prosecution, answered entirely in terms of trial performance: “I think back on all trials; I keep a log of them, so I think that there are very few that I regret my decisions.” *Id.* (Dean junior 1260).

105. *Id.* (Cline entry level 630); *id.* (Cline junior 615) (new prosecutors think it’s “expected of you” to be “trying everything and in trials all the time”).

106. *Id.* (Harris mid-level 1129) (“There is a lot of enthusiasm, people are excited to learn, they are excited to go to trial”); *id.* (Everly mid-level 765) (“As a new prosecutor I thought, ‘Wow! Somebody stole somebody’s car and I get to prosecute that! . . . When you are first starting out, you are just excited about everything.’”).

107. *Id.* (Gill junior 119) (“I like the abstract notion that I’m doing justice.”); *id.* (Cline junior 560); *id.* (Harris entry level 1099) (“[T]he position I’m in is doing justice, and making sure all the people who have done criminal acts are held accountable for it.”); *see also* Burke, *supra* note 52, at 187 (prosecutorial identity as the “pursuer of justice” can lead to bad decision-making). This mirrors some of the idealism experienced by new medical students. *See* Becker & Geer, *supra* note 28.

108. Prosecutor Interviews, *supra* note 1 (Atkins junior 1011) (“I think economic concerns should be beneath what we do. . . . [B]ut I guess I just have too much of an ideological view of prosecution.”); *id.* (Everly junior 700) (“I’m not going to dismiss cases or reduce cases just because of volume.”). This accords with observations of Connecticut state prosecutors made by HEUMANN, *supra* note 30, at 92 (the new prosecutor “views plea bargaining as an expedient employed in crowded urban courts by harried and/or poorly motivated prosecutors. He views the trial as ‘what the system is really about’”).

prosecutor in Gill County, for instance, explained his recent decision to try a Driving While Intoxicated (“DWI”) case with weak evidence:

I teed up 0.07 DWI . . . It was a case I thought was worth trying, even though we were probably going to lose, and we did lose. But it was worth taking a shot, because we had such a light docket. And the driving was poor.<sup>109</sup>

The prosecutor explained that insisting on trials in weak cases sends worthwhile signals to the judge and the police officer: “I want the officer to know I feel it’s a strong case. I want the judge to know I think it’s a strong case.”<sup>110</sup> He appeared to believe that taking cases to trial is about more than just testing the evidence; the decision also tests his commitment to prosecution in a very public way, showing others in the courtroom that he is not afraid to embrace the adversarial role.

New prosecutors want to win cases even more than they want to try cases. One entry-level prosecutor on the misdemeanor team in Harris County emphasized to us the importance of his record in jury trials:

I won all my jury trials, so the first one was really important to me. And I think the last one was really important to me, because it was one of the harder defense attorneys, and so that was fun.<sup>111</sup>

The rookie prosecutor, like the rookie police officer, wants to contribute to the larger law-enforcement effort and to feel important, even though the cases she handles are relatively unimportant.<sup>112</sup> Frequent trials and one’s focus on a winning record seem to create that sense of contribution.

In the eyes of senior prosecutors, what newcomers to the office possess in terms of youthful energy they lack in terms of judgment—particularly the judgment to predict accurately which cases they can win at a reasonable cost to the office, to the victims and witnesses, and to the public. Newcomers have not yet learned to “pick their battles”<sup>113</sup> or to “take care of their witnesses.”<sup>114</sup> As a result, they force many cases to trial that should never be tried.

For the experienced prosecutor, there is no presumption in favor of trials. Given the low level of danger that many defendants pose to the community and the amount of resources a single trial can consume, veterans believe that in many cases,

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109. Prosecutor Interviews, *supra* note 1 (Gill entry level 188).

110. *Id.* (“[The judge] shouldn’t determine what we think are strong cases. If I think it’s a good case, I need to go forward with it.”).

111. *Id.* (Harris entry level 1099).

112. Just as Maureen Cain found that police officers experience “role confusion,” young prosecutors look to make things happen because their caseloads are mostly filled with minor crimes. CAIN, *supra* note 41; see also LOFTUS, *supra* note 37 (discussing officer tendency to tell “action” stories in order to create a sense of drama).

113. Prosecutor Interviews, *supra* note 1 (Gill junior 287); *id.* (Everly junior 740) (some prosecutors “goad people” into trial because they feel “bored”); *id.* (Brooks junior 935) (juniors take “horrible” cases to trial).

114. *Id.* (Gill mid-level 296); *id.* (Everly senior 830); *id.* (Cline senior 525).

the public can receive full value through a negotiated guilty plea.<sup>115</sup> Thus, trials should be reserved for exceptional cases, such as those presenting genuine factual disputes.<sup>116</sup>

Early in a career, the extra effort of a trial in an unexceptional case might seem worthwhile because the prosecutor is trying to build skills and establish a reputation, especially if his office implicitly or explicitly signals that trials are a priority. But once a prosecutor has built up his arsenal and his credibility with the defense bar, he comes to realize that large caseloads make trials too costly for most cases, “and anyway, you’ve been through that.”<sup>117</sup> “Trying cases,” we were told, “is more of a young man’s game.”<sup>118</sup>

A senior prosecutor explained that a changed attitude about guilty pleas was the single most important marker of her maturity as a prosecutor:

What I laugh about . . . is I still have my high school paper where I said I would never plea bargain a case if I became a lawyer. And you have to. So yeah, I think you have to be willing to reassess and change as the times and the conditions need for you to do so. I think that’s maturity.<sup>119</sup>

We treat this veteran view on trials—a scarce resource to be used only when it benefits the public above and beyond the likely sentence after a plea—as a positive aspect of balanced prosecution.<sup>120</sup> This does not mean that we generally prefer guilty pleas to trials—far from it. Too often in our criminal courts the defendant does not have all pertinent information about the prosecution’s case, or does not receive the kind of advice from counsel that is necessary to help him weigh the options.<sup>121</sup> Too often the threat or use of enormous trial penalties leaves a

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115. *Id.* (Gill mid-level 284) (“[Y]ou realize, ‘Well, these offers are way too hard, because I’m gonna be doing way too many trials.’ And in all honesty, they don’t deserve the top of the presumptive offer.”). A senior prosecutor approaches every file “presum[ing] that the case will be plea bargained . . . and [if] the case goes to trial, the prosecutor feels compelled to justify his failure to reach an accord.” HEUMANN, *supra* note 30, at 117–18.

116. See Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPAC L. REV. 1, 49–54 (2013) (discussing prosecutor views about importance of economizing on trials).

117. Prosecutor Interviews, *supra* note 1 (Gill mid-level 284); *id.* (Everly senior 735); *id.* (Everly senior 745).

118. *Id.* (Harris senior 1071).

119. *Id.* (Gill senior 323); *id.* (Gill junior 152) (maturity meant realizing that the “glitz and glam” of Hollywood portrayals of jury trials does not match the “boring” reality); *id.* (Cline mid-level 610) (“When you’re fresh out of law school you want to win every case. . . . [Now] I love getting things resolved, and moving on is more important than winning every case.”); *accord id.* (Brooks junior 935).

120. For Heumann, this was reason to conclude that plea bargaining is here to stay; movements to abolish it are a waste of time, he argued, because seasoned practitioners will always find good reasons to resolve cases short of trial. HEUMANN, *supra* note 30, at 157–62.

121. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005) (drawing distinctions among plea negotiation practices in different jurisdictions, with some more coercive than others); Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea*

defendant too frightened to contest the prosecution's case.<sup>122</sup> All of these circumstances dramatically—and regrettably—drive down trial rates.<sup>123</sup>

With that said, we believe that it is possible for prosecutors to use trials sparingly without creating a coercive environment for plea bargains. Their reasons for judicious use of trials run orthogonally to the usual concerns about plea bargains. So long as the trials happen often enough to allow defendants to predict the likely outcome at trial and to press any viable defenses, and so long as defendants are adequately represented and possess all relevant information, there is no need for prosecutors to treat all plea negotiations as regrettable compromises.

Moreover, while young prosecutors' unrestrained enthusiasm for trials might seem unproblematic because the crimes they handle are often of small magnitude, the opposite is true. State misdemeanor courts handle an enormous volume of cases.<sup>124</sup> They are *extremely* overcrowded. Some scholars have argued that there are not enough trials in these courts,<sup>125</sup> but this is predominantly a concern about defendants' ability to contest the charges brought against them, not a concern about inadequate opportunities for building prosecutorial skills. In addition, when a prosecutor unwisely decides to try a minor case, it can harm the people involved by wasting their time and resources, or by subjecting defendants and victims to the unnecessary trauma of full-scale litigation.<sup>126</sup> In short, prosecutors should not be drumming up more misdemeanor trials just to give themselves a platform to test their skills.

It is undoubtedly true that, for some veteran prosecutors, their talk of "economizing" masks laziness rather than a commitment to justice.<sup>127</sup> A handful of our interviewees alluded to this possibility; as one said, "There are lawyers who get complacent in prosecutor's offices just like there are anywhere."<sup>128</sup> But the vast majority of our subjects resisted this construction of what they do, describing

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*Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trials*, 117 HARV. L. REV. 2463 (2004).

122. *Id.*

123. See Wright, *supra* note 121; Alschuler, *supra* note 121; Bibas, *supra* note 121.

124. See Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

125. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010).

126. We recognize that sometimes the defendant will get a windfall by going to trial rather than accepting a pretrial guilty plea offer, such as might be made by a seasoned prosecutor looking to dump a weak case. But given the greater likelihood of wrongful conviction in low-level cases, John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 22–23 (2013), the windfall possibility does not convince us that more trials are necessarily better in terms of accuracy.

127. See Prosecutor Interviews, *supra* note 1 (Brooks mid-level 960) (some of her coworkers "giv[e] away the farm" because they want to get out of court faster); *id.* (Gill mid-level 143); *see also* Yaroshefsky & Green, *supra* note 20, at 289.

128. Prosecutor Interviews, *supra* note 1 (Dean mid-level 1235).

themselves and their coworkers as passionate about the job, proud of their craft, yet pragmatic about resources and the limits of the criminal justice system.<sup>129</sup>

#### *4. Concrete Acceptance of Defense Counsel*

During our interviews, prosecutors at every experience level declared that defense attorneys perform an important function in the criminal courts. Younger prosecutors, however, were more likely to describe this positive value in the abstract, even in grudging terms: “I’m coming around to the idea that they’re just doing their job. It’s not how I would want them to do their job, but I have to kind of adjust to that.”<sup>130</sup>

When it comes to their own cases, new prosecutors see defense attorneys doing more harm than good.<sup>131</sup> For instance, one junior prosecutor in Harris County declared that he resented defense attorneys’ efforts to question the integrity and truthfulness of his officers. While defense attorneys might raise issues of police credibility, he asserted that he could distinguish honesty from fraud. He said, “I look in the cop’s eye and I ask them. And I look at the evidence. I’ve never had anything to back that [suspicion of lying] up.”<sup>132</sup> One of his colleagues viewed the defense’s role more generally as “heaping . . . clutter” on a case; clearing the debris away is the prosecutor’s job.<sup>133</sup> The experience gap between newer prosecutors and senior members of the defense bar, who defend drug and DWI cases in particular, creates a constant source of stress for the new prosecutor, who is often concerned about being intimidated, outmaneuvered, “eat[en]” or “run over.”<sup>134</sup>

Given the resources devoted to careful filing of new cases, newer prosecutors tend to believe that their offices successfully keep the innocent out of

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129. See *id.* (Everly senior 775) (“[Y]ou can treat it like a 9 to 5 job, but if you really are as passionate about it as most of us are here . . . then it’s more than that.”); *id.* (Brooks mid-level 915) (working with “this tremendous group of attorneys . . . pushes you to want to be better. And not slack off”).

130. *Id.* (Gill junior 110).

131. See *id.* (Dean 1280) (“[Y]ounger prosecutors believe that the adversarial nature of our system makes defense attorneys personal enemies.”); *id.* (Harris entry level 1089) (commenting that the defense attorney’s job is to circumvent the truth-finding process).

132. *Id.* (Harris junior 1069). This junior prosecutor predicted that, “if I ever see a case come across my desk where it’s clear the cop lied, that might crush me.” *Id.*

133. *Id.* (Harris entry level 1089); see also Stemen & Frederick, *supra* note 116, at 59 (2013) (junior prosecutors antagonistic to defense attorneys).

134. Prosecutor Interviews, *supra* note 1 (Cline junior 560) (defense attorneys will “eat you, even if they aren’t good defense attorneys”); *id.* (Harris junior 1067) (“[D]efense attorneys have been there a long time, so it’s a little intimidating.”); *id.* (Gill senior 290) (feeling intimidated); *id.* (Gill mid-level 194) (“[T]hey’ll run you over in a heartbeat.”).

the criminal justice system.<sup>135</sup> Therefore, defense lawyer attempts to further test these previously-vetted cases involve a lot of flimsy argument and wasted effort.<sup>136</sup>

Over time, the prosecutor adopts a less antagonistic posture and finds more concrete value in defense lawyers' work.<sup>137</sup> One prosecutor referred to the "us versus them" mentality as "prosecutorial immaturity."<sup>138</sup> As they mature, prosecutors see how the defense attorney can add a critical balance, even when the prosecutor fully believes in the fairness of the case:

I've also seen a new facet and dimension to the role of the defense attorney. I think it's incredibly important. I don't know how I didn't before. I just looked at them with such disdain and disgust, and now I see how invaluable their job is. I don't want to do it. I'm glad they do, but my god in heaven, that Constitution has got to be protected! And I'm not saying we are threatening it, but I'm just saying there's got to be those checks and balances.<sup>139</sup>

The instrumental reasons to have a robust defense bar to provide "those checks and balances," even in the prosecutor's own cases, are apparent to experienced prosecutors.<sup>140</sup> "I think [defense] attorneys are worth their weight in

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135. *Id.* (Gill junior 110) (defense lawyers just playing games); *id.* (Gill mid-level 161) (other prosecutors in office "offended" if defense attorneys question charging or discovery practices after prosecutor uses "due diligence"). On prosecutorial declination rates, see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1129 (2008) (New York City prosecutors decline to file one-third of all felonies submitted by police). At the federal level, see Michael E. O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1444 (2004) (federal prosecutors decline to file 26% of cases brought to them by federal agents).

136. Prosecutor Interviews, *supra* note 1 (Gill junior 236) (can't trust defense attorneys—they lie to you all the time—some are dirty); *id.* (Gill entry level 191) (certain defense attorneys just try to make it their job to be difficult); *id.* (Harris entry level 1077) (comparing strategies of public and private defense bar, says private bar more likely to do frivolous and annoying things); *id.* (Atkins junior 1051) (few defense attorneys know what they are doing because nobody ever taught them); *id.* (Cline entry level 550) (they file garbage motions).

137. See *id.* (Harris junior 1128) ("I did not have that clear of a conception of [the defense attorney's role], and I certainly didn't have the experiences that I've had with defense counsel since then."); *id.* (Everly senior 780) (voicing "respect" for attorneys "protecting their client's constitutional rights, pointing out things about cases that just don't seem quite right"); *id.* (Gill junior 152) ("I welcome the opportunity to have a well-polished defense attorney on the other side of the bar from me."); *id.* (Gill mid-level 275) ("[T]he stakes are so high with these [cases] that you have to have competent people on the other side.").

138. *Id.* (Everly senior 715).

139. *Id.* (Harris senior 1109). While senior prosecutors talked often about the value of a productive relationship with defense counsel, local public defenders do not necessarily share this view of respectful and productive working relationships. For instance, based on 15 interviews we conducted with public defenders in Harris County, the defense bar appears to view the relationship with the prosecutor's office as tense and uncooperative.

140. *Id.* (Harris entry level 1089) ("I had this very kind-of-generic opinion of what a defense attorney was before I became a prosecutor. [That idea] . . . faded away and it is being replaced with, well there is an exceptional example of a defense attorney and a truly professional person . . . you don't necessarily have to be—you are far from a bad guy just

gold,” one mid-level prosecutor told us.<sup>141</sup> For example, a vigorous defense protects against post-conviction challenges to the conviction<sup>142</sup> and helps to ward off potential embarrassments in court. Moreover, when a defense attorney presses a point before trial, it helps the prosecutor evaluate the strength of his case, which is far better than having a case fall apart in the courtroom. A senior attorney from Gill County made the point: “[I]f you can get a guy to tell you what he thinks the weakness in your case is, you’re a whole lot better off to find that out in a plea discussion [and] verify it, rather than being a jerk and learn it in trial as he jams it down your throat.”<sup>143</sup>

Further, a prosecutor who takes defense arguments seriously is not only better prepared for trial but also develops a flexible state of mind. The most successful prosecutors, like defense attorneys, are able to “understand the human dynamic.” They are not “rigid” or “stuck in a prosecutor’s box.”<sup>144</sup> Even senior prosecutors who do not admire the work ethic of particular defense attorneys still recognize the importance of full disclosure and consultation with the defense to keep cases moving.<sup>145</sup>

The prosecutor views on the value of defense counsel that recurred in our interviews also showed up consistently in the responses of prosecutors who completed our supplemental surveys. Senior and mid-level attorneys said that they sometimes altered their decisions “for defense attorneys who I respect,” while less experienced prosecutors said that they took such actions less often.<sup>146</sup>

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because you are on that side of it.”); *id.* (Gill mid-level 131); *id.* (Cline senior 570); *id.* (Gill mid-level 101). That said, the value of the defense function to the prosecutor may differ depending on the stage of the case; there may be enormous value in the defense function at the pretrial phase but decidedly less at the trial phase, as the emphasis shifts from negotiating sentence to arguing culpability. Thanks to Trea Pipkin for this insight.

141. *Id.* (Brooks mid-level 915); *see also id.* (Gill mid-level 227).

142. *See id.* (Gill mid-level 230) (In a jury trial, “I know that their record is going to be clean, they’re going to have done a good job for their client . . . It just mitigates so much of that post-conviction [claim] for ineffective assistance of counsel”); *id.* (Dean senior 1240) (“I don’t see the point of re-trying the case if it comes back on appeal.”).

143. *Id.* (Gill senior 320); *see also id.* (Gill mid-level 299); *id.* (Gill mid-level 143).

144. *Id.* (Gill mid-level 254).

145. *Id.* (Harris mid-level 1061) (“I’ve kind of learned that the more people are aware of what I’m doing and what the case is about, the more effectively I can resolve it . . . I was kind of bitter that I’m doing their job for them and they are getting paid so much more than me. But at this point, I’m like, it just makes my life more stress-free to do their job for them.”); *id.* (Cline junior 560) (“[I]f you are hard-headed with these defense attorneys you are not going to get anything.”); *id.* (Dean senior 1280) (In 1982 he would not turn over his file; in 2013 he says, “Other than the attorney notes, what’s the harm?”).

146. On a five-point scale of frequency, the veteran group scored 2.2 and the less experienced group scored 1.9; the difference is statistically significant, at  $p = 0.01$ . Technical Report, *supra* note 102, at 2–3. *See also* Yaroshefsky & Green, *supra* note 20, at 278 (reporting that prosecutors considered themselves more forthcoming with defense attorneys they trust, and saw disclosures as valuable to maintaining cooperative relationships).

***B. Currents and Crosscurrents***

The connection that we observed between experience and various facets of “balanced” prosecutor behavior appeared across all the major categories of interviewees.<sup>147</sup> The theme popped up during discussions with male and female prosecutors and with prosecutors of all ethnicities. Experience had comparable effects in different regions of the country, among prosecutors who operate under different state criminal codes.

Despite these commonalities, we do not claim that the experience effect happens to the same degree, or at the same rate, in all offices or among all prosecutors. Not every prosecutor with ten years of experience will display the same interest in proportionality. Offices with different cultures may foster or impede a developing sense of balance among their respective employees, and some employees will transform more quickly than others. While the pace of change might differ from place to place, the direction of change seems to be quite constant.<sup>148</sup> The recurrent story we heard traces movement over time toward balance.

One subtle difference we noticed involved a concern among some female prosecutors, during the early stages of their careers, that police officers, defense attorneys, and victims would not perceive them as tough and competent. Some women treated this misperception as a gender stereotype.<sup>149</sup> Other women were concerned that they appeared to be too young to hold jobs that carried enormous responsibility and, as a result, they had to cultivate an image of toughness.<sup>150</sup> One prosecutor said that she purposely wore glasses to make herself appear more severe so that police, defense attorneys, and judges would take her more seriously.<sup>151</sup> Another declared that, early in her career she was determined to make defense attorneys see her as a “bulldog in a skirt.”<sup>152</sup> In time, these concerns dropped aside and the experienced female prosecutors believed that their reputations were established without putting any special effort into projecting an image.

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147. We have, to this point, noted a correlation without discussing possible causation mechanisms. Part IV will take up the question of causation.

148. We do not purport to have a random sample of offices in our dataset. It's possible that any office agreeing to participate in this sort of research would be relatively amenable to fostering balance. That said, our offices did not appear to be equally fertile environments for producing balanced prosecutors. We hope future research will explore the experience–balance connection in a greater variety of offices, both those much smaller and those much larger than the ones we've studied here.

149. Other works provide insights about gender stereotypes in other legal settings. See JENNIFER PIERCE, GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS (1995); LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE (1997).

150. A few of our older subjects commented that age worked to their benefit in the courtroom, to hide inexperience; that is, they started prosecutorial careers mid-life, and were taken more seriously by judges and defense attorneys because of their age. See, e.g., Prosecutor Interviews, *supra* note 1 (Flatt mid-level 505).

151. *Id.* (Gill mid-level 266). For similar concerns voiced by young female doctors, see Beagan, *supra* note 27.

152. Prosecutor Interviews, *supra* note 1 (Gill junior 206).

Aside from this gender variation among our interviewees, there were some cross-narratives complicating the relationship between experience and balance. For instance, we met prosecutors who believed that their approach to the job had been consistent throughout their careers. They tended to use words like “always” to explain how they did things,<sup>153</sup> attributing their choices to their core personality traits or to family histories (like being a straight-laced, “black and white” person;<sup>154</sup> or being a nonadversarial person;<sup>155</sup> or having parents who instilled a commitment to right and wrong<sup>156</sup> or to helping the underprivileged<sup>157</sup>). Prosecutors who voiced this perspective said that they came into the profession with clear expectations and, because they have always been guided by their core values, they have done the job pretty consistently from day one.<sup>158</sup>

Further along the stability axis, our interviewees also told stories of “zealots”<sup>159</sup>—prosecutors who were rigid or overly aggressive *throughout* their careers, rather than just at the beginning.<sup>160</sup> Prosecutors fitting this description force cases to trial just to show off their skills or to make a point. They are regularly antagonistic with defense counsel or stingy with discovery, and they give little thought to what others perceive to be substantive justice concerns.<sup>161</sup> Zealots are

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153. See *id.* (Everly junior 795) (“I try to always look at the behavior and never look at [the defendant] personally.”); *id.* (Harris junior 1121) (“I’m Type A. I’m overly cautious and I will stay the same.”); *id.* (Cline senior 545) (“I always had a lot of common sense.”); *id.* (Dean mid-level 1235) (always been “comfortable” in “knowing what I need to be doing”); *id.* (Brooks junior 950) (“I really like law and rule . . . it gives me a sense of security . . . I dislike a lot of disorder; chaos is not my thing”); *id.* (Gill junior 164) (always been “staunch in following the laws”).

154. See *id.* (Atkins mid-level 1049); *id.* (Brooks junior 950); *id.* (Cline senior 575); *id.* (Everly senior 725); *id.* (Flatt mid-level 505); *id.* (Harris junior 1101).

155. *Id.* (Everly senior 755); *id.* (Cline entry level 550); *id.* (Everly junior 795).

156. *Id.* (Dean junior 1270); *id.* (Harris junior 1117); *id.* (Cline senior 575); *id.* (Dean senior 1240); *id.* (Gill mid-level 158); *id.* (Harris junior 1067).

157. *Id.* (Gill junior 308); *id.* (Everly mid-level 815); *id.* (Cline entry level 550).

158. See *id.* (Gill junior 263) (“I’d like to think my values and my morals lead me in every decision I make.”); *id.* (Everly mid-level 800) (“I don’t think my basic sense of right or wrong has evolved . . . I think it’s always been what I was born with.”). Stability does not suggest any particular relationship to balance. Some “stable” prosecutors portrayed themselves as innately balanced, while others said their core values inspired a stricter approach to prosecution. Lastly, as in any profession, some prosecutors undoubtedly arrive on the job with an innate inclination towards laziness, but learn to mask that in the language of balance.

159. *Id.* (Gill mid-level 131) (when our office inadvertently hires a “zealot,” we “do our best to indoctrinate them otherwise”).

160. For example, a mid-level prosecutor said there are some intense, “true believer” type prosecutors to whom he’d want to say, “Dude, chill out.” *Id.* (Gill mid-level 221).

161. These types of prosecutors unfortunately “spend less time [than their colleagues] worrying about the possibility that somebody might not have done it.” *Id.* (Dean mid-level 1285); see also *id.* (Gill mid-level 107) (“You don’t need just somebody who’s just prosecuting, prosecuting, prosecuting, you know, right-wing, fascist . . . You need—you need both sides.”).

said to have “drunk the Kool-Aid” and consequently have “blinders”<sup>162</sup> on about the strength of their evidence; they may also lack a sense of proportion in punishment.<sup>163</sup> These are lawyers who “like to play on the edge,”<sup>164</sup> “run roughshod over people,”<sup>165</sup> “find ways to get really upset about really insignificant things,”<sup>166</sup> or “pick fights they probably shouldn’t pick.”<sup>167</sup> In short, our interviewees described “zealots” as prosecutors who never found the cure for Young Prosecutors’ Syndrome, even after years of experience. Notably, our interviewees believed that zealots were rare among the prosecutors they knew;<sup>168</sup> some commented that their own office would not employ a zealot, or that a zealot would never last long in their office if he or she managed to get hired in the first place.<sup>169</sup>

These observations about “zealot” prosecutors serve as an important exception to the primary trend we discuss in this Article, because they suggest that experience does not always temper one’s judgment or approach to the job. Because we did not encounter a single prosecutor who admitted to being cast from the zealot mold,<sup>170</sup> it is difficult for us to explain the reasons why some prosecutors do not

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162. *Id.* (Harris mid-level 1083); *see also id.* (Cline senior 635); *id.* (Atkins senior 1009).

163. *See id.* (Gill mid-level 269) (“You’ll see some people come down very—‘get an active sentence, get the conviction,’ at all costs.”).

164. *Id.* (Everly senior 735).

165. *Id.* (Flatt senior 500).

166. *Id.* (Cline junior 565).

167. *Id.* (Everly senior 785); *id.* (Everly mid-level 765) (some prosecutors “only see punishment”); *id.* (Gill mid-level 113) (“straight line hardballs”); *id.* (Gill senior 200) (“full-steam-ahead crazy people”); *id.* (Gill junior 125); *id.* (Atkins senior 1017) (“true believer” prosecutors lose their perspective and ability to be objective, and therefore “take shortcuts, or [get] tempted to put on perjured testimony” or to prosecute a “case that they know doesn’t have merit”).

168. This portrait of zealots as the exception contrasts sharply with the perspective offered by Abbe Smith; she asserts that the vast majority of prosecutors fit the zealot mold. *See Smith, supra* note 24; *see also* Mark A. Godsey, *False Justice and the “True” Prosecutor: A Memoir, Tribute, and Commentary*, 9 OHIO ST. J. CRIM. L. 789, 811 (2012) (reflecting on his own experience as a prosecutor, and concluding that most prosecutors get worn down by repeated attempts by defendants to escape responsibility); Russell Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 WASH. & LEE L. REV. 73, 92 (2009) (prosecutors refuse to listen after hearing repeated assertions of innocence from defendants they regard as patently guilty); Yaroshefsky, *supra* note 18 (documenting horrible track record of New Orleans District Attorney’s Office and zealot culture).

169. Prosecutor Interviews, *supra* note 1 (Everly mid-level 790) (“[P]eople who it’s just about the winning . . . don’t seem to last a long time in this business.”); *id.* (Gill senior 326) (this office tries to avoid hiring the zealot, or “do our best to indoctrinate them otherwise”); *id.* (Gill junior 239) (prosecutors who cannot adopt the “forest-for-trees sort of perspective . . . have gone by the wayside”); *id.* (Everly senior 785) (“We try to weed [zealots] out early on . . . or to teach them better.”).

170. The closest we came to meeting a self-identified zealot was one person who said prosecutors should become “instruments of vengeance” against career criminals, *id.* (Dean senior 1200) (saying for career criminals, prosecutors should “go from New Testament to Old Testament”), and another who said we should reconsider certain procedural protections, like *Miranda*, for defendants in serious crimes, *id.* (Harris mid-level 1097). A

become more balanced with experience, while others do.<sup>171</sup> Persistent aggressiveness in a prosecutor may stem from nature, e.g., core personality traits, or nurture, e.g., mentors or office culture,<sup>172</sup> or some combination of the two.<sup>173</sup>

Further complicating the experience–balance connection is a narrative we heard about “improving one’s trial skills over time,” which may make the prosecutor less inclined to give defendants a break. A few prosecutors looked back on their early years and regretted the decision to plead out a case because, at the time, the prosecutor did not have the necessary trial skills to prosecute the case successfully.<sup>174</sup> More experienced and skillful prosecutors, they concluded, would take such cases to trial, and might stand a good chance of winning.<sup>175</sup> Thus, in this second variation of the dominant theme we identify here, experience plays a part in the prosecutor’s choices, but it contributes to balance in a different way than the cure story predicts.

While the zealot narrative and the improving-skills narrative periodically arose in our data, they sometimes coexisted with the dominant theme of experience leading to balance. Some prosecutors invoked one of these alternative narratives only minutes before saying something else that was consistent with the experience–balance connection, describing themselves or other prosecutors they know. For that reason, we do not regard them as distinct stories told by two different sets of prosecutors, but rather as side-by-side, co-occurring narratives experienced by the same set of prosecutors. It seems, therefore, that for some prosecutors, becoming a better prosecutor over time is not a linear progression, but involves a combination

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few prosecutors admitted that they have become more aggressive and/or less sympathetic over the years. *Id.* (Brooks junior 950); *id.* (Dean mid-level 1230); *id.* (Harris mid-level 1125).

171. The fact that we didn’t meet a single prosecutor who self-identified as a “zealot” might be explained in two ways. First, those prosecutors might have self-selected out of our study; they opted not to be interviewed. Second, those prosecutors might have interviewed with us but kept their true attitudes hidden from us. This is known as “impression management”: prosecutors have learned the “right” story to tell outside interviewers. For a discussion of impression management in the police officer context, see James F. Hodgson, *Policing Sexual Violence: A Case Study of Jane Doe v. The Metropolitan Toronto Police, in SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA* 173–89 (2001) (coining the phrase “impression management”).

172. Prosecutor Interviews, *supra* note 1 (Gill senior 326) (in some offices there is “an outlook that you grab every defendant by the throat; wring everything out of them that you can . . . We would like to think we’re a little more interested in being more even-handed about it and prioritizing”). See, e.g., Yaroshefsky & Green, *supra* note 20, at 280, 288 (describing the difference between broad and narrow compliance jurisdictions when it comes to *Brady* practice).

173. A senior prosecutor put it like this: “[There are] two ways that you develop your identity . . . One of them is you are what you bring to the table and the other is the nature of where you work . . . and the environment you’re in.” Prosecutor Interviews, *supra* note 1 (Flatt senior 500).

174. For instance, the attorney did not know at the time how to handle an evidentiary roadblock, bring a difficult victim around, or cross-examine a particular defense expert.

175. See Prosecutor Interviews, *supra* note 1 (Cline junior 565); *id.* (Dean senior 1240); *id.* (Dean junior 1270); *id.* (Atkins junior 1053); *id.* (Gill mid-level 227).

of knowing when to retreat and when to use a bigger arsenal to fight in appropriate cases.

#### IV. HOW EXPERIENCE PRODUCES BALANCE

The prosecutors who talked to us noticed the changes in their own professional self-images and discussed the changes that occur as other prosecutors mature in the job. They also offered many ideas about why this adaptation happens. In this Part, we explore the causal mechanisms that might lead experience to produce more balanced conceptions of the prosecutor's role. Experienced prosecutors suggested four different factors that would explain the causal connection: an increase in confidence, a legacy of past mistakes, the ability to put small crimes in larger context, and the influence of life experience. These are not mutually exclusive factors; all four likely nudge prosecutors toward mature balance.

##### A. Confidence Based on a Track Record

A prosecutor's confidence in herself, her trial skills, her judgment, and her ability to evaluate people grows over time, as she has seen and handled a lot of cases. Early on, prosecutors tend to ask multiple questions and gather information from dozens of colleagues—particularly their peers and team members—about how to handle their cases.<sup>176</sup> But a more mature prosecutor can draw on her own stock of experiences with judges, defense attorneys, witnesses, police officers, and colleagues to make informed decisions in new scenarios.

This sense of confidence—subjective self-worth, we might call it—frees the prosecutor to take risks, such as declining or dismissing charges, or seeking a conviction or sentence less than the maximum available under the law. Moreover, the confident prosecutor does not worry so much about appearing weak to defense attorneys and judges, or about letting down police officers and victims, as long as she believes she is following an appropriate path.<sup>177</sup> For example, a prosecutor from Gill County said, “You know, the longer I've been here, the more comfortable I am with my own decisions, especially in trial court . . . Whereas before I was gun-shy and didn't want to mess anything up, now I know.”<sup>178</sup> Experience has thus inspired

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176. See *id.* (Everly junior 760); *id.* (Brooks junior 905); *id.* (Everly senior 785). Novices in other fields are constantly seeking comparisons too, because “they don’t have the experience base to recognize what to do” on their own. KLEIN, *supra* note 5, at 86; see also Lingard et al., *supra* note 53, at 611 (the novice doctor “must move beyond anxiety about uncertainty, to approach an attitude of confidence, both about the fact that uncertainty is ever present and about the ability to act in spite of this”).

177. See Prosecutor Interviews, *supra* note 1 (Gill mid-level 176).

178. *Id.* (Gill junior 173); *see also id.* (Everly junior 700) (“When I started I had to work really hard to get the confidence level to go into court and be confident about what I was doing.”). As one junior prosecutor explained, an experienced prosecutor can recognize “archetypes” of cases, and thus predict “which cases are going to eat up a lot of time” and which are likely to result in guilty pleas. *Id.* (Everly junior 740). This reliance on archetypes is consistent with the literature about experts in other fields, who “buil[d] up a repertoire of patterns to quickly make sense of what is happening” each time they face a new situation; these patterns are based on “all the experiences and events the expert [has] lived through and heard about.” KLEIN, *supra* note 5, at 41.

her to trust her own judgment and to use her intuition, freeing her from the fear of “mess[ing] . . . up”<sup>179</sup> that constrained her before.

Experienced prosecutors know that this sense of self-worth must be paired with humility: “[It] would be very easy . . . to start believing that all the decisions you make are right, . . . and other people can’t make good decisions. So there is a certain amount of humility that you have to carry around with you.”<sup>180</sup> Another senior prosecutor put it like this: “[I]t is kind of fun thinking that you’re the right hand of justice, as long as you don’t think you’re the right hand of god.”<sup>181</sup> In short, humility keeps confidence from escalating into arrogance.

An important source of confidence for the new prosecutor is knowledge that the prosecutor’s choices fall into line with accepted practices in the office.<sup>182</sup> This is why some scholars, such as Elaine Nugent-Borakove, equate an increase in prosecutorial experience with increased uniformity in prosecutorial practices.<sup>183</sup> But our interviewees suggest that this effect tapers off as experience continues to grow, thus placing prosecutors in line with experts from other fields—like firefighters and military strategists—who trust their instincts rather than pre-packaged formulas when faced with complex situations.<sup>184</sup> A prosecutor’s grounding in routine office practice eventually gives way to independent decision-making: “[O]nce you realize that you’re kind of on the same page as everybody, you start realizing it’s . . . okay to branch out a little bit more. . . . You start feeling freer to go with your own decisions, as opposed to deferring.”<sup>185</sup>

As the prosecutor’s judgment improves due to her increased experience and courage, she can feel her “backbone” strengthen;<sup>186</sup> this, in turn, causes her to feel

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179. Prosecutor Interviews, *supra* note 1 (Gill junior 173).

180. *Id.* (Gill senior 290).

181. *Id.* (Gill senior 320); *see also id.* (Cline junior 585).

182. See *id.* (Gill entry level 251) (“[A] lot of when you are starting is paying attention to what everyone else is doing”); *id.* (Gill mid-level 107). Other rookie prosecutors don’t ask enough questions or seek advice often enough, according to their more senior colleagues. See, e.g., *id.* (Gill mid-level 107) (“[Y]ou are like a 25-year-old straight out of law school, or 26 or whatever, you don’t know it all. You might have thought you did at one time, but buddy, you don’t. You need to rely on and listen to people who do know a little bit more than you.”); *id.* (Cline mid-level 555) (“[S]ome of the people fresh out of law school . . . aren’t good about [taking] advice.” They seem to exhibit “a high level of self-confidence”).

183. M. Elaine Nugent-Borakove, *Performance Measures and Accountability*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 91, 100 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

184. KLEIN, *supra* note 5, at 67–82.

185. Prosecutor Interviews, *supra* note 1 (Gill junior 317); *id.* (Everly mid-level 720) (“Now, I . . . more independently exercise my judgment without having to run and to ask all the time.”).

186. *Id.* (Atkins mid-level 1007) (“[Y]ou have to have good instincts, you have to have common sense, and you have to have a backbone.”). One senior prosecutor remarked that the two prosecutors he admired the most when he was starting out “had extraordinary courage, and they didn’t care who it offended.” *Id.* (Gill senior 218).

more confident about voicing her opinions: “not aggressive[ly], but assertive[ly].”<sup>187</sup> A sense of confidence is essential in the courtroom environment, where defense lawyers, police officers, and even judges might dish out rough treatment.<sup>188</sup> The prosecutor who lacks a solid sense of her self-worth, or who has not yet established a reputation as a good lawyer, is likely to be intimidated or manipulated by defense attorneys, judges, victims, officers, or colleagues. One prosecutor said that, early on, he felt like he was getting pushed to be “extremely harsh,” “obnoxious,” and “aggressive” by some colleagues in the office, who felt that he needed to transcend his past life as a defense attorney.<sup>189</sup> A mid-level attorney in Cline County recalled a police officer yelling at her in open court after she reduced charges in a case that he had developed; he accused her of not having enough backbone to be a prosecutor.<sup>190</sup> As these anecdotes reveal, a prosecutor who fails to develop a sense of confidence, self-worth, and courage will feel like a “wind dummy,” blown about by other courtroom actors.<sup>191</sup>

One important example of confidence is letting go of the need to do trials just to show one’s prowess.<sup>192</sup> A Brooks prosecutor expressed it like this: “I’m not a prosecutor that’s centered on ‘I must win.’ I am [a] good prosecutor. I know how to argue well.”<sup>193</sup> Perhaps even more significant for obtaining a sense of confidence is getting past the fear of losing trials. Young prosecutors are afraid to “mess . . .

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187. *Id.* (Gill junior 206); *id.* (Harris entry level 1091) (learning how to say no to defense attorneys, and sticking to it).

188. *Id.* (Gill junior 206) (“I was yelled at, and reamed, and called names, and hit on, and whatever, by judges and officers. And treated with so much utter disrespect. . . . I think you’ve got to be tough.”); *id.* (Harris junior 1067) (“When I first started doing misdemeanors . . . I felt like I did not know what I was doing, and the defense attorneys have been there a long time, so it’s a little intimidating.”); *id.* (Everly senior 735); *id.* (Gill senior 146).

189. *Id.* (Atkins junior 1015); *id.* (Atkins junior 1053) (explaining that when she was new and hadn’t yet found her “comfort zone,” she “slavishly” stuck to her positions as much as possible, because that allowed her to withstand the pressure); *id.* (Gill mid-level 131).

190. *Id.* (Cline mid-level 555); *see also id.* (Brooks mid-level 925) (explaining that when she was a young attorney, she “didn’t have the words” to challenge a police officer).

191. *Id.* (Brooks mid-level 960); *see also id.* (Cline mid-level 535) (new prosecutors have “no sense of direction with [their] cases”); *id.* (Atkins mid-level 1007) (explaining that if you deal with victims with “authority and honesty,” then they won’t think you’re dismissing their case because you don’t care). Judges and defense attorneys are less likely to try to push around the prosecutor whom they regard as good lawyer. *See id.* (Everly senior 735) (“I think my ability to negotiate [has improved] because, do lawyers want to take you on?”); *id.* (Gill senior 146) (some cases pleaded out because “maybe they don’t want to try a case with me. I don’t know, that is a little egotistical to say that”). But the point we make about the influence of confidence is different: the prosecutor who has a strong sense of his self-worth is less apt to respond to judicial and defense efforts to manipulate him, even when those efforts occur.

192. *See id.* (Everly senior 725) (discussing how, with experience, trials decrease because “you get to be a known quantity”); *id.* (Everly senior 805) (stating that, after 100 jury trials, “I don’t have to prove anything to myself. I have been around this defense bar long enough so I don’t have to prove anything to them, either”); *see also id.* (Cline senior 525); *id.* (Gill senior 323); *id.* (Everly senior 745); *id.* (Gill mid-level 284).

193. *Id.* (Brooks mid-level 960); *see also id.* (Brooks mid-level 925) (“When I first started, all I wanted to do was try cases” but now I “look deep before I leap”).

up;”<sup>194</sup> they are very concerned about their conviction statistics.<sup>195</sup> While experienced prosecutors also want to win cases that they take to trial,<sup>196</sup> they are no longer afraid to lose, because they know criminal trials involve many random occurrences beyond the attorney’s control: “You are going to lose cases. Juries are going to find people not guilty. You can’t change what people say on the stand.”<sup>197</sup> One particularly memorable insight came from a mid-level prosecutor in Cline, who said that trying a criminal case is “like directing a play; it’s more like monkey theater, where you give the monkeys their scripts and they get up there and they go off on their own and you just have no idea what’s going to happen.”<sup>198</sup> When a prosecutor can let go of the need to control the evidence at trial, to acknowledge that no matter what he does in court, trial will be more like improvisation than a carefully scripted performance, he has achieved a good balance of confidence and humility.

Confidence also makes it possible to absorb lessons quickly and to remain future-oriented. Whether a given trial was improvised or carefully orchestrated, whether it resulted in a guilty verdict or an acquittal, once it is over the prosecutor has to mentally move on to the next case.<sup>199</sup> One mid-level prosecutor specifically advises new prosecutors not to obsess over their losses: “Learn your lesson, apply it to the next case; don’t dwell, just go.”<sup>200</sup> Moreover, experienced prosecutors recognize that a perfect win record is not all it is cracked up to be. A prosecutor’s peers (and supervisors) may see this as a sign that a prosecutor is cherry-picking easy cases from his caseload to try, rather than challenging himself.<sup>201</sup> A perfect

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194. *Id.* (Gill junior 173).

195. *Id.* (Gill junior 167) (“I think you’re running into people that are afraid of losing.”); *id.* (Dean senior 1220) (describing how losses are treated as “devastating” for those who have never failed at anything in life).

196. See, e.g., *id.* (Flatt mid-level 505) (“[W]hen I go to trial I get competitive and I want to win, and I’m disappointed when I lose.”); *id.* (Brooks mid-level 915) (“[N]o one wants to lose, but you know, it’s not the end of the world.”).

197. *Id.* (Cline mid-level 555); *see also id.* (Brooks junior 950) (“[I started out all] freaked out [about jury trials], [and] now? I’m like ‘I’ve got a jury trial, whatever, who cares?’”); *id.* (Cline junior 560) (“[I]f you win, great, if you lose, you got beat.”); *id.* (Everly junior 740) (explaining that experienced prosecutors “kind of get past” focusing on winning or losing).

198. *Id.* (Cline mid-level 620). On the ability to improvise, see *id.* (Cline mid-level 625) (“I’ve had cases where the attorney assured me it was going to be a plea. They come into court that day, client changes their mind, I haven’t even looked at the file and you just have to, like, go to trial and be ready and you can’t freak out.”).

199. *See id.* (Dean junior 1210) (“[Y]ou relish, you’re happy that you won, you go and sit down at your desk and you got three more to work on.”); *id.* (Harris junior 1093) (“[W]hen things happen in the courtroom that don’t go the way that you thought they would go, you still have 20 other things to do right away. You can’t spend a lot of time processing that.”); *id.* (Gill mid-level 269) (explaining that when the cards don’t fall where you would like them to fall, “[Y]ou have to just be able to suck that up and move on to the next case”).

200. *Id.* (Cline mid-level 625).

201. *See id.* (Everly senior 825) (“If you haven’t lost a case you are not doing your job.”); *id.* (Brooks mid-level 915) (“[T]he attorneys that usually brag that they’ve never lost a case . . . usually . . . they’re sort of fudging things.”); *id.* (Dean senior 1200) (“It’s easy to be undefeated if you don’t try the hard ones.”).

conviction record thus may say more about an attorney's lack of confidence than it does about her trial skills.

### B. The Legacy of Past Mistakes

Disappointing experiences with victims, witnesses, and police officers lead seasoned prosecutors to listen more closely to their intuitions and to defense lawyers, and to continuously reevaluate their cases. "I didn't realize how bad the case was until I got halfway through and I went: 'Good grief!'"<sup>202</sup> Like this prosecutor who found herself in the middle of a case that had no chance of success, experienced prosecutors talk about being burned by witnesses and victims they once considered credible; they also recall police errors or unexpected defense techniques that critically undermined their initial valuation of the case. Prosecutors are thus similar in this respect to the legal services lawyers studied by Carrie Menkel-Meadow;<sup>203</sup> the realities of practice have the capacity to both tame and frustrate attorneys, but they cannot be ignored.

For example, several prosecutors spoke of coming to the profession "very naive," as far as their ideas about the credibility of law enforcement witnesses.<sup>204</sup> They installed or fine-tuned their "BS meter" on the job.<sup>205</sup> One prosecutor from Gill County mentioned that while he started "guns-a-blazing," he now holds back, acknowledging, "Hey, maybe the police officers have done something wrong."<sup>206</sup> Another said that he came to recognize there are two sides to every story, and the truth usually rests "somewhere in between the police and the defendant's story."<sup>207</sup> Still another advised young prosecutors to remember that the officer "might not have

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202. *Id.* (Gill senior 182); *accord id.* (Everly mid-level 720) (describing his embarrassment at failing to reevaluate his case after losing the confession as evidence).

203. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 47 (Austin Sarat & Stuart Scheingold eds., 1998) (arguing that "situational and social structural aspects" of the work influence one's ability to remain faithful to, and to express, one's impulses and motivations).

204. See, e.g., Prosecutor Interviews, *supra* note 1 (Cline junior 595) (evincing complete trust in police: "[I]n my heart I feel like police officers do a good job, they don't just arrest people just to arrest them. So when they arrest somebody they are usually guilty of what they arrested for."). An entry level prosecutor from Harris County voiced a similar level of confidence in local police work. *Id.* (Harris entry level 1089) ("I have the luxury of having case after case with the police reports generally on my side.").

205. See *id.* (Gill mid-level 278); *id.* (Gill mid-level 293); *id.* (Gill senior 257); *id.* (Cline mid-level 555); *id.* (Atkins junior 1053).

206. *Id.* (Gill mid-level 299); see also *id.* (Atkins mid-level 1007) ("If I read a report and I think the cop is lying, I'd better do something about that."). Compare *id.* (Harris entry level 1089) ("I have the luxury of kind of taking the high road . . . I have the luxury of having case after case [where] the police reports are generally on my side, the facts are generally on my side."), with *id.* (Gill mid-level 284) ("[T]here are people that love the police, and think the police can do no wrong, and will defend the police until they are blue in the face.").

207. *Id.* (Gill mid-level 101); see also *id.* (Gill mid-level 278) ("[Y]ou can't be too prone to believe one side versus the other."). Another Gill prosecutor admitted, "Sometimes we have really bad guys, but really also, really bad police work." *Id.* (Gill junior 173).

the best of intentions.”<sup>208</sup> Consider, for example, this explanation by a senior prosecutor who worked in several different offices throughout his career; he equates increasing experience with increasing skepticism about the account of the crime laid out in the police report:

[Y]ou hear this recitation of facts from a victim or officer. When you are . . . a rookie prosecutor, you might say: “Oh, okay, yeah, I see that, I think somebody did that.” And then if you had that same case now, you’ll be like, “Okay, there’s something that doesn’t quite add up,” or “It may be a crime but it ain’t the one the officer thought it was.” And that may be an over-aggressive officer or just their own inexperience.<sup>209</sup>

In short, an effective prosecutor is not “married to cops,” but rather does his own math and views the case “suspiciously” when the officers first present it, to avoid later trouble at trial.<sup>210</sup> This sort of “healthy skepticism” may also be the prosecutor’s best protection “against the possibility of convicting the innocent, and the surest path to ensuring the integrity of convictions.”<sup>211</sup> This thematic difference expressed in the interviews of veteran and inexperienced prosecutors also shows up in the attitudinal survey instrument: the veterans rated “good relationship with police” and “low declination rates” as less important measures of success than their junior colleagues did.<sup>212</sup>

Learning to deal with victims as witnesses is also a painful lesson for many prosecutors, as they try to find the best balance between empathy, cynicism, and critical evaluation of potential testimony.<sup>213</sup> A prosecutor who gets “a little bit blinded by their feelings of trying to protect the victim in the case, rather than evaluating from a perspective of neutrality,” is likely to miss something important and get ambushed at trial.<sup>214</sup> After a while, prosecutors learn that, when dealing with

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208. *Id.* (Gill junior 203). A senior prosecutor from Dean says that as she’s matured, she’s become able to tell law enforcement, “You don’t have a side; you don’t have a dog in the fight.” *Id.* (Dean senior 1250).

209. *Id.* (Everly senior 745). Most point out that certain officers and certain departments develop reputations, and it takes time for the prosecutor to learn which are trustworthy. *See, e.g., id.* (Atkins junior 1015); *id.* (Gill junior 236); *id.* (Gill mid-level 299).

210. *Id.* (Gill mid-level 284) (“[I]f we don’t see the weaknesses in our cases, when we try to take them across the street to try them, we are going to get the rug pulled out from underneath us.”); *see also* Stemen & Frederick, *supra* note 116, at 67 (noting experienced prosecutors are better able to sort out the quality of evidence from police officers).

211. Vance, Jr., *supra* note 16, at 633.

212. The difference between groups (senior and mid-level versus junior and entry level) on the low declination rates question is statistically significant at  $p = 0.00002$ . On the police relationship questions, the difference between entry level prosecutors and the other groups is significant at  $p = 0.02$ . Technical Report, *supra* note 102, at 3. *See generally* Levine & Wright, *supra* note 6, at 1176–77 (stating veterans develop stronger relationships with police because police defer to their perceived or proven expertise).

213. One senior prosecutor praised a colleague for this virtue: “[He] had a way of caring very much about the cases, but not getting emotionally involved, which makes you a better lawyer. . . . You care about treating them correctly, but you don’t get wrapped in the drama.” Prosecutor Interviews, *supra* note 1 (Gill senior 257).

214. *Id.* (Gill junior 245); *id.* (Dean senior 1205).

victims of crime, “being a zealous advocate is a different thing than being an emotional advocate.”<sup>215</sup> Experience also teaches that life is more complex than it first appears in the police report: many victims are not “shining angels,”<sup>216</sup> “the victim is not always the victim,”<sup>217</sup> and some victims will become downright uncooperative.<sup>218</sup> We offer this reflection from a senior Dean prosecutor who became disillusioned by victims over time:

I started off thinking every victim deserves someone to fight for them and every victim was telling me the truth. And after being burned by victims who were, in fact, not telling the truth, I now start . . . with the idea that everyone is lying to me, and I look at the evidence and I look at which story makes more sense. I guess more jaded. . . . I think I’m much more reserved. Less emotional, I think, when I talk to them, which is probably better . . . [B]eing completely unbiased is more just.<sup>219</sup>

This prosecutor remembers her early, broad-based sympathy for victims but believes that she became a better, more objective prosecutor once the veil of sympathy lifted. Without the distorting influence of sympathy, she could be “less emotional” and “more just” in her case management choices.<sup>220</sup>

Many prosecutors also begin their careers with a naive perception of who judges are, and how professionally they will behave—over time that veil gets pierced too.<sup>221</sup> A senior Gill prosecutor said it like this: “When you start out as a new lawyer, you’re like, ‘Wow! That guy is a *judge!*’ And by the time you’ve got some gray hair on you, you’re like, ‘Wow! *That guy is a judge?*’”<sup>222</sup> Similarly, a Flatt prosecutor noted that, while judges think of themselves as legal scholars, prosecutors soon learn that “in reality” a judge is often “just a lawyer who knew a governor.”<sup>223</sup> Another observed that judges often do not understand that “respect is a two-way street . . . They put on some black robe and they can be very disrespectful [to] people.”<sup>224</sup>

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215. *Id.* (Gill mid-level 230).

216. *Id.* (Everly mid-level 720) (“[T]here are a lot of lost souls out there, on both sides as far as victims and defendants.”).

217. *Id.* (Gill mid-level 107); *accord id.* (Dean senior 1225) (feeling frustrated at victims using the criminal justice system to “accomplish their own hidden agenda,” like taking a “dig at their spouse” through “trumped-up aggravating stalking or domestic violence” charges).

218. See *id.* (Gill junior 302); *id.* (Gill junior 167); *id.* (Everly senior 810); *id.* (Brooks mid-level 925).

219. *Id.* (Dean senior 1205).

220. *Id.*

221. Dealing with judges’ mistakes can be particularly tricky for the prosecutor when the defendant is unrepresented. One junior prosecutor says, “I feel like I don’t want somebody to get screwed over because the judge is basically looking at me for how to rule on an objection.” *Id.* (Atkins junior 1059).

222. *Id.* (Gill senior 290); *id.* (Gill junior 206) (judges don’t balance interests well).

223. *Id.* (Flatt senior 500) (quoting a friend for this observation).

224. *Id.* (Cline mid-level 555) (“[Y]ou have to develop some type of game face for when they rule against you.”); *id.* (Brooks mid-level 960) (expressing that she is growing weary of her judge politicking in the courtroom all the time). A junior prosecutor opined that

Taken together, these experiences with police officers, victims, and judges inspire seasoned prosecutors to address proof problems early on. “You need to think like a defense attorney . . . you don’t want to find out about the holes in the case during the opening statement of the defendant,” warns a veteran prosecutor from Harris County.<sup>225</sup> Experienced prosecutors implicitly understand that cases may not be as strong as they first appear, and that one should approach witness evaluation and trial preparation with a skeptical eye.<sup>226</sup> The metaphors for this type of trial-and-error learning abound. One particularly memorable senior prosecutor said, “I grew up on a farm and so I know what it’s like to stomp your toe, and I try to make sure that I look closer for the rocks next time that I am running through the yard.”<sup>227</sup>

### C. Putting Small Crimes in a Larger Context

Experienced prosecutors regularly talk about being able to see the “big picture,” both in terms of individual cases and their dockets as a whole.<sup>228</sup> In referencing the importance of seeing the big picture, experienced prosecutors called to mind the portrait of experts more generally: they deeply understand the system in which they work and thus can avoid fixating on minor data points.<sup>229</sup>

On the micro level, as they come to appreciate the context behind an alleged crime—the defendant’s backstory, the partial responsibility of the victim, or other mitigating factors—they start to question whether criminal justice punishment is the optimal response in all cases.<sup>230</sup> “There is breaking the law and not breaking the law,”<sup>231</sup> but the bottom line is, “Is this someone we ought to worry about?” said a mid-level prosecutor from Atkins.<sup>232</sup>

On the macro level, seasoned prosecutors know they have to make choices within their caseload to save resources for the small subset of very serious crimes

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dealing with judges in a professional manner can present a particular hurdle for female attorneys: “It’s very much like a high school in district court. And there is one judge in particular, if you wear certain nice clothes, she’ll be much more likely to – you know . . . And there are many male judges who, if you don’t wear skirt suits and you don’t flirt with them, they are probably going to find against you . . .” *Id.* (Gill junior 206).

225. *Id.* (Harris senior 1071); *see also id.* (Atkins mid-level 1055) (“You’ve got to tear down your case so you know what’s going to be thrown at you.”).

226. *Id.* (Harris mid-level 1079) (“[D]on’t trust your first look at a case.”).

227. *Id.* (Everly senior 825); *see also id.* (Harris mid-level 1079) (comparing trial awareness to sailing a ship through icebergs in the North Sea).

228. *See id.* (Everly senior 770) (“When you’re young and you’re a brand-new prosecutor it’s a lot different; you don’t see the big picture.”); *id.* (Gill senior 104); *id.* (Cline mid-level 535); *id.* (Gill junior 110); *id.* (Harris junior 1117); *id.* (Gill mid-level 101); *id.* (Gill junior 125); *id.* (Everly mid-level 765); *id.* (Atkins senior 1013); *id.* (Cline senior 525).

229. *See KLEIN, supra* note 5, at 22.

230. Prosecutor Interviews, *supra* note 1 (Gill mid-level 131) (explaining that the more variables you see, the more you can assimilate them into a proper resolution); *id.* (Everly senior 725) (recalling an assault case she tried early on but shouldn’t have, in light of the victim’s contributory behavior).

231. *Id.* (Gill junior 302).

232. *Id.* (Atkins mid-level 1007). This same prosecutor said that he doesn’t “necessarily deal with criminals. I deal with people who commit crimes. . . [The evil people] are very few and far between.” *Id.*

and very bad defendants, whom one of our interviewees called “the hunters.”<sup>233</sup> We heard repeatedly from our interviewees that “[t]here are so many cases, you can’t get upset about [the little ones].”<sup>234</sup> When a prosecutor has a steady diet of murders, rapes, and armed robberies, she can no longer get too worked up over a simple drug possession or nonviolent theft—small crimes that are referred to as “ash and trash.”<sup>235</sup> A senior prosecutor in Gill explained that prosecutors become “desensitized” to a wider range of crimes as they move up the ladder in experience:

When you first start on the Misdemeanor Team, those DWIs are serious stuff. And then you move on to the Drug Team, and all of a sudden, the DWIs don’t seem so serious anymore. And all of a sudden, a couple of ounces of weed seems like the biggest crime on the planet. Then you do Drug Team for a while, and you realize that there’s kilos of cocaine out there, and weed doesn’t seem like a big deal anymore. And then you do the Persons Team, and you see people actually getting robbed at gunpoint. Then drugs don’t seem like a big deal anymore. So as you kind of go up the ladder, everything gets put in perspective. . . . Over time, you learn what the real priorities are.<sup>236</sup>

Possession of a crack pipe or crack rock appears to be the paradigmatic low-level felony that is prosecuted too vigorously by new prosecutors. Several interviewees conjured up that image to illustrate a case that young prosecutors would get excited about, while experienced prosecutors would dispose of it immediately (or “marginalize it”<sup>237</sup>) and pivot to more serious crimes.<sup>238</sup> For example, a Gill

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233. *Id.* (Flatt senior 500). Another called this task “distinguishing between people we’re just mad at and people we’re afraid of.” *Id.* (Everly senior 770).

234. *Id.* (Cline junior 565); *see also id.* (Cline mid-level 625) (“[Y]ou can’t get too attached to one case.”); *id.* (Everly mid-level 815); *id.* (Gill mid-level 161) (explaining that a huge caseload means “you can’t be crazy brutal on every case”); *id.* (Atkins junior 1021).

235. *Id.* (Atkins senior 1009) (stating for “ash and trash” [cases] . . . let’s just give them a plea, get them on probation, and then litigate the serious stuff”); *id.* (Everly senior 810) (“You maybe become more focused on the violent crimes.”); *id.* (Dean senior 1255) (stating that although larceny seems serious for attorneys just out of law school, “when you get perspective to you start realizing, ‘Okay, this person did take \$5000 but guess what? They didn’t beat the heck out of the person; they didn’t use a weapon’”); *id.* (Everly senior 750) (explaining that you are not going “to get really worked up” over “drugs and people forging prescriptions and having fake driver’s licenses and that stuff” after you have prosecuted for a while). *See also* DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 57 (2012) (discussing how even violent crimes sometimes produce muted reactions in more senior prosecutors, causing them to offer more lenient plea deals than their junior counterparts would); Burke, *supra* note 52, at 189–90 (explaining that a new prosecutor assigned to misdemeanor unit might “feel more passion” for a misdemeanor public indecency case than a senior prosecutor assigned to the sex crimes unit would).

236. Prosecutor Interviews, *supra* note 1 (Gill junior 317).

237. One senior prosecutor explained, “When you’re a younger prosecutor you just can’t, it’s very hard to realize that some crimes need to be a little bit marginalized.” *Id.* (Everly senior 725). She specifically expressed frustration that other counties would use prison bed space on a crack-pipe defendant when she has armed robbers who need that bed. *Id.*

238. *See id.* (Everly junior 835); *id.* (Everly senior 810); *id.* (Gill mid-level 209); *id.* (Flatt mid-level 505); *id.* (Everly senior 770) (recalling early crack-rock trial as one that taught him a painful lesson about the need to anticipate jury response to small crimes). A

prosecutor on the drug team commented that, whenever a new person comes to the team, his or her usual response is, “Oh, a crack rock! Oh my god, they had a crack rock!” [but] in the scheme of things, it’s not that big a deal.”<sup>239</sup> Over time, prosecutors commonly became less enthused about drug cases more generally, because “at the end of the day, nobody got killed or mugged or robbed here.”<sup>240</sup>

A homicide prosecutor noted how much her views had changed when she returned for a day to work in the misdemeanor courtroom: “I just was like, ‘Would you stop speeding? Dismissed. Window tint—are you going to get that fixed right now? Dismissed.’ But when I was in district court, I would have been much more like, ‘Oh, this is serious.’ Your perspective changes.”<sup>241</sup> For this prosecutor, there was no going back to her youthful perspective on prosecution; she had seen too many cases in the homicide unit to invest any professional energy in traffic offenses.

For the veteran prosecutor, the small cases are the ones that call for creative dispositions, oftentimes as a way to speed the process along and to avoid causing undeserved long-term harm to the defendant.<sup>242</sup> Prosecutors in these cases need to use “a bit of diplomacy, a bit of compromise,” in order to get the job done.<sup>243</sup> This means thinking flexibly about probation terms, diversion programs, restitution awards, and the like.

Mature prosecutors also make their case decisions in light of the economic realities of the justice system. While some continue to view this scarcity as an unfortunate compromise—as one senior prosecutor expressed, “You can’t do perfect justice”<sup>244</sup>—the limited resources in the system make negotiated guilty pleas and lesser punishments the norm. Trials and more severe (and expensive) punishments require some special showing that the public will get its money’s worth.<sup>245</sup>

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junior prosecutor tells a similar story about possession of small amount of methamphetamine: “You lost; there’ll be another one who looks just like him. Give it a week, you won’t even remember.” *Id.* (Harris junior 1117).

239. *Id.* (Gill mid-level 161).

240. *Id.* (Gill junior 125); *accord id.* (Gill mid-level 284) (“stupid” to lock up users); *id.* (Everly senior 725); *id.* (Everly mid-level 720).

241. *Id.* (Gill mid-level 230).

242. *See id.* (Harris junior 1117) (opining that you don’t ruin a defendant’s chances of getting a nursing license just because of a small amount of marijuana); *id.* (Everly mid-level 720) (“this person doesn’t need to be in jail right now”); *id.* (Everly senior 810) (“You kind of figure out . . . is it just one less year in prison that if you recommend it’s going to be the difference between pleading this out and going to trial.”); *see also* Burke, *supra* note 52 (explaining older prosecutor are more likely than younger prosecutor to prioritize investing resources in serious cases).

243. Prosecutor Interviews, *supra* note 1 (Gill mid-level 176).

244. *Id.* (Gill junior 326).

245. *See, e.g., id.* (Everly senior 805) (“[I]t costs the taxpayer money to try cases.”); *id.* (Harris mid-level 1097) (money spent on some cases is not worth it); *id.* (Everly mid-level 720) (“You’ve got to realize whether [principles are worth fighting] for in a particular case.”); *id.* (Everly senior 785); *id.* (Brooks mid-level 925); *id.* (Cline junior 565); *id.* (Gill junior 239).

Prosecutors who resist this level of pragmatism do not last long; they develop unwieldy caseloads, burn out, or antagonize the defense bar or the judges.<sup>246</sup>

The ability to sort the big things from the small things also makes the job more sustainable for the prosecutor on a personal level, by lessening anxiety and stress. As one prosecutor noted: “[W]hen I first started off in the office it seemed like every single thing was just—it’s like I had a constant headache, because . . . I wasn’t able to sort out, is this the sort of thing that I should really be giving my 100% in?”<sup>247</sup> A colleague likewise reported that when she first started out, she “micromanaged” all her cases, but once she realized “you just can’t do that,” she became “more relaxed” and now experiences “less stress” on the job.<sup>248</sup>

The prosecutor’s adaptation in this regard—developing the ability to prioritize—happens as he handles more serious cases over time. But exposure to more serious crimes is not the whole explanation. Even misdemeanor prosecutors in County Attorney’s offices come to realize that with experience, one learns to distinguish between routine cases and cases that require extra effort—the ones important enough to sweat over.

Relegating most cases on the docket to a low-priority level might also reflect the prosecutor’s sense of despair about the limits of the criminal justice system to accomplish meaningful change. Here is where we saw the influence of cynicism. “I can’t fix a damn thing,” one prosecutor bemoaned, looking at her stack of 30 unindicted cases, phone messages from hostile victims, and a report of a rape victim who went into hiding.<sup>249</sup> One prosecutor said she sometimes feels “like a hamster, just running on a treadmill, churning cases.”<sup>250</sup> Prosecutors see “the same old thing day after day,”<sup>251</sup> including “borderline insane people,”<sup>252</sup> and untruthful victims.<sup>253</sup> In that respect, prosecutors echoed some of the comments made by

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246. *Id.* (Harris mid-level 1073) (admitting that she had to be reined in, or calmed down, by both her original judge and her supervisor, because she became worked up over every case); *Id.* (Gill mid-level 284) (admitting she might have been fired if she hadn’t changed her overly aggressive posture).

247. *Id.* (Harris entry level 1089).

248. *Id.* (Harris mid-level 1075). Still another Harris County prosecutor described how she was “worried about so many different things” all the time in the beginning, and “it was really easy to get kind of lost in the noise.” *Id.* (Harris junior 1087). Heumann likewise reports that new prosecutors feel anxious, overwhelmed and disoriented all the time. HEUMANN, *supra* note 30, at 93–95.

249. Prosecutor Interviews, *supra* note 1 (Dean junior 1210).

250. *Id.* (Gill mid-level 212).

251. *Id.* (Everly mid-level 790).

252. *Id.* (Brooks mid-level 960); *see also id.* (Gill mid-level 194); *id.* (Gill junior 185).

253. *Id.* (Gill mid-level 176) (“I feel like I’ve been lied to more in the last eight years than the other 31 years of my life. . . . It definitely makes you cynical.”); *id.* (Gill mid-level 221); *id.* (Dean mid-level 1285); *id.* (Gill junior 287) (“[Y]ou get a little jaded over time, when you realize you can’t do everything perfectly; you can’t convict every person and you can’t try every case.”); *id.* (Gill mid-level 161) (jaded when you realize “there’s so much crime out there”); *id.* (Gill junior 263); *id.* (Harris senior 1065); *id.* (Cline mid-level 530); *id.* (Flatt mid-level 505); *id.* (Atkins junior 1051); *id.* (Dean senior 1255).

police<sup>254</sup> concerning the frustrations of the job and the thanklessness of the tasks they perform. But there are two notable differences: first, in contrast to police officers, who seem to become cynical about the defendant population, prosecutors tended to direct their cynicism toward the victim and law enforcement populations.<sup>255</sup> Second, at least some of the prosecutors who acknowledged the risk of becoming jaded followed these comments with a pep talk of sorts, insisting that they do not give in to such feelings.<sup>256</sup>

#### *D. Wider Range of Life Experiences*

Because prosecutors mature as people while they are maturing as professionals, the passage of time in the prosecutor's personal life seems to enhance the influence of professional factors on her prosecutorial transformation. "Life experiences . . . go into your overall big-picture view"<sup>257</sup> of what a case is worth, we were told. One of the senior-level prosecutors said that, to be a balanced prosecutor, "you just need a little seasoning, you need a little more life experience than somebody [coming right out of law school]."<sup>258</sup>

As prosecutors gain more life experience, they become exposed to the infinite dimensions of human frailty. "I think as you get older, . . . you have more life experiences, and you meet different types of people, and you have highs and you have lows, in your personal life and your professional life."<sup>259</sup> This exposure tends to make prosecutors more forgiving of mistakes than those prosecutors who lack life experience. For example, one of our interviewees offered this colorful portrait of a particularly rigid coworker: "He just never spent enough time wanting to get drunk and naked with hippie chicks when he was younger."<sup>260</sup>

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254. See *supra* notes 37–38 and accompanying text.

255. See *supra* Part IV.B; Prosecutor Interviews, *supra* note 1 (Gill mid-level 293); *id.* (Everly mid-level 720); *id.* (Dean senior 1225); *id.* (Gill mid-level 107).

256. Prosecutor Interviews, *supra* note 1 (Everly mid-level 790) ("Even when we grouse about it, we kind of continue to go on and do it.").

257. *Id.* (Gill junior 125).

258. *Id.* (Everly senior 745); see also *id.* (Brooks mid-level 920) ("[Y]ou need . . . life experience and experience in the criminal justice system."). Indeed, it may be the case that many of the features of Young Prosecutors' Syndrome are simply synonymous with the features of late-stage adolescence, so expecting new prosecutors to transcend their age cohort is unrealistic. This is one reason we advocate in Part VI hiring a mixed cohort of experienced lawyers and recent graduates.

259. *Id.* (Gill mid-level 230). Another explains it like this: "I think the more mature you become as a person . . . the better prosecutor you are because you're really doing a balancing act; you're really a problem-solver." *Id.* (Brooks mid-level 960); see also *id.* (Gill mid-level 224) ("That may be a maturity thing, too, realizing why you do this, getting better at it, getting more confident, being more open to listening.").

260. *Id.* (Atkins mid-level 1019); see also *id.* (Cline junior 595) ("[A] lot of prosecutors . . . grow up in such rosy environments that they think, you know, nobody does anything bad or shouldn't do anything bad, and it's not always like that."); *Id.* (Gill mid-level 278) ("[Prosecutors] who have lived a more 'sheltered life' . . . kind of feel uncomfortable talking about experiences that are completely obviously foreign to them.").

Senior prosecutors thus connect life experience to compassion in their professional lives:

I think maturity . . . helps [you] to be a rounded individual. When you look in the mirror, you can't think of yourself as holier than thou. You just have to say, "You know what? I've been in these people's position and thank god I didn't get caught." . . . I think that when you've lived something besides just going to school, going to law school and jumping into the practice, . . . I think you are just a little bit more compassionate.<sup>261</sup>

As this quote shows, experience can foster empathy in a prosecutor; it allows him to put himself in the defendant's (or the victim's) shoes.<sup>262</sup> When motivated by that spirit, he can approach the defendant's case with a sense of restraint, rather than giving in to anger, frustration, or disgust. That said, prosecutorial empathy based on experience might be a one-way street, favoring defendants and victims whose lives at least partially resemble the life of the prosecutor or his social circle. People from vastly divergent backgrounds, such as the homeless, might not stand to gain anything from the prosecutor's experience.<sup>263</sup>

Aside from noting the influence that experience produces on their case management decisions, prosecutors with life experience say they are more inclined

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261. *Id.* (Atkins junior 1051); *see also id.* (Gill senior 290) ("[I]f you can't look at [the defendants] and say, . . . that could be my brother, or my friend, who I know has been in trouble before, . . . and you just look at these people as bad and irredeemable, then . . . you shouldn't be here."); *id.* (Harris junior 1113) ("The people that were helpful to me [in learning the ropes] were people who had life experience, who had worked in other areas, did not go straight from law school to this job or college to law school to this job. . . . people who had families, who had other business experience or career experience or life experience . . . Those are the people that help you, who have a sense of, 'Was this something that is really going to be an issue?' or it's just, 'This is just a poor judgment problem?'"); *id.* (Dean senior 1255) ("[A]s you get older, and you have more experiences socially or with families or with children, you learn more. I think that your compassion probably extends a little bit too.").

262. This experience-based compassion extends to both the defendants and the victims: "[W]hen I have a B&E case, I can talk to my victims easier because my house has been broken into and I know what they feel like." *Id.* (Gill mid-level 194). Maturity based on life experience can also help a prosecutor in court, because it makes him more skeptical of stories he hears from witnesses. *Id.* (Everly senior 745).

263. Many prosecutors empathize because they see parallels between the defendant's behavior and their own adolescent behavior. *See, e.g., id.* (Gill junior 263) ("[T]hey are just good kids, and they went out drinking late, most of us did when we were that age; whatever stupid we did, we probably just didn't get caught, and these kids got caught."); *id.* (Gill junior 149); *id.* (Gill senior 146). There is a risk that the prosecutor's exercise of discretion here is really a bias in favor of defendants from middle-class families. That is, seeing a crime as the result of boredom as opposed to an evil disposition, or seeing the defendant as similar to oneself, might map on to race or class in troubling ways. This is an example of the dark side of prosecutorial discretion that criminal-justice scholars have long decried, and about which prosecutors at all levels need to remain cognizant. These are the same sorts of discretionary decisions, based on life experience, stereotypes, and assumptions that jurors tend to make, so the prosecutor may be trying to preempt a jury sympathy problem or reduce uncertainty in the case outcome. Frohmann, *supra* note 92; Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y REV. 291 (1987).

to control their own emotions as advocates. For example, a senior prosecutor from Everly acknowledged that, “most of us, as we get older, don’t tend to get nearly as insulted by some of what goes on in the courtroom.”<sup>264</sup> Another mid-level prosecutor explained that he had recently developed a willingness to listen and reason, rather than to storm away, if faced with a difficult opponent:

I think before it would be easier for me to get, like, ticked off at somebody if they were a jerk and then I think it’s human nature to sort of shut down at that point. Before I might have said, “Fine, we’ll have a trial; go sit down.” But now I sort of see the bigger picture, so I am, “Alright, let me just try to reason with this person a little bit.”<sup>265</sup>

The seasoned prosecutor thus trades “shutting down,” feeling “insulted,” or getting “ticked off” for staying in communication with an adversary, even when that person is being a “jerk,” because she can see the ultimate value in doing so: getting cases resolved with better-quality results.<sup>266</sup> Some prosecutors refer to this process as developing a “thick skin.”<sup>267</sup>

Parenting seems to be a particularly salient private role that influences the prosecutor’s professional empathy. For example, one prosecutor said that being a parent has influenced the way she deals with young defendants who want their mothers to argue for them.<sup>268</sup> Another prosecutor said she could relate to the mother of a victim, but then had to explain why the prosecutor’s role was different from the parent’s role.<sup>269</sup> Prosecutors treat parenting experience as an important source of wisdom among their colleagues, apart from their years in the office or in the courtroom.<sup>270</sup>

When an individual prosecutor combines life experience with the relevant lessons learned from work in a prosecutor’s office, the result is a more balanced conception of the job. This transformation does not happen at the same pace for every individual prosecutor, though. In particular, we noticed a lot of variety among junior prosecutors in their awareness of growth and the amount of balance they

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264. Prosecutor Interviews, *supra* note 1 (Everly senior 785); *see also id.* (Everly senior 830) (“[S]ometimes I’d get frustrated with people and then I’d act rashly and it didn’t help; all it did was get my blood pressure up. And it was met with the same kind of hostility that I was giving out.”). Another said, “[As you age] you become a little more introspective, a little more philosophical about things, control your temper, don’t get as fired up about things you don’t need to get fired up about.” *Id.* (Gill mid-level 176); *accord id.* (Cline mid-level 555).

265. *Id.* (Cline mid-level 535).

266. *Id.*

267. *Id.* (Cline mid-level 625); *id.* (Gill mid-level 266).

268. *Id.* (Brooks mid-level 965).

269. *Id.* (Gill mid-level 224).

270. *Id.* (Harris junior 1113) (“I think if they are a stay-at-home mom and then they become a lawyer, for me that’s not necessarily a variety of professional experience, but they have a wealth of experience, a different type of experience.”); *id.* (Atkins mid-level 1055); *id.* (Gill junior 236); *id.* (Gill entry level 251); *id.* (Gill junior 305) (speculating that for other prosecutors, parenting might provide insight, even though interviewee was not a parent). Interestingly, all of the prosecutors who discussed the potential impact of the parental role were women.

displayed. While personality might account for some of this variance, we noticed that individuals who arrived at the office with greater life experience—for instance, those who entered prosecution as a second career—seemed to evolve more quickly toward balanced prosecution, requiring fewer years of on-the-job experience before embracing a new self-image.<sup>271</sup>

#### V. DOES A BALANCED SELF-IMAGE PRODUCE BALANCED RESULTS?

We have examined how experienced prosecutors talk about their professional self-image in ways that differ from junior prosecutors, particularly those with less than two years of experience. Senior and mid-level prosecutors look back on themselves as entry-level prosecutors and see profound changes in their approach to their work, changes we describe generally as a sense of balance. They also see an increasing sense of balance when they compare themselves and their cohort to the less experienced prosecutors working in the office today.<sup>272</sup>

While these comments provide striking evidence of prosecutors' attitudes, values, and professional identity, do they tell us anything about conduct? Prosecutors might change the way they describe the job without altering the way they perform on the job.<sup>273</sup> Does the evolution in an experienced prosecutor's thinking produce any measurable effects on selection of charges, discovery compliance, evaluation of cases for plea offers, decisions to go to trial, sentencing recommendations, or any other prosecutorial decisions?

The best evidence of changed prosecutor behavior would come from observing prosecutors at work in actual cases. Ideally, we would conduct a longitudinal study to observe prosecutors early in their careers and then return a few years later to watch those same prosecutors deal with similar cases, noting any differences in approach. Alternatively, we might examine the files from a wide range

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271. For example, a County Attorney who worked in the financial services industry before going to law school, and the handful of prosecutors who were career officers in the military, tended to express balanced viewpoints earlier in their prosecutorial careers. This echoes a finding from the literature about medical students: students who had careers before medical school were better able than their younger colleagues to keep medical school in perspective; some attributed this sense of balance to having their goals and self-identity more firmly established before medical training began. Beagan, *supra* note 27, at 288.

272. These findings are echoed in the work of Ellen Yaroshefsky and Bruce Green, who interviewed 35 prosecutors in seven different prosecutors' offices regarding their discovery practices. See Yaroshefsky & Green, *supra* note 20, at 281, 286. Based on those interviews, they surmised that "experienced lawyers are more likely than junior ones to make fuller and earlier disclosures." *Id.* at 288–89. This occurs because senior lawyers are more likely to have experienced a reversal on appeal, criticism by a judge, or other professional embarrassment because of inadequate disclosure in the past.

273. Heidi Altman reached the same conclusion in her study of the way prosecutors consider immigration consequences in their filing and plea offers. Altman surveyed prosecutors in Kings County, New York, and found that prosecutors' declarations about their priorities sometimes do not reflect their actual charging practices; many prosecutors believed themselves to be more generous than they actually were. Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Non-Citizen Defendants*, 101 GEO. L.J. 1, 16–17 (2012).

of cases brought during a particular period of time; this would allow us to compare how senior and junior prosecutors handle similar cases.<sup>274</sup> Unfortunately, neither approach was available to us, so we cannot make direct empirical comparisons between the actual performances of senior and junior prosecutors at this time.<sup>275</sup>

Indirect evidence of performance does appear, however, in our simulation survey responses. In our research, and in a project conducted by the Vera Institute of Justice,<sup>276</sup> prosecutors completed a survey instrument that presented ten “vignettes,” or commonly encountered fact patterns and defendant profiles.<sup>277</sup> Some vignettes included strong evidence of guilt, while others offered weaker evidence; some defendants had serious prior convictions, while others had little or no criminal history.<sup>278</sup> The survey asked the respondent to select the appropriate charges to file at the start of the case, and to specify the charges that could form the basis for an appropriate negotiated guilty plea.

Ironically, when it came to filing charges, the experience–balance connection went into hiding. Despite all of their talk about a balanced attitude and

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274. This was the approach used by FREDERICK & STEMEN, *supra* note 16, in their study of Northern County and Southern County (which is Gill County in our study). They found that senior prosecutors declined to file drug and property offenses at a higher rate than their junior colleagues. But the experience effect they found may have been muted by their decision to assume, rather than control for, offense severity within each class of cases.

275. Our Institutional Remedy Board (“IRB”) approval and our consent form from each resource cite was limited to surveys and interviews; it did not include in-court observations, ethnographic study in individual offices, or review of case files. Moreover, the file records for most cases either do not appear in usable electronic format or do not link to individual prosecutors. When we requested records from one of our research sites, for example, we were told that the office itself didn’t keep those sorts of records. We were then referred to the court clerk’s office, which told us that they keep records based on charges, rather than cases. This meant, for example, that we could find out how many burglary charges were resolved in a year and for what sentences, but not how cases that included burglary charges were handled. Moreover, because these are court records, the name identified on the file is the judge, not the prosecutor. These records were thus not helpful for the questions that concerned us.

Another approach to checking prosecutor self-reports of behavior would involve systematic interviews with defense attorneys in the jurisdiction, to hear their impressions of the prosecutors with whom they work. That, too, may produce biased results, and it requires a different kind of IRB approval than we received, since defense attorneys are a different population than prosecutors.

276. FREDERICK & STEMEN, *supra* note 16.

277. The Vera research administered this survey in Southern (Gill) County and Northern County, with the bulk of the responses coming from Southern (Gill). We received about 20 survey replies from Dean and Everly Counties. We administered this survey in an additional southwestern county that is not included in our analysis in this Article because the processing of interview data is not yet complete.

278. These instruments are known as “factorial” surveys, because they allow researchers to vary the different factors that bear on complex decisions. In this instance, the survey matched a different criminal history to the same evidentiary summary for different respondents. Analysis of the survey responses allows a researcher to isolate the effects of one factor while controlling for the impact of others. See Lisa Wallander, *25 Years of Factorial Surveys in Sociology: A Review*, 38 Soc. Sci. Res. 505 (2009).

their fine-tuned, pragmatic approach from the earliest possible moment, the seasoned prosecutors acted similarly to the rookies in their charging decisions: senior and junior prosecutors selected roughly the same number and severity of charges to file in the survey. For all of the prosecutors who completed this survey, the strength of evidence mattered far more than the defendant's criminal history or perceived danger to the community at the point of filing charges.<sup>279</sup>

An interesting pattern, however, emerged when the prosecutors evaluated potential plea agreements in the vignettes—the experience–balance connection reappeared. The prosecutors' concern about weak evidence in a given case was especially influential at the guilty-plea stage in the most serious criminal incidents, but that effect was strongest among senior prosecutors. Generally, weak evidence mattered less for misdemeanors, and mattered even less for the prosecutors with the least experience.<sup>280</sup> The effects of experience thus appear to be muted at the filing stage, but then become significant during the plea-offer stage.

Consistent with the themes that emerged in our interviews, senior prosecutors who evaluated possible guilty pleas in these simulated survey cases appeared to be less committed to trials and less adamant about convictions on all available charges. Apparently, experienced prosecutors are more alert to potential problems at trial than their junior colleagues, and more willing to consider alternative routes to resolution. While this was true in all cases, it was especially important in the most serious cases that would receive the most severe testing from defense counsel.

Our claims about the balancing effects of prosecutor experience are also consistent with empirical studies of how prosecutors spend their time. In an effort to develop recommendations for prosecutor workloads, the American Prosecutors Research Institute monitored 56 prosecutors' offices around the country over a three-year period to learn how many hours prosecutors devoted to various jobs.<sup>281</sup> The researchers discovered that prosecutors with more than five years of experience

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279. See Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making—Technical Report*, at 174 (Dec. 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/240334.pdf> [hereinafter Frederick & Stemen, *Technical Report*]. In general, prosecutors placed more weight on strength of evidence during the early charging phase of the case, and shifted their attention to criminal history and efficiency to explain their choices about plea offers later in the process. The survey results about filing may be an artifact of the artificial nature of the vignettes, because they stand in contrast to the American Prosecutors Research Institute ("APRI") results about the time spent on filing by seniors versus juniors, described *infra*.

280. See Frederick & Stemen, *Technical Report*, *supra* note 279, at 230–32. In particular, the number of charges proposed for a guilty plea increased with the attorney's rating of the strength of evidence, and this effect was stronger for more serious crimes. The interaction between evidence strength and the number of charges in a proposed guilty plea was stronger with experienced attorneys, especially for more serious levels of crime.

281. AM. PROSECUTORS RESEARCH INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 6 (2002), available at <http://www.ndaa.org/pdf/How%20Many%20Cases.pdf>. APRI carried out research on behalf of a professional organization, the National District Attorneys' Association.

spent 35% more time than less experienced prosecutors on the front-end screening decision. Conversely, junior prosecutors accepted cases more quickly, but then spent nearly twice as much time overall preparing their cases for trial or for other disposition.<sup>282</sup> Junior prosecutors were also more likely than their experienced colleagues to dispose of cases through trials rather than guilty pleas.<sup>283</sup>

Consistent with our interview data, this fieldwork on prosecutors' time-allocation suggests that experienced prosecutors are more selective in accepting cases. Less experienced prosecutors accept cases more readily, possibly because they are more inclined to believe what they hear from the police and victims. Junior prosecutors also seem to resist the compromises that could lead to guilty pleas and other quick dispositions.<sup>284</sup>

## VI. DEVELOPING PROSECUTORIAL BALANCE FASTER

Prosecutors appear to experience positive professional growth as a result of more years on the job. Is it possible, then, to speed up the transformation process, so that prosecutors can adopt a balanced and pragmatic approach to the work earlier in their careers? Or is there nothing to do but wait? Given the large proportion of state prosecutors with less than five years of experience, the answer to this question could have enormous implications for American criminal justice.

The path toward professional growth is personal to each prosecutor, but because prosecutors work in collective settings, structural features of the prosecutor's office can influence the process. Through office arrangements, the Elected can instill and promote the ideals she wants to see her deputies embody. As Patrick Fitzgerald, the U.S. Attorney for Chicago, has said, if "culture shapes behavior," then chief prosecutors either need to hire people with the right values or model those values and nurture them in their employees.<sup>285</sup> The institutional measures we discuss in this Part include: hiring a blend of experienced and inexperienced prosecutors; adopting training and mentoring programs for newly hired prosecutors; designing work assignments and physical-layout arrangements in the office to facilitate interaction between veteran and newer prosecutors; and promoting prosecutorial autonomy by providing structured opportunities for independent decision-making. We finish this Part by extending the career preparation timeline backward into law school, to identify how law schools could pave the way for prosecutors to mature more quickly on the job.

### A. Hiring

Chief prosecutors pursue a variety of hiring policies. Some prefer to hire attorneys who have experience in other prosecutors' offices, relying on them to apply their judgment and skills right away in the new office. Others choose to hire most of their attorneys directly out of law school, sometimes targeting graduates

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282. *Id.*

283. *Id.*

284. *Id.*

285. Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 14 (2009).

who spent time during law school clerking in the prosecutor's office. There are costs and benefits to each of these strategies.<sup>286</sup>

For purposes of fostering a mature and balanced approach to prosecution, an office should not *exclusively* hire recent graduates, especially if they lack significant work experience. An entire cohort of inexperienced attorneys will likely have reduced contact with veterans and may develop the experience–balance connection more slowly as a result. When a hiring class consists entirely of people who share inexperience, they tend to gravitate towards each other for advice as well as socializing; they thus become the reference group for each other, even though none of them knows much about career success strategies.<sup>287</sup> On the other hand, hiring an entire cohort of experienced attorneys as new prosecutors would be prohibitively expensive and would impede the transfer of office culture and values from the current office veterans to newcomers who, on the whole, may not be very open to learning from others about the prosecutor's role.<sup>288</sup> Creating a mix of attorneys with varying levels of experience might help an office steer around these dangers.

Personnel choices and budgets in state prosecutor offices should also emphasize the retention of senior prosecutors. To be sure, such a policy might prove expensive, but the financial sacrifice associated with this approach can powerfully benefit the public because it provides a cadre of in-house mentors and trainers for rookie prosecutors.<sup>289</sup> As a senior prosecutor from Gill explained, because many people "don't come into the job with a strong sense of inner values," offices need to "mentor people who either don't have the life skills or life experience" to evaluate cases fairly.<sup>290</sup> But we believe these mentorship programs work best within a heterogeneous group of prosecutors.

#### ***B. Training in the Prosecutor's Office***

The training of new prosecutors in their offices should follow the classic modes of clinical education: supervision, rounds, and seminars.<sup>291</sup> One-on-one supervision of the work of a junior attorney takes its most intense and fruitful form when the office arranges for junior prosecutors to "second chair" a trial in a serious crime alongside an experienced lead prosecutor. The availability of both first chairs and second chairs requires an office to have prosecutors with differing experience levels. This practice is expensive, which means a chief prosecutor would have to use it sparingly. Nevertheless, we believe that concrete observations about proof problems and handling difficult witnesses in the context of an actual trial could give

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286. See Levine & Wright, *supra* note 6, at 1138; Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 255–56 (1988) (discussing issues with hiring prosecutors right out of law school).

287. See Levine & Wright, *supra* note 6.

288. *Id.* at 1139.

289. See Nugent-Borakove, *supra* note 183, at 97 (citing JOAN JACOBY, BASIC ISSUES IN PROSECUTION AND PUBLIC DEFENDER PERFORMANCE (1982)) (documenting the importance of experience level of assistant prosecutors as one factor in office functioning).

290. Prosecutor Interviews, *supra* note 1 (Gill senior 311).

291. See Ann C. Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 141–47 (1994).

new prosecutors a tangible and memorable basis for making sober judgments in their own cases later on.

The use of “rounds” in prosecutor training—discussions that allow peers to learn about the details of the work that others in their group are doing—is also possible in the prosecutor’s office.<sup>292</sup> Many offices, including some that participated in our study, designate some categories of cases for “round table” treatment.<sup>293</sup> Conversations during rounds tend to move beyond preparation for a single case, often including larger office priorities, resource issues, and best practices. By participating in such discussions, the new prosecutor has the opportunity to ask direct questions about her cases, to listen to more experienced colleagues comment on strategy for their cases, and to place her own work in the broader context of her colleagues’ cases and the institution’s goals.<sup>294</sup>

The seminar format, which stresses simulation of skills by the new professional, is also available in a prosecutor’s office.<sup>295</sup> Training programs sponsored by state professional associations and within single offices can promote the wisdom that comes from experience by providing vicarious learning opportunities. Trainees in these programs should be asked to grapple with dilemmas that they would not ordinarily decide for themselves until a few years later. They could be subject to a series of simulated exercises, based around vignettes derived from real cases, and asked to make case handling decisions on these facts. The goal of these exercises is to force young prosecutors to think about alternative strategies in advance, and to discuss with veteran prosecutors the comparative advantages and disadvantages of each strategy.<sup>296</sup>

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292. See Susan Bryant & Elliott S. Milstein, *Rounds: A Signature Pedagogy for Clinical Education?* 14 CLINICAL L. REV. 195 (2007); COLETTE DAIUTE & BRIDGET DALTON, *COLLABORATION BETWEEN CHILDREN: LEARNING TO WRITE – CAN NOVICES BE MASTERS?* (1992); see also Donald J. Sorochan, *Wrongful Convictions: Preventing Miscarriages of Justice, Some Case Studies*, 41 TEX. TECH L. REV. 93, 106 (suggesting that senior lawyers in prosecutors’ offices should give second opinions, become devil’s advocates, and conduct case reviews to reduce incidence of wrongful conviction); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 375–81 (suggesting that multiple levels of case review and counter-arguing sessions would reduce incidence of wrongful conviction). In the psychology literature, these techniques are sometimes called “prospective hindsight.” Deborah J. Mitchell et al., *Back to the Future: Temporal Perspective in the Explanation of Events*, 2 J. BEHAV. DECISIONMAKING 25 (1989).

293. See Vance, Jr., *supra* note 16, at 632 (discussing round-tableing in the Manhattan DA’s office for major or complex cases as a way to reduce the risk of prosecuting the wrong person and to strengthen the case against the actual perpetrator).

294. See Levine & Wright, *supra* note 6, at 1157–61.

295. See generally STEPHEN D. BROOKFIELD, *THE SKILLFUL TEACHER: ON TECHNIQUE, TRUST, AND RESPONSIVENESS IN THE CLASSROOM* 123–30 (1990).

296. See Fisher, *supra* note 286, at 257–60 (discussing ideas for how chief prosecutors can train and reinforce a complex set of prosecutorial values and priorities, beyond simply adversarialism); Bibas, *supra* note 2, at 1007 (noting office leaders can do more to develop norms and values beyond simply maximizing conviction statistics; they need to pay attention to how office structures, hiring, training, promotion, and tenure practices shape prosecutors and their behavior); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1620–21 (2005)

In addition to hearing splashy accounts of veterans' courtroom successes, rookies should hear testimonials about cases that went badly, about the difference between penal code requirements and judicial understandings of law, and the like.<sup>297</sup> A more varied menu of stories, in other words, should make new prosecutors more watchful for potential problems in their own cases, as well as more realistic about what they can achieve in the prosecutorial role.<sup>298</sup> Having senior prosecutors act as role models for the juniors, helping them identify what behaviors and attitudes to acquire in order to succeed in the office, is another important benefit.<sup>299</sup>

Additionally, it might be useful to expose prosecutors to the defense side early in their careers. Stephanos Bibas, for example, wrote positively about the system at work in Great Britain, where barristers alternate between prosecuting and defending cases;<sup>300</sup> Bennett Gershmann posited that each newly hired prosecutor ought to spend a year as a public defender and vice versa.<sup>301</sup> Alternatively, a more attainable solution might be a training program for all new prosecutors and new defenders in a jurisdiction. As part of their training, each attorney would be required to switch sides for some exercises.<sup>302</sup> Like the more sustained switch programs described above, these training exercises would serve two main purposes: to erode the "us versus them" mentality that often pervades these offices; and to expose each attorney to the challenges that the other side faces in working with evidence, clients,

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(recommending that senior prosecutors serve as supervisory internal reviewers for decisions made by junior prosecutors).

297. As with police, storytelling is more than just idle chat (or "canteen culture," see WADDINGTON, *supra* note 4) for prosecutors. The recounting of war stories relays the norms and values of the profession and of the office, while simultaneously inviting the rookie to share in the prior successes of his colleagues. It also encourages the rookie to imagine himself in the situation being described and to channel his feelings and reactions in accordance with the storyteller's account. See Clifford Shearing & Richard Ericson, *Culture as Figurative Action*, 42 BRITISH J. SOC. 481 (1991); Van Manaan, *supra* note 4, at 54–55 (discussing socialization process of aspiring police recruits); Bibas, *supra* note 2, at 1012 n.223 (noting the importance of informal lunchtime conversations between senior and junior prosecutors); Yaroshesky & Green, *supra* note 20, at 282 (stories become lore as they are shared and repeated).

298. Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79 (2010) (prosecutors who are agnostic about a defendant's guilt will be better judges of the quality of the evidence and therefore better defenders of the innocent).

299. See Ibarra, *supra* note 27, at 767 (discussing socialization of business executives). Wholesale imitation is not the goal, but it is a provisional measure that one can improve on over time. *Id.* at 777.

300. Bibas, *supra* note 2, at 1010.

301. Bennett L. Gershmann, *The New Prosecutors*, 53 U. PITTS. L. REV. 393, 457–58 (1992). See also Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for Truth*, 56 N.Y.L. SCH. L. REV. 911, 913 (2012) (suggesting an "Office of Public Advocacy" where attorneys alternate roles).

302. For this suggestion we thank Matt McCoyd, former assistant district attorney for DeKalb County, Georgia. See also Alafair S. Burke, *Prosecution (is) Complex*, 10 OHIO ST. J. CRIM. L. 703, 714–15 (2013) (discussing how prosecutors should socialize more with defense attorneys, or defense attorneys should serve on prosecutorial advisory boards, to reduce prosecutorial "groupthink" tendencies).

office policies, and arguments.<sup>303</sup> Even if only partially successful, this kind of training program would instill a greater sense of balance at the outset of the prosecutorial career, at least for some participants.

Given that we are promoting ways to speed up the maturation process, it is worth pausing to ask whether there might be a downside to this “vicarious learning” approach. A handful of our interviewees insisted that, while painful, prosecutors’ negative real-world experiences with judges, witnesses, and defense counsel teach lessons that stick powerfully over the course of their careers.<sup>304</sup> If prosecutors do not go through the experience process with all of its lumps and bruises, might they fail to properly internalize these lessons and, thus, not have battle scars to share with future generations? Perhaps—but to us it seems that this is a risk worth taking. Adding vicarious learning techniques into the mix will not completely eliminate the risk of prosecutors making bad decisions. Prosecutors who mature quickly will still make mistakes, and these mistakes will form the grist for their own memories and stories to pass along. Fewer mistakes would be good for the justice system overall, without sacrificing the credibility of tomorrow’s veteran prosecutors. It is not fair to make defendants bear the costs of the prosecutorial trial-and-error learning process.

### C. Work Flow

In addition to determining hiring and training priorities, chief prosecutors control the flow of work through the office. They divide attorneys into working groups and decide which attorneys will complete various phases of a particular project. To limit the damage caused by new prosecutors, chief prosecutors might consider limiting new prosecutors’ work to strictly misdemeanor cases until they gain some experience with defense attorneys, victims, police officers, and judges. However, creating a self-referential group of young prosecutors in misdemeanor court may not be the quickest path toward achieving balance, and it does not offer a workable strategy for State’s Attorney’s Offices—those that handle only felonies.

To promote balanced prosecution as early as possible among new prosecutors, chief prosecutors should arrange their offices to put veterans in more frequent contact with juniors. Less-experienced prosecutors who can look over the shoulder of veterans as they complete the office routine can learn more quickly how to exercise judgment, how to ask the larger questions about whether cases should be prosecuted, and how to place their current cases into context.

This objective—placing veterans in the routine line of sight for inexperienced prosecutors—has implications for the physical arrangement of the

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303. As Herbert Simon has expressed in the field of administration and bureaucracy, a person “does not live for months or years in a particular position in an organization, exposed to some streams of communication, shielded from others, without the most profound effects upon what he knows, believes, attends to, hopes, wishes, emphasizes, fears, and proposes.” HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR*, at xvi (3d ed. 1976). The suggestions of Bibas, Gersmann, Burke and others aim to disrupt the careerist mentality that develops when prosecutors spend their entire professional lives on only one side of the courtroom.

304. See, e.g., *Prosecutor Interviews*, *supra* note 1 (Everly senior 770); *id.* (Harris senior 1103); *id.* (Everly senior 785).

office as well. If the offices of veterans cluster together, separate from the offices of rookies, the latter will run into the former less often, causing them to rely more heavily on other rookies for advice. As a result, rookies may be reluctant to seek out the experienced prosecutors for fear of interrupting them, or having to knock on a closed office door. In this office configuration, rookie prosecutors will gain the benefits of experience more slowly because they will not encounter veterans as often. On the other hand, if juniors are interspersed with veterans on the same floor, sharing the same copiers, administrative assistants, and the like, the opportunities for learning would multiply. New prosecutors would have natural encounters with experienced prosecutors in communal spaces, leading to informal conversations about cases. Mentor–protégé relationships can develop spontaneously, even if the office does not formally create them.

A chief prosecutor's commitment to fostering the maturation process for junior prosecutors also can influence his adoption of vertical or horizontal prosecution arrangements.<sup>305</sup> Vertical prosecution refers to the unitary case-handling model: one attorney takes a case file when it arrives in the office and makes all the relevant choices as it moves “up” through the process, from charge selection and indictment, to discovery, to formulation of guilty plea offers, to pretrial motions, to trial, to appeal and postconviction challenges.<sup>306</sup> Horizontal prosecution, in contrast, calls for different attorneys to take the file at each level of the process.<sup>307</sup> A screening attorney hands off the case to a pretrial attorney, who then hands it off to a trial team member, and so forth.

It is possible under either the vertical or horizontal model for newcomers to see veterans at work on a routine basis. It seems to us, however, that horizontal prosecution is less conducive to the sort of crosspollination that we have in mind, because horizontal prosecutors see neither the antecedents nor the implications of the decisions they make on cases. Young prosecutors are typically assigned to the pretrial unit, working on cases after filing but before trial, where the job is to take a case to preliminary hearing or to respond to a suppression motion. They do not have a chance to chat with the filing attorneys about their reasons for filing choices, nor to converse with the trial attorneys who must try the cases or resolve them through pleas. In that environment, the young prosecutor is likely to develop tunnel vision, focusing only on her part in the chain instead of the overall flow of the case, and to neglect the context in which filing and trial strategy decisions are made.

Finally, chief prosecutors in all but the smallest offices typically divide their attorneys into trial teams, and these team assignments also have implications for the maturation process. Sometimes each team handles a specific type of crime, such as drugs, auto theft, sexual offenses, or homicides. In other offices, the teams all handle a cross-section of offenses that arrive in the office. Again, either model could work, but the more specialized approach creates a greater risk that seasoned prosecutors will gravitate toward a particular specialty (homicides, for instance), and

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305. See generally CRAIG HEMMENS ET AL., CRIMINAL COURTS: A CONTEMPORARY PERSPECTIVE 135 (2d ed. 2013) (contrasting horizontal and vertical prosecution models).

306. See generally Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1141, n.40 (2005) (discussing types of vertical arrangements in more detail).

307. See *id.*; HEMMENS ET AL., *supra* note 305.

junior prosecutors will be assigned to the lower-risk cases, like misdemeanors or juvenile court.<sup>308</sup> Due to this separation, rookies in most offices probably will not encounter veterans, other than their unit supervisor, on a regular basis.

Chief prosecutors who opt for the advantages of specialized teams<sup>309</sup> should take care to distribute experienced prosecutors across all units; a single veteran supervisor for each unit is not likely to provide sufficient mentoring for more than just a few new prosecutors at a time.<sup>310</sup> Additionally, experienced prosecutors will tend to skim the most serious cases from the unit's docket, because they are the most qualified to handle them. If the goal is to teach young prosecutors how to expand their arsenal of skills and mature their judgment, each team member should receive a cross-section of cases, or at least participate in round-table discussions with other team members about case strategy.

Beyond the specialization question, chief prosecutors face a classic dilemma of how tightly to control the work of their line attorneys. Some offices leave a great many decisions to the individual discretion of line prosecutors, trusting their judgment as autonomous professionals. Others institute tighter controls and aim for more verifiable consistency across cases. One measure of the level of autonomy might be found in the office's promotion standards (does the office encourage risk-taking or track conviction statistics, for example).<sup>311</sup> But there are

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308. Catherine M. Coles, *Evolving Strategies in 20th-Century American Prosecution*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 177, 185 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (noting that newly appointed prosecutors are typically assigned to juvenile or misdemeanor units, where the cases are considered relatively simple). Despite the portrayal of misdemeanors as simplistic, the importance of misdemeanor prosecutions has been the subject of recent scholarly attention, particularly given the growth of public-order/quality-of-life crime arrests in some urban jurisdictions. See Natapoff, *supra* note 125; Bowers, *supra* note 125; Issa Kohler-Haussman, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Roberts, *supra* note 124.

309. See Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461 (2005) (discussing the advantages of specialized units); David C. Pyrooz et al., *Gang-Related Homicide Charging Decisions: The Implementation of a Specialized Prosecution Unit in Los Angeles*, 22 CRIM. JUST. POL'Y REV. 3 (2011) (discussing the advantages of specialized units).

310. Beyond the time constraint issue, having more than one veteran on a team is important for substantive instruction purposes. Any single prosecutor—even one who is highly effective—might be idiosyncratic in the way she does the job, or just not be a very good mentor for younger attorneys. This may be particularly problematic if the unit supervisor is a much older prosecutor with one foot towards retirement.

311. In the Harris County office, prosecutors told us that their chief set goals, in terms of number of trials to be conducted each year, for each attorney, and that promotions depend on reaching one's goals. Prosecutor Interviews, *supra* note 1 (Harris mid-level 1097); *id.* (Harris mid-level 1126). See, e.g., Coles, *supra* note 308 (noting that under the conventional portrait of the prosecutor as case processor, outcome measures are limited to the number of trials, the number of convictions, and the length of sentences; if prosecutors broaden their mission, their tactics and outcomes should become more diverse); Nugent-Borakove, *supra* note 183. See generally AM. PROSECUTORS RESEARCH INST., *supra* note 16, at i.

other indicators, as well—such as requiring supervisor approval for indictment language and sentence recommendations.<sup>312</sup>

Chief prosecutors must walk a fine line when deciding how much autonomy to allocate to junior prosecutors. We tentatively note that offices exercising certain forms of control over their attorneys—those with the most detailed “price lists” of acceptable sentencing outcomes for most charges—may delay the prosecutorial transformation towards balance.<sup>313</sup> This intuition stems from the literature about expertise in other fields: where bosses insist on strict conformity with rules and procedures, they actually inhibit the development of expertise, training their employees to become merely adequate at their jobs, rather than superior.<sup>314</sup> Psychologists explain that procedures are useful “when there is a lot of turnover and few workers ever develop much skill,” because “they help less-experienced workers do a reasonably acceptable job” and “can help teams coordinate by imposing consistency.”<sup>315</sup>

Prosecution, however, is a profession that is defined by its discretion,<sup>316</sup> which makes it unsuitable for highly constrained decision-making. First, choices about filing and plea offers require judgment and skill, rather than reflexive rule application. This is because crimes are defined broadly but are committed in particular ways, and because each defendant comes to court with unique facts in his or her background that might affect the prosecutor’s sense of an appropriate outcome. Second, offices that tightly control their line prosecutors’ choices could inspire high turnover rates because more senior attorneys might look for opportunities to grow elsewhere.<sup>317</sup>

Certainly the decisions of junior prosecutors require some supervision; newer prosecutors are rarely well-versed in the law or courtroom procedure and lack familiarity with the norms and customs of the office.<sup>318</sup> With that said, some offices have been able to adopt a hybrid approach, giving the junior prosecutor authority to make some decisions on her own while designating certain crimes for special consultations between the junior prosecutor and a supervisor. Even in these special cases, though, the junior prosecutor might be able to participate in the selection of case objectives. Moreover, the data systems in an office can help a junior prosecutor place his decisions into context, promoting accountability and reasoned judgment

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312. This is a feature of the Dean office.

313. We encountered this in the Harris County office. Preliminary analysis of our data from our ninth office, which has a very tightly controlled organizational structure and many layers of bureaucracy, supports this conclusion as well.

314. KLEIN, *supra* note 5, at 22 (asserting that procedures can lead to mindlessness and complacency, can erode expertise, and can sometimes mislead).

315. *Id.* at 29.

316. See MILLER, *supra* note 15.

317. Prosecutor Interviews, *supra* note 1 (Flatt senior 500) (commenting on the “adversarial” and “very competitive” culture and practice of the prosecutor’s office in another jurisdiction).

318. See Coles, *supra* note 308, at 185; Prosecutor Interviews, *supra* note 1 (Harris junior 1126) (new misdemeanor prosecutors don’t know what they are doing and need a lot of hand-holding).

without direct enforcement of rules by supervisors.<sup>319</sup> These arrangements allow room for new prosecutors to mature at an ordinary pace.

In some offices, experienced, well-respected leaders believe that rookies have to be allowed to make some decisions, as this is the only way they can learn how to make decisions.<sup>320</sup> The wisdom behind this advice goes to more than just promoting office morale or developing decision-making ability among one's employees.<sup>321</sup> Attorneys who are allowed to make decisions are also inclined to take ownership of their judgments early in their careers. Because they feel responsible for the positive and negative consequences of their choices, they embrace the lessons of experience.<sup>322</sup>

#### D. Law School Curriculum

Finally, law schools can do more to prepare the ground for a balanced prosecutorial mindset to take hold. Sociolegal scholars have long recognized that law schools play an important role in socializing new lawyers, introducing them to the values of the profession and reinforcing certain perspectives while downplaying others.<sup>323</sup> For example, Elizabeth Hoffman writes that a law school can do much, through curriculum choices, to nurture a public-interest commitment among its graduates so that students who begin law school with a strong interest in public service remain committed to that ideal during their professional lives.<sup>324</sup>

In a similar vein, law schools can nurture a professional commitment to flexibility and can emphasize the value of negotiation as an alternative to litigation.<sup>325</sup> This is particularly essential in the criminal-justice curriculum. Most of

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319. The office in Gill County was attempting to put such a data system in place during the time of our interviews. See also Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

320. See, e.g., Prosecutor Interviews, *supra* note 1 (Gill senior 272) (he has been supervising new attorneys in the office for over twenty years, and is regarded by most of the attorneys in the office as their primary teacher about how to make prosecutorial decisions).

321. In our prior work, we found that attorneys—like most professionals—experience the greatest job satisfaction when they perceive themselves to have at least some measure of professional autonomy. Levine & Wright, *supra* note 6.

322. See *supra* notes 176–191 and accompanying text.

323. See, e.g., ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (1992); GUINIER ET AL., *supra* note 149; Howard S. Erlanger, & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 LAW & SOC'Y REV. 11, 11–35 (1978); Susan Ann Kay, *Socializing the Future Elite: The Nonimpact of a Law School*, 59 SOC. SCI. Q. 347, 347–54 (1978).

324. See Elizabeth A. Hoffman, *Legal Education and Early Career Mentoring: Mid-Career Attorneys' Pro Bono Commitment*, 14 INT'L J. LEGAL PROF. 81, 92 (2007).

325. See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247 (2009); A.B.A. SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 135 (1992) (MacCrate Report); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 7, 111–14 (2007).

the current curriculum touching on criminal topics asks the students to picture themselves in litigation contexts such as trials, hearings on pretrial motions, and sentencing hearings. Competitions and simulation exercises usually arise in litigation contexts. But litigation skills courses and competitions do not adequately prepare a student for real practice in U.S. criminal courts, where approximately 95% of criminal cases are resolved short of trial.<sup>326</sup>

The criminal-law curriculum also tends to have fairly anemic offerings about the criminal justice system itself. Few law schools offer courses that expose students to structural concerns that plague justice systems around the world or invite students to take a hard look at empirical data about crime rates, incarceration rates, and the intersections of race, poverty, and crime. The conventional criminal curriculum likewise tends to ignore critical actors—apart from lawyers and judges—who influence case and real-life outcomes for individual defendants.<sup>327</sup> Given law schools' myopic focus on litigation and relative neglect of structural, interdisciplinary, and empirical issues about criminal court functioning, one senior prosecutor reflected on how little law school prepared him for the reality of practice: "Practically speaking, my law degree . . . was worth about as much as ballet lessons . . . when I started out."<sup>328</sup>

A more relevant legal education would include workshops on negotiating strategies or judgment exercises, along with clinical experiences that allow students to observe and participate in the resolution of real cases. Such a curriculum would build a more diverse set of skills and show the need for flexibility in problem-solving.<sup>329</sup> If law students were exposed to criminal-justice courses emphasizing the interplay between crime, "community, economy, background [and] family history,"<sup>330</sup> they might be more able to recognize these issues in their caseloads right from the start. If law students were to read even one article explaining the implications for a defendant of a simple marijuana possession case, documenting the effects of probation, court fees, and stigma on a young person's ability to get ahead in life, they might think more critically about the web of restraint and the damage that even small charges can cause.<sup>331</sup> Starting one's career with a wider

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326. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Moreover, the rate of dispositions accomplished by guilty plea seems to be climbing. Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 554, 556 n.41.

327. See Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?* 64 J. LEGAL EDUC. 5 (2014) (commenting on the failure of most law schools to teach about the War on Drugs or mass imprisonment policy).

328. Prosecutor Interviews, *supra* note 1 (Gill senior 290). Many of our other interviewees expressed a similar view about the absence of valuable real-world training in law school. See, e.g., *id.* (Gill senior 218); *id.* (Atkins junior 1053).

329. This is consistent with the recommendations of the Carnegie Report, and with the training that professionals in other disciplines (such as medicine) receive before they receive their degrees.

330. Prosecutor Interviews, *supra* note 1 (Flatt mid-level 510).

331. We thank Allegra McLeod for this insight. The impact of continuous court and police surveillance on minority communities is powerfully documented in ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014), as well as in multiple recent law review articles about misdemeanor courts. See, e.g., *supra* notes 124–125 & 308.

range of skills and a less adversarial bent could help a new prosecutor mature more quickly on the job.

### CONCLUSION

The shocking growth in prison populations in the United States over the past few decades has triggered a search for possible sources of restraint. But gaining control over the punishment complex is not just about making changes to the formal law. While recent legislative initiatives to reinstate judicial discretion in sentencing and to promote second-look sentencing are a fine start, given the prosecutor's ability to determine which offenders are subject to criminal punishment in the first place, changing the hearts and minds of prosecutors who make these judgments is essential to any reform agenda.

We believe that understanding who prosecutors are—and how they think of themselves and their work—is critical for those who hope to create a culture of restraint in the criminal justice system. Our central insight is that individual prosecutors do not share identical professional self-images, and therefore do not behave identically. Based on our interviews and surveys of more than 200 state prosecutors in the United States, professional self-image appears to be neither a static fixture of the individual prosecutor's personality nor a homogeneous feature of the overall prosecutorial landscape. Rather, prosecutors vary in their vision of what it means to do the job well. For many prosecutors, the professional self-image seems to mature over the course of their career, from Young Prosecutors' Syndrome to displays of balance.

The professional transformation that our interviewees described points to the value of experience in helping the prosecutor to emerge from Young Prosecutors' Syndrome. While young prosecutors begin their careers thinking of themselves as superheroes, ready to try any case on the docket and to do battle with any defense attorney who stands in the way of a conviction, more seasoned prosecutors think of themselves as arbitrators, negotiators, "BS meters," and advocates. They have traded in their capes and swords for a more diverse toolkit that allows them to calibrate their responses based on context and resources. Their work decisions are informed by their past courtroom experiences—with judges, defense attorneys, witnesses, victims, and law enforcement—as well as by life experiences. Considered together, these experiences tend to make the veteran prosecutor—like the veteran expert in other fields—a more confident, independent and proportionate professional than she was at the start of her career. While prosecutorial practices reflect more muted changes than their comments suggest, while our interviewees' stories were fraught with traces of cynicism, and while there are some prosecutors who remain overly aggressive throughout their careers, any reader of these interviews would be struck by the gap between rookie prosecutors and veterans on the issue of balance.

Prosecutors thus strongly resemble professionals in other settings; they are not simply law enforcement figures located outside the broader legal and professional community.<sup>332</sup> Three features in particular seem to join prosecutors to

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332. Alafair Burke asserts that prosecutors are an insular group; they don't become involved in the bar or socialize outside of the office. Burke, *supra* note 302. Our data do not

broader professional networks. First, prosecutors, judges, criminal defense attorneys, and all other types of attorneys are linked by bar membership and a common legal education that emphasizes rule of law and constitutional values.<sup>333</sup> Second, prosecutors share with other lawyers a common “uniform,” although the business suit is not usually thought of in these terms. Lastly, many prosecutors recognize that one day they might be called upon to practice a different sort of law, or to switch sides. Given these commonalities, a prosecutor’s professional reputation among judges and the bar is a long-term asset. Developing a positive relationship within the legal community requires the prosecutor to moderate or leave behind the idealistic, superhero-like vision of the prosecutor’s role—and many of the behaviors that go along with that vision—in favor of a more balanced self-image.

Perhaps new prosecutors can overcome Young Prosecutors’ Syndrome far earlier in their careers if they work in the right professional environment. An emphasis on receptivity to balance must begin in law school, where there should be a greater curricular emphasis on negotiations as a supplement to litigation skills, and on clinical opportunities, criminal-justice courses, and judgment exercises to give students an idea of what the action really looks like. Receptivity to balance should then continue once the prosecutor arrives on the job, through well-developed training and mentorship programs, along with office organizational arrangements that regularly put rookies and veterans in direct contact with each other. If junior prosecutors are provided with these foundations, they will likely learn to identify strengths and weaknesses in their cases more quickly, to appreciate the value of good defense lawyering more readily, to moderate their instinctive idealism with pragmatism about the limits of the prosecutorial role, and to conduct a more individualized assessment of appropriate responses for defendants and victims. All in all, by fostering an accelerated development of balanced prosecutors, we will develop more balanced systems that will produce wiser, more just results.

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support this broad generalization. Our interviewees differed in the extent to which they considered themselves lawyers first or prosecutors first; they also varied in the degree to which they reported socializing with non-prosecution lawyers in other settings. Many referenced the number of close friends they had in the defense bar. We explore the dimensions of this topic in future work.

333. Prosecutors—as lawyers and courthouse regulars—must have some faith in courts and the legal process. This link among attorneys holds, no matter where they went to law school.

**APPENDIX: EXPERIENCE LEVELS OF INTERVIEWEES**

Entry Level, 0-1 years = E

Junior Level, 2-4 years = J

Mid-Level, 5-9 years = M

Senior Level, 10 or more years = S

**Atkins District Attorney**

1005 M, 1007 M, 1009 S, 1011 J, 1013 S, 1015 J, 1017 S, 1019 M, 1021 J, 1049 M, 1051 J, 1053 J, 1055 M, 1057 M, 1059 J

**Brooks County Attorney**

900 M, 905 J, 910 J, 915 M, 920 M, 925 M, 930 M, 935 J, 940 E, 945 M, 950 J, 955 M, 960 M, 965 M

**Cline County Attorney**

525 S, 530 M, 535 M, 540 S, 545 S, 550 E, 555 M, 560 J, 565 J, 570 S, 575 S, 580 E, 585 J, 590 E, 595 J, 600 S, 605 S, 610 M, 615 J, 620 M, 625 M, 630 E, 635 S

**Dean State's Attorney**

1200 S, 1205 S, 1210 J, 1215 S, 1220 S, 1225 S, 1230 M, 1235 M, 1240 S, 1245 M, 1250 S, 1255 S, 1260 J, 1265 J, 1270 J, 1275 S, 1280 S, 1285 M, 1290 J

**Everly State's Attorney**

700 J, 705 M, 710 S, 715 S, 720 M, 725 S, 730 S, 735 S, 740 J, 745 S, 750 S, 755 S, 760 J, 765 M, 770 S, 775 S, 780 S, 785 S, 790 M, 795 J, 800 M, 805 S, 810 S, 815 M, 820 J, 825 S, 830 S, 835 J

**Flatt State's Attorney**

500 S, 505 M, 510 M

**Gill District Attorney**

101 M, 104 S, 107 M, 110 J, 113 M, 116 S, 119 J, 122 M, 125 J, 128 J, 131 M, 134 J, 137 J, 140 S, 143 M, 146 S, 149 J, 152 J, 155 J, 158 M, 161 M, 164 J, 167 J, 170 E, 173 J, 176 M, 179 S, 182 S, 185 J, 188 E, 191 E, 194 M, 197 E, 200 S, 203 J, 206 J, 209 M, 212 M, 215 J, 218 S, 221 M, 224 M, 227 M, 230 M, 233 M, 236 J, 239 J, 242 M, 245 J, 248 S, 251 E, 254 M, 257 S, 260 J, 263 J, 266 M, 269 M, 272 S, 275 M, 278 M, 281 S, 284 M, 287 J, 290 S, 293 M, 296 M, 299 M, 302 J, 305 J, 308 J, 311 S, 314 E, 317 J, 320 S, 323 S, 326 S

**Harris District Attorney**

1061 M, 1063 J, 1065 S, 1067 J, 1069 J, 1071 S, 1073 M, 1075 J, 1077 E, 1079 M, 1081 M, 1083 M, 1085 S, 1087 J, 1089 E, 1091 E, 1093 J, 1095 E, 1097 M, 1099 E, 1101 J, 1103 S, 1105 J, 1107 E, 1109 S, 1111 M, 1113 J, 1115 S, 1117 J, 1119 S, 1121 J, 1123 E, 1124 J, 1125 M, 1126 J, 1127 M, 1128 J, 1129 M, 1130 M