



The Anatomy of Discretion

An Analysis of Prosecutorial Decision Making

Summary Report to the National Institute of Justice

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Requests for additional information about the research described in this report should be directed to contactvera@vera.org.

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Finally, we would like to thank the late Neil Weiner, who as the Research Director at the Vera Institute of Justice was the primary creative force behind the development and design of this research project. Sadly, he passed away before the project could begin. We dedicate this project to him.

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Executive Summary

Prosecuting attorneys enjoy broader discretion in making decisions that influence criminal case outcomes than any other actors in the American justice system. They make pivotal decisions throughout the life of a case—from determining whether to file charges, to crafting plea offers and recommending sentences. That they do so with little public or judicial scrutiny generates questions about the justice and fairness of the process.

There is an extensive body of research on factors that affect prosecutorial decision making.¹ However, this material has several important limitations. First, it focuses overwhelmingly on quantitative analyses that identify factors having reliable statistical relationships with case outcomes; few studies have applied qualitative methods to explore how and when prosecutors' interpretation of those factors influence the decision making process.² Second, few studies are comparative. Some rely on analyses of outcomes in one jurisdiction.³ Others examine one decision point.⁴ Still others focus on one offense type.⁵ These studies have found case outcomes to be primarily associated with the strength of evidence, the seriousness of offenses, and the culpability of defendants. However, there is scant research on contextual factors that may influence prosecutorial decisions, such as prosecutors' characteristics, organizational constraints, and social context (relationships among participants in the courtroom workgroup, for example).⁶ Finally, there has been little research examining the influence of prosecutors' conceptions of justice and fairness—how much, for example, case-level decisions are influenced by the system-level pursuit of procedural or distributive justice, or by prosecutors' concerns about the consequences of their decisions for individual victims and defendants.⁷

With support from the National Institute of Justice, the Vera Institute of Justice undertook research to better understand how prosecutors make decisions throughout the processing of a case. The study used data from two moderately large county prosecutors' offices, selected because of previous working relationships with the Vera Institute. The participating counties—identified in the report as Northern County and Southern County—are roughly comparable in size and demographics, with just under a million residents each and recent increases in their Latino populations. Both offices operate in states with determinate sentencing structures (no discretionary parole), mandatory periods of post-release supervision, and statutorily defined sentencing guidelines based on seriousness of the conviction offense and either prior conviction history or a broad evaluation of risk to the community.⁸ The guidelines are mandatory in Southern County but only advisory in Northern County.

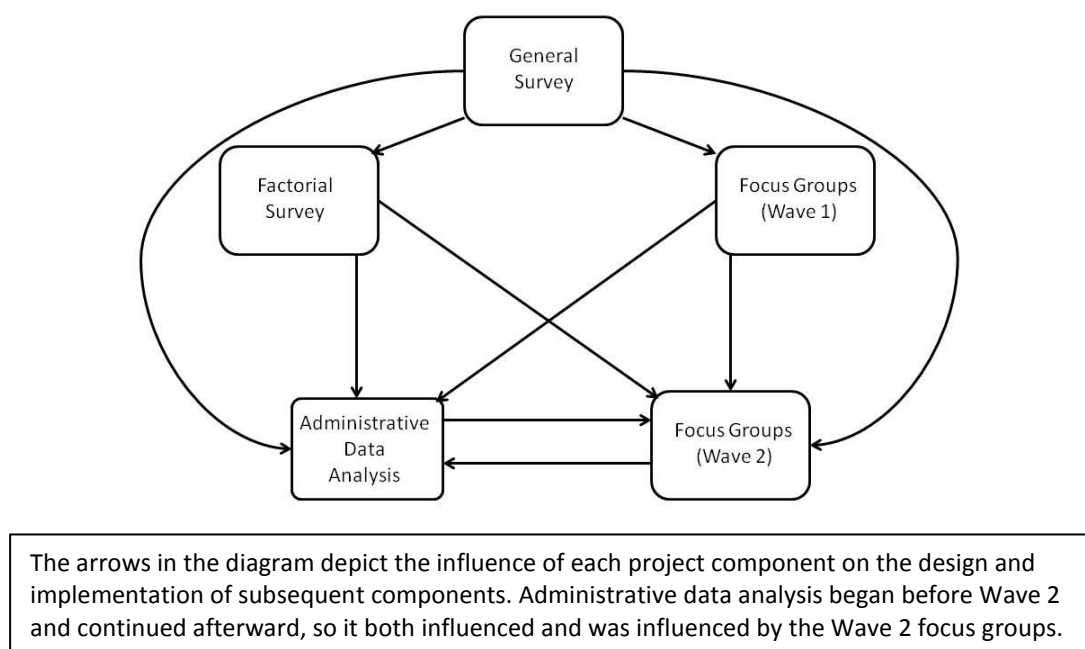
Vera researchers examined initial case screening and charging decisions, plea offers, sentence recommendations, and post-filing dismissals for multiple offense types in each of the two participating jurisdictions. At each decision point, they analyzed the impact of legal, quasi-legal, and extra-legal factors on case outcomes and examined how prosecutors weighed these factors in their decision making. The research was guided by the following questions:

1. How did prosecutors define and apply the concepts of justice and fairness?
2. What factors were associated with prosecutorial outcomes at each stage?
3. How did prosecutors interpret and weigh different case-specific factors in making decisions at each stage?
4. How did contextual factors constrain or regulate prosecutorial decision making?

5. How consistent were prosecutors’ decisions across similar cases? What case-level and contextual factors influenced the degree of consistency?

To address these questions, Vera researchers used a combination of mutually reinforcing quantitative and qualitative approaches. They combined statistical analyses of actual case outcomes, responses to a standardized set of hypothetical cases (a factorial survey), and responses to a survey of prosecutors’ opinions and priorities with qualitative analyses of individual interviews and focus group discussions. Each component influenced the design and interpretation of other components and contributed unique information to an overall synthesis of findings. Together, they provide mutually reinforcing perspectives on a wide variety of case-related and prosecutor-related factors, as well as contextual variables that could constrain or regulate prosecutors’ decision making, such as office policies, office and court resources, and relationships with other actors in the criminal justice system. (See Figure 1, below.)

Figure 1: Interactions among project components



Researchers found that prosecutors’ decisions were guided by two basic questions: “Can I prove the case?” and “Should I prove the case?” The former question was most influential at the outset of a case, at initial screening and charge filing, when an objective assessment of the evidence was the dominant factor in moving cases forward. Later, other case-level factors—such as the seriousness of the offense, the defendant’s criminal history, and characteristics and circumstances of the defendant and victim—assumed an increasing degree of influence as prosecutors evaluated whether a case should go forward. This dynamic is reflected in the following specific findings:

- Strength of the evidence was the primary consideration at screening and continued to influence decisions throughout the processing of a case.
- Seriousness of the offense influenced decisions throughout the processing of a case.
- Victims' characteristics, circumstances, wishes, and willingness to testify affected prosecutors' evaluations of both the strength of the evidence and the merits of the case.
- In deciding whether or how a case should proceed, prosecutors were guided by an overarching philosophy of doing justice—or “the right thing.” Most participants described justice as a balance between the community's public safety concerns and the imperative to treat defendants fairly. In considering that balance, survey respondents overwhelmingly considered fair treatment to be more important than public protection.
- In addition to considering legal factors, prosecutors evaluated defendants' personal characteristics and circumstances to judge whether the potential consequences of case dispositions would be fair.⁹

Vera's analysis revealed that a variety of contextual constraints frequently influenced prosecutors' decisions about whether a case can and should be prosecuted. First, internal rules or policies within the prosecutor's office sometimes determined whether a case is accepted for prosecution or how to craft an appropriate plea. Second, the lack of resources of the prosecutor's office and the local court system sometimes led prosecutors to reject, dismiss, or amend charges in order to work within available resource limits. Third, relationships with law enforcement officers, judges, and defense attorneys altered how a case would be handled. These constraints—rules, resources, and relationships—could trump evaluations of strength of the evidence, seriousness of the offense, and defendant criminal history, forcing prosecutors to make decisions that they might not consider ideal. More specifically:

- Shortages of courtrooms, judges, clerks, court reporters, and scheduled court hours—and especially unscheduled reductions in court hours—often forced prosecutors to undercharge, reevaluate and change plea offers, or dismiss cases.
- A decrease in emphasis on investigations resulted in a decline in the quality of information coming from police departments and an increase in cases declined for prosecution, pending for additional information, or dismissed because of poor follow-up investigation.
- When prosecutors knew what judge would hear a case, they sometimes tailored screening, charging, and plea offer decisions to fit the judge's expectations.
- District attorneys established very few office-wide policies governing case outcomes. However, prosecution units within offices established policies and norms that limited the exercise of discretion.

The broad discretion afforded prosecuting attorneys in making decisions that determine criminal case outcomes raises concerns about the potential for unwarranted disparity across prosecutors and settings. While responses to surveys suggested prosecutors attached high importance to consistency, statistical analyses of case outcomes found considerable variation across prosecutors that could not be accounted for by the case characteristics that were available for analysis.

- Large majorities of survey respondents said there should be consistency both in how prosecutors weigh case-specific factors and in ultimate case outcomes.
- In focus group discussions, some prosecutors suggested that fair treatment necessarily implies similar outcomes for similar cases, whereas others attached greater importance to individualized treatment of defendants.
- Prosecutors differed substantially with respect to the charging and plea bargaining strategies they preferred.
- Acceptance rates for screening of hypothetical cases were quite consistent across prosecutors, but acceptance rates in actual cases varied widely across offices, units within offices, and prosecutors within units—even after adjusting for case-level characteristics. Thus, some of the inconsistency in prosecutors’ decisions in actual cases may stem from how prosecutors respond to the pressures of contextual circumstances, absent in hypothetical cases, rather than how they evaluate case characteristics.

This study found that while prosecutors valued fair treatment of the accused, they differed in their opinions about what it is. Some pointed to consistency of outcomes across similar cases and others to individualized treatment of defendants. Decisions, too, varied significantly among prosecutors, both with respect to case outcomes and to how prosecutors weighed case characteristics. Whether and how criminal justice policy makers and chief prosecutors should seek to promote consistency in the exercise of prosecutorial discretion remain open questions.

While prosecutorial discretion is generally seen as very broad and unconstrained, prosecutors often rely on a small number of salient case characteristics, and their decision making is further constrained by several contextual factors. These contextual constraints—rules, resources, and relationships—sometimes trump evaluations of the strength of the evidence, the seriousness of the offense, and the defendant’s criminal history. Chief prosecutors and criminal justice policy makers should be alert to the potential for contextual factors to influence and possibly distort the exercise of prosecutorial discretion. Moreover, future studies of prosecutorial outcomes should be mindful of these internal and external constraints when assessing the impact of case-level factors.

At the same time, the influence of contextual factors needs to be considered in light of the limitations of the present research. In this study, influential contextual factors were identified through qualitative analysis of a limited number of interviews and focus group discussions in two jurisdictions.¹⁰ It remains to develop objective measures of these factors, so that future research can begin to quantify and assess the prevalence of their influence.

Further Discussion of Findings

Vera's research sought to go beyond previous studies of prosecutorial decision making and conduct a study that would yield a more nuanced, comprehensive understanding of the process. Using mutually reinforcing quantitative and qualitative approaches and a comparative method, researchers developed a rich body of information that resists brief characterization. This section of the summary report provides further discussion of the findings summarized above.¹¹

1. Strength of the evidence is the primary consideration at screening and continues to influence decisions throughout the processing of a case, but becomes relatively less important at later stages as other factors come into play.

According to focus group participants, strong evidence is evidence the prosecutor, judge, or jury would expect to see, given the defining elements of the alleged offense. Physical evidence was generally considered stronger than testimonial evidence, as it is less likely to change over time and is generally unambiguous; "Everyone will agree that a gun is a gun," one prosecutor noted. Testimonial evidence from victims and witnesses was considered important in sex crime and domestic violence cases, where it is often the only evidence available.

Screening Decisions. In the analyses of hypothetical cases in the factorial survey, prosecutors' rating of the strength of evidence was the only case-level variable with a statistically significant influence on the screening decision. Analyses of actual cases in Southern County found that the combined effect of evidence-related measures in property crimes was about the same as the combined effect of all other factors, and the combined effect of evidence-related measures for person crimes far outweighed the combined effect of other factors.¹²

Post-Screening Decisions. After charges are filed, prosecutors continue to ask, "Can I prove the case?" as additional information becomes available or existing information changes. Prosecutors said that evidence generally decays over time, particularly in cases relying on testimony from victims and witnesses, who may forget details or lose interest. Even when evidence strength remains stable, its impact beyond the initial screening decision is limited—most prosecutors said they would offer reduced charges if the evidence deteriorates, but they would not increase the charges just because the evidence remains strong.

Consistent with prosecutors' claims, strength of evidence had significant effects on post-screening decisions, but other factors also influenced those decisions:

- Regression analyses of responses to hypothetical cases found significant effects of strength of evidence for number of charges to file, statutory level of top charge filed, number of plea offer charges, statutory level of the top plea offer charge, and the probability the prosecutor would recommend incarceration. However, these decisions were also influenced by offense seriousness and criminal history.

- After controlling for other factors, regression analyses of post-filing decisions for actual person and property crime cases in Southern County found no significant effects of strength of evidence on the seriousness of the top plea offer charge or the potential number of months of incarceration if sentenced only for the top plea offer charge (top charge exposure). Strength of evidence was associated with the number of plea offer charges, the probability that the prosecutor would recommend incarceration, the potential number of months of incarceration if sentenced consecutively for all plea offer charges (aggregate exposure), and the probability of post-filing case dismissal.

Figures 2 and 3, on the following pages, present reasons cited by prosecutors in Southern County for rejecting charges at screening and dismissing charges after initial filing. They show that the percentage of dropped charges attributed to evidentiary problems declined sharply across successive processing decisions, as would be expected if initially weak cases were weeded out at screening. Cases dropped for evidentiary reasons after screening were most likely ones in which the evidence proved weaker than initially believed or deteriorated over time.

Figure 2: Distribution of reasons for charge dismissal by processing stage (Percentage among charges for which dismissal reasons were reported by the Person and Property Teams in Southern County)

Reason for rejection/dismissal	Primary reason for rejection at screening	Reason for voluntary dismissal before upper court	Reason for voluntary dismissal in upper court
N of charges with dismissal reasons	760	289	860
Contradictory/inconclusive lab results	.9		
Evidence only supports misdemeanor charge	.7	1.4	
Evidence was destroyed or missing	.4	.7	
Incomplete/missing witness statements	12.9	8.0	7.8
Insufficient evidence for prosecution	37.4	16.6	10.8
Insufficient nexus	6.2	1.4	.7
No corroboration of evidence	11.8	3.8	1.0
Physical evidence insufficient	.1		.1
Other evidence problem	.3	1.4	1.0
Total for evidence-related reasons	70.7	33.2	21.5
Total treated as misdemeanor	9.6	22.8	1.4
Pled guilty to other charge in other complaint	.4	2.8	13.7
Pled guilty to other charge in this complaint	.7	15.2	47.3
Prosecuting other charge	5.8	4.8	1.3
Total for pursuit of other charges	6.8	22.8	62.3
Interest of justice	5.4	4.8	1.0
No probable cause for arrest	1.4		
Defendant found incompetent	.7	.7	.7
Other due process problems	3.6	5.2	6.5
No papering	.8	2.4	
Feds took the case		3.1	5.6
Deferred prosecution	1.1	4.8	.1
Death of defendant			.8
Total for all other reasons	12.9	21.1	14.8

Figure 3: Distribution of reasons for charge dismissal by processing stage (Percentage among charges for which dismissal reasons were reported by the Drug Team in Southern County)

Reason for rejection/dismissal	Screening	District court	GJ and GJ prep	Admin. court	Trial court
N of charges with dismissal reasons	1171	532	964	2844	224
Contradictory/inconclusive lab results		1.3	3.9	2.0	.9
Evidence only supports misdemeanor charge	1.6		.4	.1	.4
Evidence was destroyed or missing					
Incomplete/missing witness statements	.1		1.0		1.3
Insufficient evidence for prosecution	87.5	13.3	13.9	5.9	29.0
Insufficient nexus	3.8				
No corroboration of evidence			.1		
Victim delay in reporting	.2				
Victim unlocatable	.1		.1		
Witness credibility/bias	.1	.9	3.0	1.4	
Witness refuses to cooperate	.3	.8			
Analytical results insufficient		.8	3.1	1.1	.4
Physical evidence insufficient	.4	.2	1.5	.1	2.7
Other evidence problem	2.0	1.1	2.1	.9	6.3
Total for evidence-related reasons	96.1	18.4	29.1	11.5	41.0
Total treated as misdemeanor	.3				
Pled guilty to other charge in other complaint		6.0	3.4	13.9	16.5
Pled guilty to other charge in this complaint		38.5	28.4	66.9	30.8
Prosecuting other charge	1.6				
Total for pursuit of other charges	1.6	44.5	31.8	80.8	47.3
Interest of justice		1.5	.6	.6	7.1
No probable cause for arrest	.5				
Unlawful search, no warrant			.7		
Other due process problems	1.1	.8	.3	.1	
Affirmative defense	.1		.2		
Defendant found incompetent				.4	
No papering	.2	33.1		.3	
Feds took the case		1.7	.5	6.3	4.0
Deferred prosecution					
Low priority for unspecified reasons			36.6		
Resource limitations					.4
Death of defendant					
Total for all other reasons	1.9	37.1	38.9	7.7	11.5

2. Offense seriousness significantly influences decisions throughout the case.

Focus group participants agreed that serious offenses generally warrant prosecution. Indeed, in Northern County, felony offenses were accepted for prosecution at a higher rate than misdemeanor offenses, and the odds that a case in either jurisdiction would be accepted at screening increased along with the seriousness and number of charges (Figure 4). In the factorial survey, prosecutors were more likely to file charges in cases involving felonies than in those involving misdemeanors; similarly, more serious offenses were associated with plea offers that required guilty pleas to greater numbers of charges. Finally, in Northern County, felony cases were less likely to be dismissed than cases involving misdemeanors (Figure 5), and administrative data for both jurisdictions showed the chances of a case being dismissed decreased as the seriousness of the arrest charges increased.

Figure 4: Percentage of cases accepted for prosecution in Northern and Southern counties by crime type and offense level

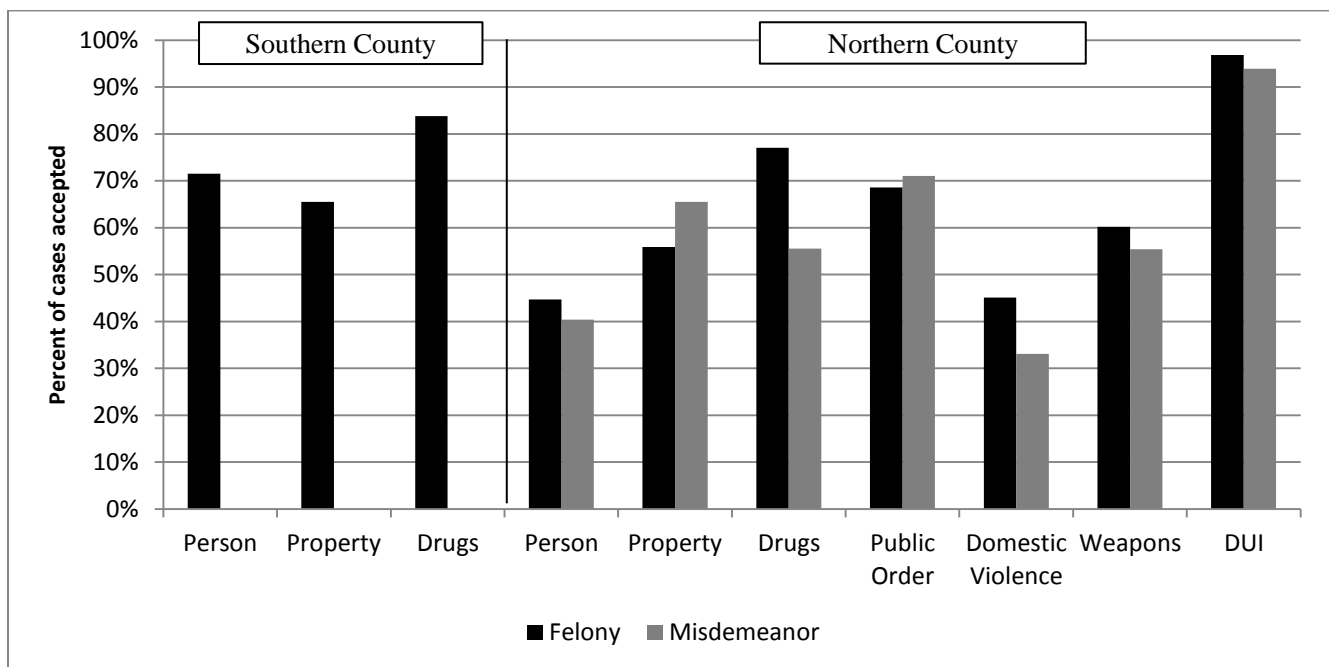
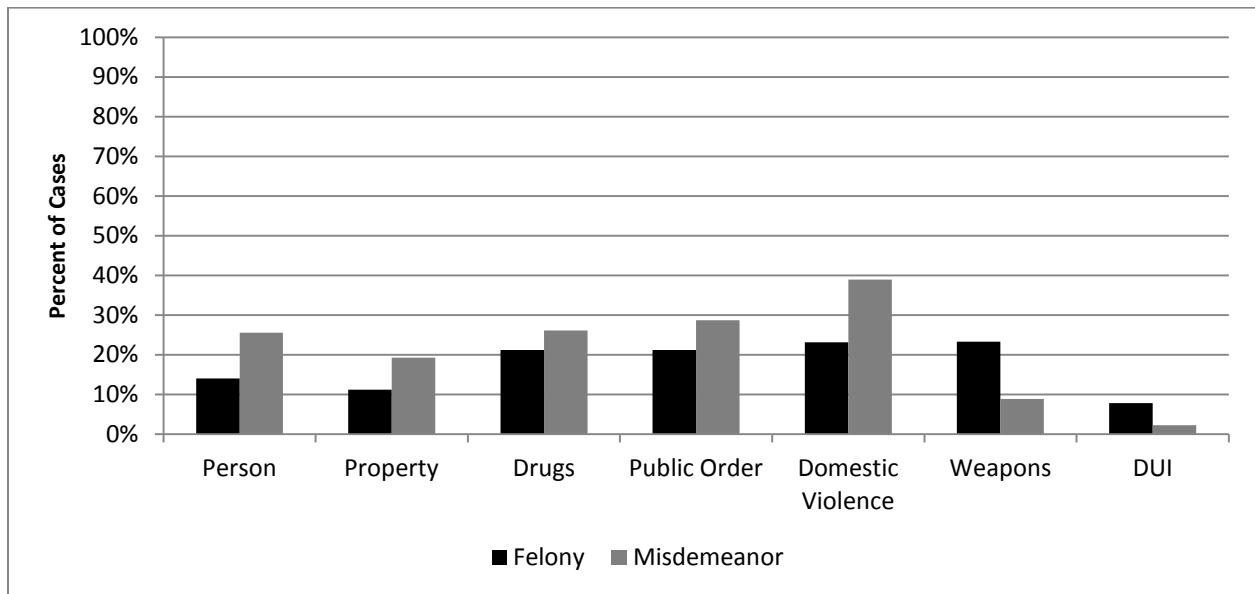


Figure 5: Percentage of cases dismissed in Northern County by offense type and offense level, January 1, 2009-December 31, 2009



3. Defendants’ criminal histories can have various effects on prosecutors’ decisions.

Focus group participants suggested that some defendants with serious criminal histories might be prosecuted despite relatively weak evidence, while cases involving defendants with negligible criminal histories might be rejected despite strong evidence. They also indicated that defendant criminal history affects cases throughout the prosecutorial process. However, results from statistical analyses of both hypothetical and actual cases did not correlate precisely with this assessment. The quantitative analyses produced mixed results—some indicating an influence at screening and others indicating effects only for some later decisions.

4. Deciding whether a case should go forward includes evaluating defendant characteristics and circumstances to judge whether the potential consequences are fair.

Most focus group participants described justice as a balance between the community’s public safety concerns and the imperative to treat defendants fairly. In considering that balance, survey respondents by a large margin identified fair treatment of defendants as a more important consideration than public protection (see Figures 6 and 7, below).

Figure 6: Criteria that survey respondents considered important for evaluating success of their office

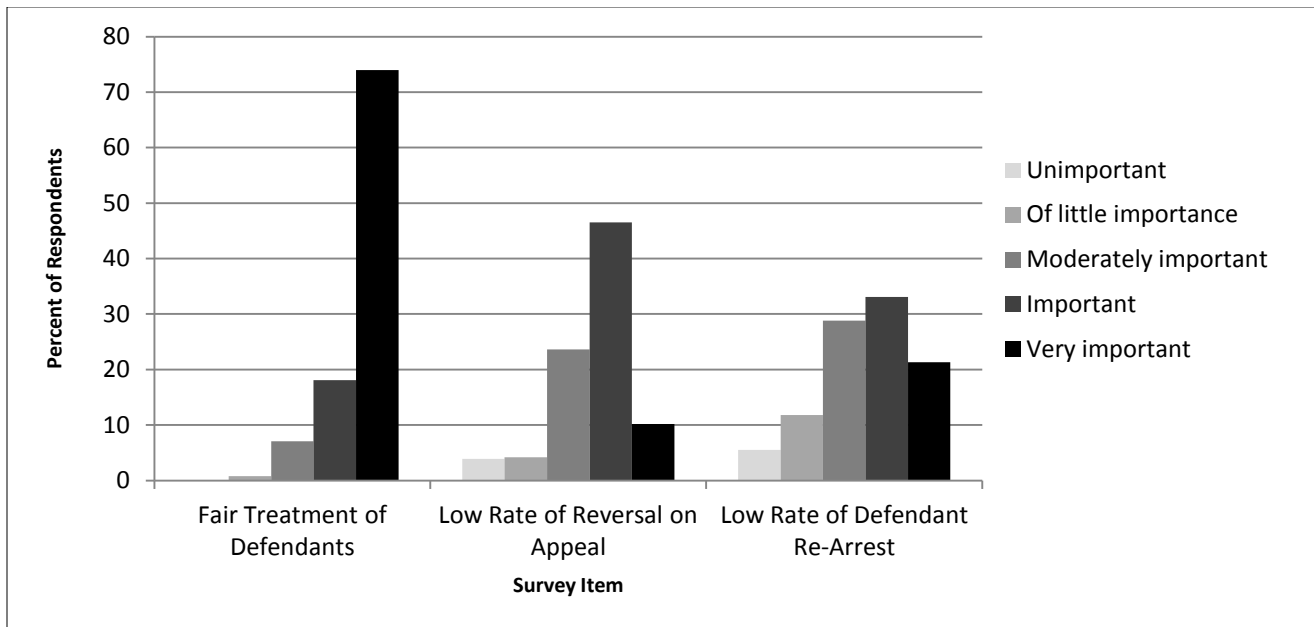
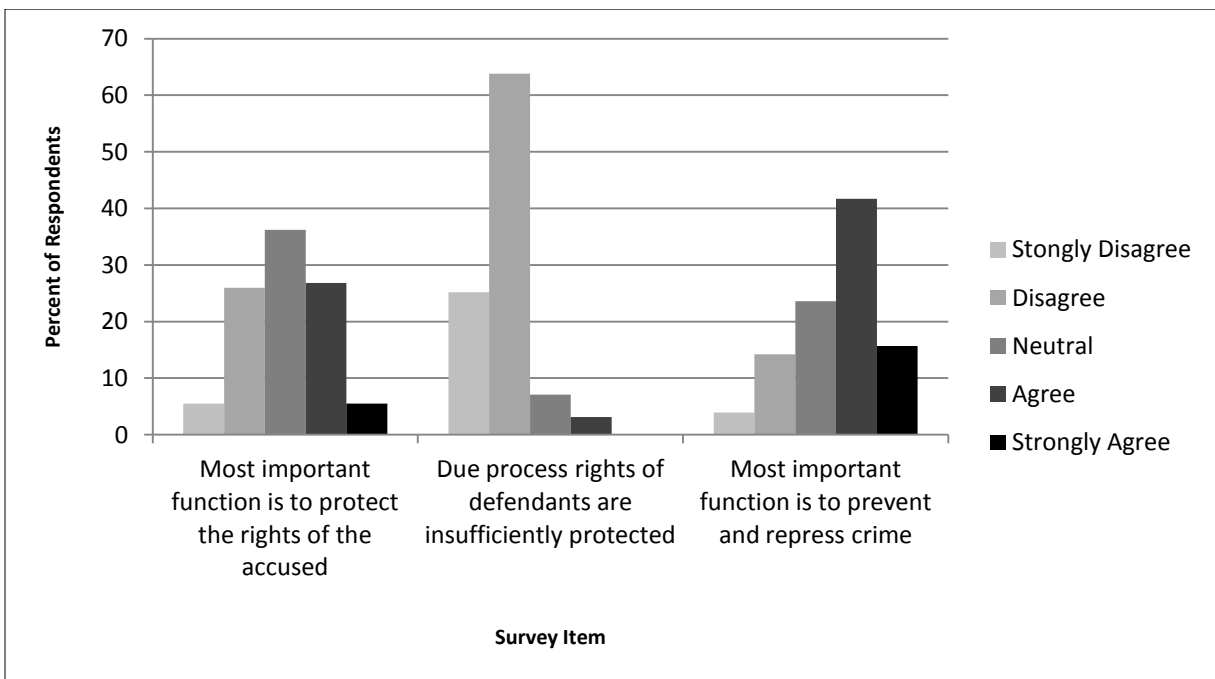


Figure 7: Survey respondents' ratings of agreement with selected statements about importance of protecting due process rights and public safety.



Focus group participants said that they evaluate “fairness” in terms of the impact of their decisions on the life of a defendant and adjust their decisions according to the consequences they view as appropriate, given a defendant’s characteristics and circumstances. In addition to criminal history, these could include quasi-legal and extra-legal factors such as age, gender, employment, parental status, substance abuse, mental health status, treatment history, victim-offender relationships, and defendant’s demeanor. However, analyses of actual cases produced mixed results for the few defendant characteristics available for analysis:

- Effects of age on screening decisions and post-filing dismissals were generally small and inconsistent across jurisdictions, crime types, and processing stages.
- Defendant race and ethnicity had little impact on case outcomes in either jurisdiction, and the effects that were observed were inconsistent across crime types. However, in Northern County, domestic violence cases were more likely to be accepted at screening, drug cases were less likely to be dismissed after initial filing, and public order offenses were more likely to be dismissed after initial filing, when cases of these types involved black or Hispanic defendants.
- Compared to cases involving female defendants, cases involving male defendants were more likely to be accepted at screening for property offenses in Southern County and for property, drug, public order, domestic violence, and weapons cases in Northern County. In Northern County, property and drug cases involving male defendants were also less likely to be dismissed post-filing.
- Participants in the focus groups also acknowledged that the defendant’s demeanor (for example, showing disrespect to courtroom actors) may affect decisions. As one supervisor in Northern County noted, even if the offense is not serious, some prosecutors (particularly newer ones) may pursue a case to “teach the defendant a lesson.”

5. Victims’ characteristics, circumstances, wishes, and willingness to testify affected prosecutors’ evaluations of the strength of the evidence and the merits of the case.

Prosecutors in both counties said that victim credibility and probable participation at trial may influence the decision to proceed with a case. A victim’s wishes also affect whether a case should proceed. Some prosecutors said it is often unfair to make victims proceed against their wishes, particularly in sex offenses. In domestic violence cases, though, prosecutors were said to try to “keep the victim out of the process.” Similarly, other units consider uncooperative victims when evaluating evidence strength, but disregard uncooperative victims’ desires when evaluating whether a case should proceed.

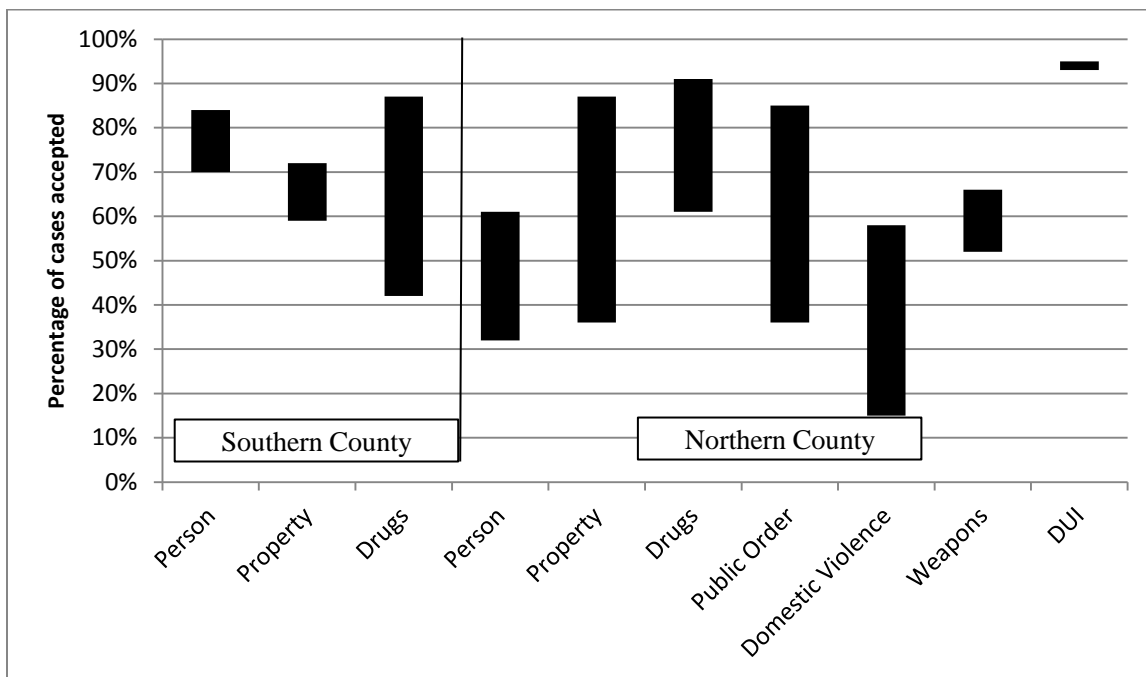
Victim characteristics were significant predictors of actual case outcomes for some cases. For person, property, and domestic violence offenses in Northern County, cases involving black or male victims were less likely to be accepted for prosecution than cases involving white or female victims. Overall, victim characteristics had little impact on dismissal decisions, but the odds of dismissal were significantly higher for property cases involving black victims in Southern County, person cases

involving black victims in Northern County, and property cases involving Hispanic victims in Northern County.

6. Prosecutors attached high importance to consistency in process and outcomes, but statistical analyses of case outcomes found variation across prosecutors that could not be accounted for by case-level characteristics.

Large majorities of survey respondents considered consistency in outcomes to be an important criterion for evaluating office-level success, and more than 85 percent agreed that there should be a great deal of consistency across prosecutors in the case-specific factors that influence decision making. A consistent approach, in principle, should yield similar outcomes for similar cases. Yet researchers found significant variation in screening decisions across prosecutors (Figure 8).

Figure 8: Range of acceptance rates across prosecutors, by offense type



Statistical analyses of administrative data found significant variation in outcomes among prosecuting attorneys, even after adjusting for case-level characteristics such as crime type, offense seriousness, defendant and victim characteristics, strength of evidence, and defendant criminal history. In Northern County, for example, analyses of screening decisions showed that roughly 10 percent of the variance in screening outcomes resulted from differences between prosecutors' average acceptance rates. Screening decisions were much more consistent across prosecutors for hypothetical cases presented in the factorial survey, but for those cases there was significant variation among prosecutors for charging decisions, plea offers, and incarceration recommendations.

Most of the observed variation in outcomes among prosecutors could not be attributed to prosecutor characteristics that were available for these analyses. The prosecutor-level predictors that

were available for the Northern County analyses—gender, experience, supervisory role, unit, and caseload—mostly had statistically nonsignificant effects, and the direction of effects was inconsistent across crime types. Some prosecutor-level predictors—years of experience and survey responses reflecting preferred prosecution strategies, for example—influenced some decisions for the hypothetical cases, but there remained significant variation in responses among prosecutors that could not be accounted for. Thus, the inconsistency in decision outcomes among prosecutors is left largely unexplained by the analyses in this study.

The contrast between results for the hypothetical cases and results for actual cases is noteworthy. Screening decisions were highly consistent among prosecutors for the hypothetical cases but not for actual cases. Factorial survey responses may be closer to what prosecutors believed would be ideal responses, unconstrained by contextual influences. If so, it could be that some of the inconsistency in prosecutors' decisions in actual cases stems from how prosecutors respond to the pressures of contextual circumstances, rather than how they evaluate case characteristics.

7. Prosecutors' decisions were subject to contextual constraints: rules, resources, and relationships.

Prosecution units establish norms and policies that limit the exercise of discretion. The contextual factor with the most direct impact on prosecutorial decision making may be the development of rules within each prosecutorial unit. Although prosecutors said they were provided few office-wide rules for handling cases, they also stated that they received considerable guidance. The district attorney in each office relied on experienced unit supervisors to articulate an overarching philosophy and supervise its application. Unit supervisors established guidelines that governed decision-making in some circumstances, calling for prosecutors to decline certain cases at screening, charge cases in a particular way, and offer specific conditions in plea offers. Furthermore, focus group participants said that advice from mentors, formal roundtable discussions, and informal discussions among colleagues contributed to group norms and helped prosecutors understand the acceptable range of decisions.

Court resources had a more direct influence on decisions than prosecutors' resources. Shortages of courtrooms, judges, clerks, court reporters, and scheduled court hours—and especially unscheduled reductions in court hours—posed persistent difficulties for prosecutors. According to Southern County prosecutors, the lack of courtroom space and the consequent continuance of cases caused prosecutors to undercharge cases, continually reevaluate plea offers, and dismiss cases they otherwise “should prosecute.” They described a process of ranking cases, based on evidence, offense seriousness, victim cooperation, and time since initial filing. The effect was to change the threshold of what prosecutors were willing to accept or dismiss and often resulted in decisions the prosecutors considered less than ideal. Moreover, these decisions were often beyond the control of an individual prosecutor; when resource constraints required a re-evaluation of cases, some units determined case priorities and dispositions by group consensus.

According to the district attorney in Northern County, constraints on court resources freed up prosecutors to do more work on cases at the front end. As a result, the prosecutor's office worked harder to evaluate cases for declination and deferral, effectively restructuring the process to remove

people from the system early. This may explain Northern County's generally lower acceptance rates. (See Figure 4.)

Law enforcement priorities and relationships with individual officers can significantly affect a case.

In both jurisdictions, interview and focus group participants agreed that changes in the largest municipal police departments had affected how cases were processed. According to all respondents, the quality of information and cases coming from the police department had deteriorated because of a decline in law enforcement's emphasis on investigations. According to many Northern County prosecutors, the largest local police department has started to deemphasize cases such as officer-initiated offenses and undercover police investigations. For the drug team, specifically, this meant a significant decrease in large-scale drug offenses and an increase in low-level drug cases. The result of law enforcement changes in both jurisdictions has been an increase in cases declined for prosecution, pended for additional information, or dismissed because of poor follow-up investigation.

Because prosecutors have an obligation to scrutinize cases brought by law enforcement and must decline to prosecute some cases, an inherent tension exists between the two institutions. This tension often manifests itself as law enforcement's pressure on prosecutors—particularly newer prosecutors—to accept cases. Prosecutors at all experience levels admitted that sometimes they succumb to the pressure and accept weak cases. Moreover, given the changes in the largest municipal law enforcement agency in each jurisdiction, interactions with officers have become strained and less effective.

Appendix: Research Design and Methods

Study design

An extensive body of literature has explored the factors that influence prosecutorial decision making.¹³ However, prior studies have been limited in several ways. First, they have relied almost exclusively on quantitative methods to examine what factors are statistically related to case outcomes; a relatively small body of qualitative research has examined how prosecutors interpret those factors and how their interpretations influence their decisions.¹⁴ Second, few studies are comparative. Some rely on analyses of outcomes in one jurisdiction.¹⁵ Others examine one decision point.¹⁶ Still others focus on one offense type.¹⁷ These studies have found case outcomes to be primarily associated with the strength of evidence, the seriousness of offenses, and the culpability of defendants. However, there is scant research on contextual factors that may influence prosecutorial decisions, such as prosecutors' characteristics, organizational constraints, and social context (relationships among participants in the courtroom workgroup, for example).¹⁸ Finally, there has been little research examining the influence of prosecutors' conceptions of justice and fairness—whether, for example, they are predominantly defined by procedural or distributive concerns.¹⁹

Vera researchers used a combination of quantitative and qualitative approaches to examine prosecutors' decisions at key stages from initial case screening and charging decisions to plea offers, sentence recommendations, and post-filing dismissals. These included statistical analyses of actual case outcomes using administrative data, projected outcomes for hypothetical cases with systematically varied characteristics (a factorial survey), and responses to a general survey addressing prosecutors' attitudes, perceptions, and priorities. Qualitative analyses of individual interviews and focus group discussions informed the design and interpretation of statistical analyses and provided additional insights on issues not addressed in the quantitative data.

Figure 1 (p. 4) depicts the relationships among the quantitative and qualitative components. Responses to the general survey from both jurisdictions informed the design of other components and provided some of the prosecutor-level measures for analyses of the factorial survey responses. Findings from the factorial survey analyses contributed to the design and interpretation of administrative data analyses. Findings from the general survey, the first wave of focus groups, and preliminary analyses of administrative data helped guide the design and interpretation of the second wave of focus groups, which in turn contributed to the design and interpretation of the final administrative data analyses. Results from all of the components contributed to a synthesis of findings.

The resulting study considered factors beyond those typically examined in prior studies, looking at a wide variety of case-related factors, prosecutor-related factors, and organizational factors that may affect prosecutors' decisions throughout the process. In addition, the study examined internal and external mechanisms and structural constraints that regulate or limit prosecutors' decision making, including office policies, office and court resources, and relationships with other actors in the criminal justice system.

Research sites

The study relied on data from two county prosecutors' offices—identified by the pseudonyms Northern County and Southern County in this report. Both offices operate in states with determinate sentencing structures (no discretionary parole), mandatory periods of post-release supervision, and

statutorily defined sentencing guidelines based on seriousness of the conviction offense and either prior conviction history or a broad evaluation of risk to the community.²⁰ The guidelines are mandatory in Southern County but only advisory in Northern County.

Figure 9: Characteristics of population served, by jurisdiction

Selected characteristics	Northern County		Southern County	
	2000	2010	2000	2010
Approximate total population	900,000	950,000	700,000	900,000
Percent male	48	48	49	48
Median age	34 yrs.	34 yrs.	33 yrs.	34 yrs.
Percent ages 15 – 24	15	16	13	14
Percent white, non-Hispanic	62	54	61	51
Percent Hispanic, any race	9	13	7	12
Percent of housing owner occupied	53	51	62	61
Percent of households headed by female with no husband present	16	17	12	15

Characteristics of the general population served in each jurisdiction are summarized in Figure 9. Because the study focused on various time periods from 2007 through 2011, population characteristics are presented from both the 2000 census and the 2010 census.²¹ The two counties were quite similar on most of the measures presented, and there was little change between census years in percentage male, median age, percentage aged 15 to 24, percentage of housing that was owner-occupied, or the percentage of households that were headed by a female with no husband present. However, there was substantial population growth in Southern County, and there was a substantial increase in the percentage that was classified as Hispanic in both jurisdictions.

Selected characteristics of the assistant district attorneys in the two participating offices are displayed in Figure 10. Selected characteristics of the offices and respective state sentencing structures are displayed in Figure 11. The Northern County prosecutor’s office typically employs approximately 125 assistant district attorneys (ADAs) who handle roughly 30,000 felony and 46,000 misdemeanor cases per year. The office is organized into 18 specialized units that handle specific offense types (for example, homicide, domestic violence, felony drug, and guns) and five general crimes units that handle all other felony and misdemeanor cases. All new ADAs in Northern County are assigned to a general crimes unit comprising both new and experienced ADAs; ADAs may remain in a general crimes unit for their entire careers. All ADAs are responsible for screening cases within their unit. Cases accepted for prosecution are then assigned to specific ADAs and prosecuted vertically—a single ADA handles the case throughout the entire prosecutorial process. The office is structured in a three-tiered management system, with ADAs reporting to 23 unit managers who are supervised by five deputy prosecutors who, in turn, report to the district attorney. The district attorney in Northern County, first elected within the last 10 years, has implemented innovative prosecution models such as community-

prosecution units, units organized around geographic areas, and programs based on restorative-justice models.

Figure 10: Characteristics of prosecuting attorneys, by jurisdiction

Characteristic	Southern County survey data ^a	Northern County	
		Survey data ^a	Administrative data ^b
Number of prosecutors responding	65	62	145
Percent male	56	71	56
Percent nonwhite or Hispanic	17	10	-
Age distribution (%)			
Less than 30 years old	26	15	-
30 – 39 years old	55	39	-
40 years old or older	19	46	-
Distribution of experience in present DA's office (%)			
Less than 1 year	11	13	14
1 – 9 years	80	49	46
10 or more years	9	38	40

^a From responses to the general survey for ADAs assigned to adult felony cases. The response rate for that group was 95 percent in Southern County and 67 percent in Northern County.

^b From administrative data for ADAs who screened cases between January 2009 and June 2011. Comparison with the survey data suggests that the survey responses were biased toward male respondents in Northern County.

The Southern County prosecutor's office typically employs approximately 75 ADAs who handle roughly 13,500 felony cases (and a larger number of misdemeanor cases) per year.²² Distributions of ADA's gender, minority status, age, and years of experience in the Southern County office are summarized in Figure 10. Over the past few years, the Southern County office has experienced a higher rate of staff turnover than the Northern County office, resulting in a much lower percentage with 10 or more years of experience—nine percent in Southern County versus 40 percent in Northern County.

Figure 11: Selected characteristics of participating prosecutors' offices

Characteristics	Southern County	Northern County
State sentencing structure Discretionary parole Post-release supervision	No Mandatory	No Mandatory
Sentencing guidelines Type of guidelines Factors considered	Mandatory <ul style="list-style-type: none"> • Seriousness of offense • Criminal history score 	Advisory <ul style="list-style-type: none"> • Seriousness of offense • Multifaceted, subjective evaluation of risk to the community
Typical number of ADAs	75	125
Approximate number of felony cases per year	13,500	30,000
Office organization	<ul style="list-style-type: none"> • Seven felony units, specialized by crime type • One misdemeanor unit 	<ul style="list-style-type: none"> • Eighteen units that handle both felonies and misdemeanors, specialized by crime type • Five general crimes units that handle all other felony and misdemeanor cases
Managerial structure	ADAs report to eight unit heads who report to the DA	ADAs report to 23 unit heads, who are supervised by five deputies, who report to the DA
Vertical or horizontal prosecution	Horizontal for felony drug cases; vertical for other cases after initial screening	Vertical after initial screening
Strong orientation toward diversion programs and community prosecution?	No	Yes

The Southern County office is organized around seven specialized felony units that handle broad categories of offense types (for example, property, person, and drugs) and one misdemeanor unit that handles all misdemeanor and criminal traffic cases. All new ADAs in Southern County are assigned to the misdemeanor unit, which is composed solely of new ADAs, and are subsequently transferred to another unit—usually the drug unit—after 9 to 18 months. Experienced ADAs screen cases. When cases are accepted for prosecution, they are assigned to ADAs within units and prosecuted vertically, with the exception of felony drug offenses, which are prosecuted horizontally—handled by multiple ADAs, each dealing with the case at a particular stage of the prosecutorial process. Compared to Northern County, the organization of the Southern County prosecutor's office is relatively flat: ADAs report to unit managers who report directly to the district attorney. Two deputy prosecutors in Southern

County function as office managers, but do not act as intermediaries between unit managers and the district attorney. At the time the study was conducted, the district attorney in Southern County had been in office for more than two decades and had followed a fairly traditional prosecution model.

Administrative data

The analyses of actual case outcomes relied on administrative case management data maintained by each participating office. The two offices maintained different subsets of case management data, which introduced some differences in the types of cases and decision points the study examined (See Figure 12).

Analyses of automated case management data in Northern County examined a total of 76,721 felony and misdemeanor cases involving 110,437 charges screened by the office between January 1, 2009 and June 16, 2011. Analyses of automated case management data for felony drug cases in Southern County examined a total of 4,890 cases involving 12,224 charges screened by the office between May 1, 2007 and July 31, 2009. The automated information on felony drug cases in Southern County was supplemented by a review of paper case files for a sample of 508 felony person cases and 658 felony property cases screened by the office between January 1, 2007 and June 30, 2007.

Figure 12: Administrative data available for analysis, by participating jurisdiction

Data available for analysis	Northern County (All felonies and misdemeanors)	Southern County	
		Felony person and property crimes	Felony drug crimes
Decision outcomes			
Screening	X	X	X
Charging	X	X	X
Dismissal (charge- and case-level)	X	X	X
Plea offer		X	X
Sentence recommendation		X	X
Final case disposition	X	X	X
Case characteristics			
Arresting agency	X	X	X
Prosecuting attorney	X	X	X
Number of charges	X	X	X
Types of offenses	X	X	X
Seriousness of offenses ^a	X	X	X
Types and amounts of evidence ^b		X	
Codefendants		X	
Reasons for dismissal		X	X
Defendant criminal history		X	X
Pretrial custody status	X		
Defendant age	X	X	X
Defendant race	X	X	X
Defendant gender	X	X	X
Victim age	X	X	
Victim race	X	X	
Victim gender	X	X	
Victim-offender relationships		X	

^a Multiple measures of seriousness

^b Multiple measures of evidence, but no information concerning quality or relevance of evidence

Figure 13: Arrest charges in factorial survey vignettes, classified by strength of evidence and seriousness of top arrest charge²³

Seriousness of top arrest charge	Strength of evidence (design level)		
	Low	Medium	High
High-level felony	<i>Vignette #1</i> -Burglary (Residential) -Assault	<i>Vignette #4</i> -Aggravated assault with a deadly weapon (a pistol) -Carrying concealed weapon -Assault in the third degree (two counts)	<i>Vignette #6</i> -Burglary (commercial) -Theft -Possession of a stolen vehicle
Low-level felony	<i>Vignette #2</i> -Robbery 2 -Conspiracy	<i>Vignette #5</i> -Robbery 1 -Conspiracy <i>Vignette #7</i> -Possession of a controlled substance (heroin)	<i>Vignette #9</i> -Forgery (four counts) -Theft: under \$300 (four counts)
Misdemeanor	<i>Vignette #8</i> -Failure to move on	<i>Vignette #3</i> -Criminal mischief -Criminal trespass	<i>Vignette #10</i> -Possession of a stolen credit card -Attempted illegal use of a credit card

Factorial survey

Vera's researchers used a factorial survey to examine variation across prosecutors in their decisions and decision criteria for a standardized set of hypothetical cases. A factorial survey is one in which the characteristics of the questions or the characteristics of the subjects the questions address are systematically varied—typically either randomized or structured according to an experimental or quasi-experimental design. In this study, prosecutors were asked to make decisions about 10 hypothetical case vignettes, which represented combinations of levels of offense seriousness by levels of the strength of evidence (Figure 13).

All participants responded to the same 10 vignettes, but each respondent received a packet that was unique with respect to the random pairing of base vignettes with race (black vs. white)²⁴ and 10 criminal history scenarios. For each vignette, prosecutors were asked to rate the strength of evidence and seriousness of the defendant's criminal history and then indicate whether they would accept the case, what charges they would file, what their plea offer would be, their reasons for rejecting the case or dismissing charges, and whether or not they would recommend incarceration. In Southern County, 62 prosecutors completed the factorial survey, a response rate of 92 percent. Only 21 prosecutors completed the factorial survey in Northern County, a response rate of 15.6 percent. Consequently, the analyses incorporated only the responses from Southern County.

General survey

The general survey solicited prosecutors' ratings for a total of 76 statements organized in eight substantive categories: factors that define professional success for individual prosecutors (15 items); factors that define success for the district attorney's office (19 items); the influence of relationships among prosecutors, police, defense attorneys, and judges on decision making (10 items); resource and policy constraints (13 items); principles that guide screening decisions (six items); principles that guide the development of plea offers (eight items); general goals and functions of the criminal justice system (nine items); and training and oversight (16 items). Responses were received from 81 Northern County prosecutors, a 60 percent response rate; responses were received from 65 prosecutors in Southern County, a 95 percent response rate.

Prosecutors' characteristics

Some limited information about the characteristics of prosecuting attorneys was available for analyses of actual cases in Northern County and hypothetical cases in the factorial survey. The automated case management system in Northern County contained information on prosecutor gender, experience, role (supervisor or not), type of unit, and caseload. The factorial survey yielded data on the respondent's gender, race, marital status, age, unit assignment, and experience. In addition, the researchers were able to link responses to the factorial survey with respondents' attitudes, objectives, and strategic preferences expressed in the general survey.

Interviews and focus groups

The quantitative data was complemented by a rich array of qualitative data gleaned from two waves of focus group discussions and individual interviews. The first wave focused primarily on contextual conditions and circumstances that influence decision making: goals of prosecution and guiding philosophies; formal and informal policies and practices; relationships with police, defense attorneys,

and judges; relationships with colleagues within the prosecutor’s office; resource constraints and the need for efficiency; and processes that promote adherence to policy and consistency in decision making, such as training, supervision, mentoring, and informal communication. The second wave focused primarily on case-specific factors that influence decision making: strength of evidence, seriousness of the instant offense, defendant’s criminal history, and special aggravating or mitigating circumstances. Researchers conducted a total of 10 focus group sessions and seven individual interviews, for which the numbers and roles of participants are listed in Figure 14. These discussions helped frame the quantitative identification of case-level factors that influence the exercise of prosecutors’ discretion, explain how those factors exert their influence, and identify contextual factors that constrain or expand discretion.

Figure 14: Participants in interviews and focus groups

	Northern County	Southern County
Wave 1		
Interviews	<ul style="list-style-type: none"> • District attorney • Two deputy DAs • Deputy for administration 	<ul style="list-style-type: none"> • District attorney • One deputy DA
Focus groups	Two groups <ul style="list-style-type: none"> • Five team leaders • Five ADAs; various crime units 	Three groups <ul style="list-style-type: none"> • Seven team leaders • Six ADAs; less than one year experience • Eight ADAs; 1-10 years experience
Wave 2		
Interviews	(none)	<ul style="list-style-type: none"> • District attorney • One deputy DA
Focus groups	Two groups <ul style="list-style-type: none"> • Seven team leaders • Five ADAs; various crime units 	Three groups <ul style="list-style-type: none"> • Five team leaders • Six ADAs; less than one year experience • Five ADAs; 1-10 years experience

NOTE: Most of the participants in the Wave 2 focus group sessions had previously participated in the Wave 1 sessions. In Northern County, two team leaders participated in Wave 2 who had not participated in Wave 1.

Analytic approach

Most statistical analyses of the factors affecting case-processing decisions used multiple regression methods. Researchers used logistic regression methods for decisions with dichotomous outcomes: acceptance at screening, top charge retention, post-filing dismissal, and incarceration recommendation. For decisions with ordered or continuous outcomes—number of charges, charge seriousness, months of potential incarceration, and amount of change in these measures from initial filing to formal plea offer—researchers used linear regression methods. In addition, they applied multi-level logistic and linear regression methods where prosecutor-level variables were available: for all of the factorial survey analyses, and for the screening and dismissal analyses in Northern County.

Researchers conducted principal components analyses of the general survey responses to determine the number of underlying dimensions of response for each category of items, then identified the one to three specific items that most strongly represented the underlying dimensions within each category. Interpretations of the survey results were based principally on responses to the items found to be most representative of a relevant underlying dimension.

Researchers recorded the feedback received from prosecutors in focus groups and individual interviews as field notes. They classified field notes by type of respondent, topic, and site and analyzed the information across topics and sites, noting the clustering of responses around specific issues or actors, as well as outliers and other unique data. Through iteration, they developed a number of substantive themes, some of which coincided with patterns observed in the survey results and others that reflected additional insights unique to the interviews and focus group discussions. Unless otherwise noted, opinions and explanations attributed to prosecutors in this report reflect a significant majority of survey responses, consensus among participants in the interviews and focus groups, or both.²⁵

Notes

1 Marc L. Miller and Ronald F. Wright, “The Black Box,” *Iowa Law Review* 94 (2008): 125-96.

2 Lisa Frohman, “Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking,” *Law and Society Review* 31 (1997): 531-55.

3 For exceptions see, e.g., Cassia C. Spohn and David Holleran, “Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners,” *Justice Quarterly* 18, no. 3 (2001): 651-88. Travis W. Franklin, “Community Influence on Prosecutorial Dismissals: A Multilevel Analysis of Case- and County-Level Factors,” *Journal of Criminal Justice* 38 (2010): 693-701. Jeffery T. Ulmer, Megan C. Kurlycheck and John H. Kramer, “Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences,” *Journal of Research in Crime and Delinquency* 44, no. 4 (2007): 427-458.

4 For exceptions see, e.g., Rodney F. Kingsnorth, Randall MacIntosh, and Terceria Berdahl, “Dismissed in the Interests of Justice: Meaning and Misspecification in Criminal Court Processing,” *Criminology* 40 (2002): 201-225.

5 For exceptions see, e.g., Michael E. O’Neill, “Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors,” *American Criminal Law Review* 41 (2004): 1439-1498.

6 For prosecutor characteristics see, e.g. Cassia C. Spohn and Robert Fernango, “U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity,” *Criminology* 47 (2009): 813-846. Gerard Rainville, “An Analysis of Factors Related to Prosecutor Sentencing Preferences,” *Criminal Justice Policy Review* 12 (2001): 295-310. For

organizational constraints see, e.g., Michael E. O’Neill, “Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors,” *American Criminal Law Review* 41 (2004): 1439-1498. Government Accounting Office, *Mandatory Minimum Sentences: Are They Being Imposed and Who Is Receiving Them?* (Washington DC: United States Government Accounting Office, 1993). For structural differences see, e.g., Dawn Beichner and Cassia Spohn, “Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit,” *Criminal Justice Policy Review* 16 (2005): 461-498. Michael E. O’Neill, “Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors,” *American Criminal Law Review* 41 (2004): 1439-1498. David C. Pyroos, Scott E. Wolfe, and Cassia Spohn, “Gang-Related Homicide Charging Decisions: The Implementation of a Specialized Prosecution Unit in Los Angeles,” *Criminal Justice Policy Review* 22 (2011): 3-26. For social context see, e.g., Travis W. Franklin, “Community Influence on Prosecutorial Dismissals: A Multilevel Analysis of Case- and County-Level Factors,” *Journal of Criminal Justice* 38 (2010): 693-701. Jeffery T. Ulmer, Megan C. Kurlycheck and John H. Kramer, “Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences,” *Journal of Research in Crime and Delinquency* 44, no. 4 (2007): 427-458. For courtroom workgroups see James Eisenstein, Roy B. Flemming, and Peter F. Nardulli, *The Contours of Justice: Communities and Their Courts* (Boston: Little, Brown and Company, 1988). James Eisenstein and Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (Boston: Little, Brown and Company, 1977). Brian D. Johnson, “Racial and Ethnic Disparities in Sentencing Departures Across Modes of Conviction,” *Criminology* 41, no. 2 (2003): 501-542. Brian D. Johnson, “The Multilevel Context of Criminal Sentencing: Integrating Judge and County Level Influences in the Study of Courtroom Decision Making,” *Criminology* 44, no. 2 (2006): 259-298. Jeffery T. Ulmer, *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines* (Albany, NY: State University of New York Press, 1997).

7 John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999). Tom R. Tyler, & Y.J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russell-Sage Foundation, 2002). T.R. Tyler, “Procedural justice, legitimacy, and the effective rule of law,” in M. Tonry (ed.), *Crime and Justice* 30 (2003): 431-505.

8 Neal B. Kauder and Brian J. Ostram, *State Sentencing Guidelines: Profiles and Continuum* (National Center for State Courts, 2008).

9 Additional discussion of the concept of fairness is presented in items 4 and 6 in the section of this report titled “Further Discussion of Findings.”

10 A total of seven individual interviews and 10 focus group sessions.

11 For the comprehensive analysis and discussion of the findings, see the technical report, Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical Report*. (New York: Vera Institute of Justice, 2012). Available at <http://www.vera.org>.

12 Measures of the strength of evidence were not available for the analyses of actual felony drug cases screened in Southern County or for any cases screened in Northern County. However, the results of those analyses indirectly suggested the importance of strength of evidence, with model strength much weaker among cases that lacked variables measuring evidentiary strength.

13 (Miller and Wright, 2008)

14 (see, e.g., Frohmann, 1997)

15 (for exceptions see, e.g., Spohn and Holleran, 2001; Franklin, 2010; Ulmer et al., 2007)

16 (for exceptions see, e.g., Kingsworth, et al., 2002)

17 (for exceptions see, e.g., O’Neill, 2004)

18 For prosecutor characteristics see, e.g. Spohn and Fernango, 2009; Rainville, 2001. For organizational constraints see, e.g., O’Neill, 2004; Government Accounting Office 1993. For structural differences (see, e.g., Beichner and Spohn, 2005; O’Neill, 2004; Pyroos, et al., 2011). For social context see (see, e.g., Franklin, 2010; Ulmer et al., 2007). For courtroom

workgroups see (Eisenstein et al. 1988; Eisenstien & Jacob 1977; Johnson 2003; 2006; Jeffery T. Ulmer, *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines* (Albany, NY: State University of New York Press, 1983).

19 Rawls, *Justice*; Tyler and Huo, *Trust in the Law*; Tyler, "Procedural justice, legitimacy," 431-505.

20 Neal B. Kauder and Brian J. Ostram, *State Sentencing Guidelines: Profiles and Continuum* (National Center for State Courts, 2008).

21 US Census Bureau, <http://quickfacts.census.gov/qfd/states/> (Data retrieved on 2/16/2012)

22 Misdemeanor data were not available from Southern County for this study.

23 Charge seriousness was assigned by determining the statutory class of the most similar offense in Southern State law. Each of the three levels represents a group of statutory classes.

24 The ethnicity dimension (Hispanic vs. non-Hispanic) was omitted from the construction of vignettes because the small number of potential respondents made it necessary to limit the number of dimensions in the design.

25 Consensus among focus group participants was determined primarily from the flow of discussion within groups, reactions to probes and follow-up questions, and comparisons of discussions across groups, rather than polling participants.