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Abstract

In this piece, I explore the value of consistency in a prosecutor's office that is committed to racial justice, fiscal responsibility, and strategies to reduce the size of the carceral state. I argue that consistency of process, rather than consistency of outcome, is the principal value that leadership ought to embrace in furtherance of its reformist goals. In prioritizing consistency of process, the office would design a "prosecutorial calculus" to guide line prosecutors' case management decisions (i.e., it would identify the factors that should influence whether and what to file, how to handle pre-trial release, and what to offer as a plea deal). The calculus would also shape the formation and maintenance of relationships with the bar and with law enforcement. All prosecutors within a given office should follow the calculus, irrespective of team or unit assignment. Prosecutors in other offices, however, will fall outside of its reach due to strong localist headwinds and entrenched political realities. In emphasizing consistency of process, I suggest that prosecutors ought to foreground the meaningful provision of procedural justice in their working lives.

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Introduction

In the past decade, new ideas about prosecution have emerged onto the criminal justice landscape with much fanfare.[1] While progressive-minded prosecutors have won elections mainly in urban locales such as Chicago, Philadelphia, Houston, Dallas, San Francisco, Seattle, and several of the boroughs of New York City, "reformer DAs"[2] have also triumphed in places like Kansas City, Kansas; Winnebago County, Wisconsin; and Jacksonville, Florida.[3] These electoral victories signal that the urge for a more compassionate and more fiscally sound approach[4] to criminal justice policy extends beyond coastal, urban elites. Relatedly, sustained media focus on police-involved shootings, as well as popular podcasts like "Serial" and "In the Dark," appear to have both fueled and reflected a popular desire to rethink how we do justice in this country.

The term "reform prosecution" seems to represent more of a continuum than a defined policy agenda; accordingly, elected prosecutors who self-identify as "progressive" or "reformist" have promised to make a number of changes in the standard prosecution approach.[5] At the front end, they have focused on shifting enforcement priorities—like removing resources from low-level crimes in order to concentrate on offenses that are more serious. For example, Larry Krasner, the District Attorney of Philadelphia, and Kim Foxx, the State's Attorney for Cook County (Chicago), have declared that

1. Emily Bazelon & Miriam Krinsky, *There's a new wave of prosecutors. And they mean justice*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html.

2. *See, e.g.*, Justin Miller, *The New Reformer DAs,* THE AMERICAN PROSPECT (Jan 2, 2018), https://prospect.org/health/new-reformer-das/. In this article, I am adopting the "reformer" moniker rather than the "progressive" moniker to embrace those prosecutors who do not identify as politically progressive but who do support reducing the size of the carceral state and exercising fiscal responsibility in criminal justice.

3. *Id.*

4. *See generally* RIGHT ON CRIME, http://www.rightoncrime.com (last visited Mar. 20, 2020) (discussing conservative approaches to prosecution that focus on the skyrocketing costs of incarceration).

5. *See, e.g.*, Allan Smith, *Progressive DAs are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug 19, 2019), https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286 ("Progressive, reform-minded prosecutors have taken the reins in top local prosecutor roles across the country that have allowed them to begin to change the criminal justice system from the inside out."); Maurice Chammach, *These Prosecutors Campaigned for Less Jail Time – and Won*, THE MARSHALL PROJECT (Nov. 9, 2016), https://www.themarshallproject.org/2016/11/09/these-prosecutors-campaigned-for-less-jail-time-and-won. *See generally* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

their respective offices will handle thefts of low value property as misdemeanors rather than felonies.[6] Suffolk County (Boston), Massachusetts District Attorney Rachael Rollins has likewise instructed her line prosecutors to decline to prosecute a list of fifteen low-level crimes and to divert those offenders into community-based services.[7] Seattle's Law Enforcement Assisted Diversion program (of which the prosecutor's office is a prominent partner) similarly diverts many of those arrested for prostitution and low-level drug offenses even before booking.[8]

Front-end reforms also seek to reduce rates of pre-trial incarceration. Larry Krasner ended the practice of requiring cash bail for low-level offenses in 2018, causing no negative impact on the rates of recidivism or failures to appear.[9] Eric Gonzalez, the District Attorney of Brooklyn, has required his prosecutors to give a reason for demanding bail in any misdemeanor case, thereby reversing the presumption against release on one's own recognizance.[10] Gonzalez also took the lead on reducing consequences for

6. Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHICAGO TRIBUNE (Dec 15, 2016), https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html; *see generally* BAZELON, *supra* note 5. *See also* Memorandum from Larry Krasner, District Attorney, Philadelphia District Attorney's Office to Assistant District Attorneys (Mar. 13, 2018) (instructing his attorneys not to charge marijuana possession, regardless of weight, not to charge sex workers who have fewer than three convictions, and to offer more diversion before plea entry) (cited in BAZELON, *supra* note 5, at 165 and at 368, note 165). Nueces County, Texas, prosecutor Mark Gonzalez similarly instructed his attorneys not to file low level marijuana possession cases. Lauren-Brooke Eisen & Miriam Krinsky*, The Necessity of Performance Measures for Prosecutors*, OXFORD HANDBOOK ON PROSECUTORS AND PROSECUTION (Ronald F. Wright, Kay L. Levine and Russell Gold eds.) Chapter 11 (forthcoming 2021) (on file with author).

7. Memorandum from Rachael Rollins, Suffolk County District Attorney, The Rachael Rollins Policy Memo at D-1 (March 2019), http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf.

8. Nicole Jennings, *Prosecutor Dan Satterberg says LEAD program expansion will get people off drugs*, KIRO RADIO (Sept. 12, 2018), https://mynorthwest.com/1111041/dan-satterberg-lead-program/?.

9. Aureilie Ouss & Megan Stevenson, *Bail, Jail and Pre-trial Misconduct*, GEORGE MASON LEGAL STUDIES RESEARCH PAPER, LS-19-08 (2020).

10. Bail reform initiatives have been harder to implement than charging initiatives, as the imposition of bail is ultimately dependent on agreement from the judge, not the elected prosecutor's policy alone. *Id.* (discussing influence of both line prosecutor and courtroom judge on actual bail outcomes); *see also* RECLAIM CHICAGO ET AL. IN PURSUIT OF JUSTICE FOR ALL: AN EVALUATION OF KIM FOXX'S FIRST YEAR IN OFFICE (2018), https://www.thepeopleslobbyusa.org/wp-content/uploads/2017/12/Equal-Justice-for-All-A-Report-on-Kim-Foxxs-First-Year-ForPrint.pdf (noting that Chicago's new bail initiatives were offered only to a small percentage of defendants compared to Kim Foxx's campaign promises); Newly elected reform District Attorney Chesa Boudin in San Francisco, California, also recently announced a no cash-bail policy, Evan Sernoffsky, *San Francisco DA Chesa Boudin end cash*

non-citizen, undocumented defendants and on supporting the campaign to close the jail at Riker's Island.[11]

On the back end, reform prosecutors sometimes seek to mitigate or reverse the harmful effects of conviction for some offenders. For example, newly elected prosecutors have established and funded conviction integrity units in their own offices, offering to work with defense attorneys and Innocence Projects to investigate allegations of wrongful convictions.[12] Others have sought to reduce incarceration terms for juveniles originally sentenced to life without parole.[13] San Francisco has taken even greater initiative. Under the leadership of George Gascón, the former District Attorney of San Francisco, prosecutors and prison inmates at San Quentin State Prison began holding regular meetings to give prosecutors a better understanding of life behind bars and to facilitate reentry for prisoners. Gascón also created the Formerly Incarcerated Advisory Board, to help establish channels for former inmates to rejoin the workforce, the housing market, and educational environments.[14]

With all of these new programs underway, this is an exciting time in criminal justice, to be sure. But one question has been left largely unanswered by the literature about reform prosecution[15] and by reform

bail for all criminal cases, S.F. CHRON. (Jan. 22, 2020), https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-ends-cash-bail-for-14996400.php.

11. BAZELON, *supra* note 5. Kate Ryan, *Collateral Consequences: Brooklyn DA seeks to Protect Immigrant Defendants from Deportation*, WNYC (Dec. 12, 2017), https://www.wnyc.org/story/collateral-consequences-brooklyn-da-seeks-protect-immigrant-defendants-deportation/.

12. Inger H. Chandler, *Conviction Integrity Review Units*, CRIMINAL JUSTICE, Summer 2016 (noting the achievements of the longest running CIU, in Dallas, Texas). In 2007, there were only two conviction integrity units in the United States; today there are approximately 40 (Eisen, *supra* note 6);

CIUs have been responsible for dozens of exonerations across the country since they were formed; in 2015 alone there were 60 exonerations by CIUs and in 2016 there were 70. Most of those came from Harris County, Texas. Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO STATE J. CRIM. L. 705, 705 n. 2 (2017).

13. BAZELON, *supra* note 5, at 163–64 (describing the work of Larry Krasner in Philadelphia and Kim Foxx in Chicago).

14. Press Release, Office of District Attorney George Gascón, DA Gascón Teams Up with Code for America to Automatically Reduce Eligible Marijuana Convictions in San Francisco and Beyond (May 15, 2018), https://sfdistrictattorney.org/da-gasc%C3%B3n-teams-code-america-automatically-reduce-eligible-marijuana-convictions-san-francisco.

15. *See, e.g.*, David Sklansky, *The Progressive Prosecutor's Handbook*, 50 UC DAVIS L. REV. 25 (2017) (articulating a list of 10 priorities for progressive prosecutors); FAIR AND JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018), https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf (providing a series of guiding principles and recommendations to reduce incarceration and promote fairness).

prosecutors themselves: what is the role of consistency in the reform prosecutor's office? Aside from implementing bold new policies in a consistent manner, should the reform prosecutor pay attention to consistency within her own office more generally?

While Lon Fuller famously observed in 1964 that consistency was one of the core principles essential to keeping law from perpetrating the worst of injustices,[16] for years observers of state-level criminal justice systems in the United States have noted that consistency gets short shrift in the list of criminal justice values.[17] State and local prosecutors tend to make their own decisions within fairly small working groups, leading to significant disparities even when applying the same formal law as other prosecutors.[18] Indeed, the American version of localism in criminal justice goes beyond simply federalism—localism has generated variation at the county level, at the courtroom level, and even at the prosecutor level. Should correcting for that lack of consistency feature on the reform prosecutor's agenda?

I believe the answer is yes. Modern leaders ought to identify consistency as an important, even foundational value of the prosecutor's office. After all, the vision of new, 21st century prosecutorial leadership—to make lasting and meaningful changes in the justice system—can only be accomplished if all prosecutors working within an office are rowing in the same direction. Otherwise, change will be haphazard, or ad hoc, dependent on whether a particular employee feels like going along with the program. In short, to borrow from Stephanos Bibas, chief prosecutors need to create an office environment that "hires for, inculcates, expects and rewards … consistency."[19] In such an office, all prosecutors pay attention to a collective vision when making decisions about their cases; it is part of the culture, and it becomes part of the metric of individual and office success.

But it is not enough to embrace consistency of vision as an overarching principle. In order to achieve this vision, we must first establish some

16. *See* LON FULLER, THE MORALITY OF LAW (1964).

17. David Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 L. & SOC'Y REV. 247, 248–252 (1998).

18. *See, e.g.*, Ronald F. Wright, *Persistent Localism in the Prosecutorial Services of North Carolina*, 41 CRIME & JUSTICE: A REVIEW OF RESEARCH 211-264 (2012). This lack of attention to consistency separates American prosecutors from many of their counterparts around the world, and particularly from prosecutors who work under a central ministry that guides hiring, promotion and training of a nation's prosecutorial workforce. Rasmas Wandall, *Hiring and Learning Strategies in Prosecution Services, in* THE OXFORD HANDBOOK ON PROSECUTORS AND PROSECUTION (Ronald F. Wright, Kay L. Levine and Russell Gold eds.) Chapter 10 (forthcoming 2021) (on file with author); Johnson, *supra* note 17 (describing the procuracy in Japan).

19. Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2009).

baselines for what we mean by consistency. First, consistency of what: *consistency of outcomes* or *consistency of process*? A focus on *consistency of outcomes* spotlights the final decisions that prosecutors make in their cases (bail recommendations, charging, plea offers, and so forth), whereas a focus on *consistency of process* spotlights the decision-making process that prosecutors use to get to those outcomes.[20] What factors should they take into account? How ought those factors to be weighed or calibrated? Under what conditions are deviations acceptable? Secondly, once we conclude that we desire more consistency in either outcomes or process, we need to define the range of consistency that we seek. In other words, consistency among whom? Are we asking all prosecutors in the office to think in the same way? All prosecutors working in one unit or team to think in the same way? Or all prosecutors working in the same state, across various offices, because they are applying the same state criminal laws?

In this essay, I first argue that consistency of process is the principal value that reformers ought to instill in the line prosecutors who work in their respective offices. While a certain degree of outcome consistency might well be desirable, outcomes are likely to fall within an acceptable range once the leadership articulates and regulates the calculus governing how prosecutors think about case management decisions. Furthermore, even though consistency in outcomes may be easier for outsiders to measure, I worry that placing an emphasis on identifiable outcomes may inspire a form of gamesmanship that betrays the core values of the leadership's mission. That is, prosecutors might be inclined to manipulate their numbers to appear to be in compliance, rather than changing their substantive behavior to comply in reality. In emphasizing consistency of process, I suggest that prosecutors ought to foreground the meaningful provision of procedural justice in their working lives, and I predict that a measure of outcome consistency is likely to follow.[21]

In answer to the "consistency among whom?" question, I argue that all prosecutors within a given office should follow this calculus, irrespective of team or unit assignment, but the drive for consistency ends at the jurisdiction's geographic boundaries. Prosecutors who work for other jurisdictions generally need to comply with the norms of the offices for which they work—the elected prosecutor in an adjacent county has no

20. The seeds of this idea come from work by Don Stemen and Bruce Frederick. Don Stemen & Bruce Frederick, *Rules, Resources and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1 (2013).

21 *See generally* TOM TYLER, WHY PEOPLE OBEY THE LAW (2006). As Tyler explains, procedural justice urges that processes and procedures (that lead to outcomes) are themselves fair. Fairness in process depends, at the outset, on consistency in decision-making across social groups and across prosecutors. *Id.* at 6.

authority over them. While consistency across counties would be valuable in some areas, the risk that neighboring or distant counties would hold up or dilute the reform agenda in a desire to achieve statewide uniformity cautions that localism should prevail. Reform prosecutors ought to share their ideas widely, but they need to rely on persuasion rather than might to see them implemented outside of their own jurisdictions.

Part I: Consistency Across What? Developing the Prosecutorial Calculus

In order to realize the elected prosecutor's reformist vision, line prosecutors ought to follow a certain set of thought processes (what we can think of as "the prosecutorial calculus") when doing their jobs. This calculus would apply primarily when the prosecutor is making decisions about whether and what to charge, how much bail to recommend (if any), plea offers, and sentencing recommendations after trial. It should include not just which factors to consider, but the weight each of those factors ought to receive in the vast majority of cases and the treatment of exceptions. The calculus should also provide guidance to prosecutors in their construction and maintenance of relationships with the defense bar, judiciary, and law enforcement. The reform prosecutor envisions a richer dialogue between prosecutors and their colleagues in other divisions of the justice system as essential to prevent instances of wrongful conviction, over-charging, and over-sentencing, but such dialogue can only emerge if relationships incorporate a sense of trust and integrity from the start.

A. What Would a Coordinated Decision-Making Process Entail?

Can a decisional calculus be collective, rather than merely individual? It can. Criminologists studying prosecutors' offices have long observed that, when it comes to filing charges and making plea offers, certain offices tend to adopt or foreground certain strategies. For example, Mellon, Jacoby, and Brewer[22] identified four distinctive office-wide models of charging in their study of ten prosecutor offices: legal sufficiency, system efficiency, trial efficiency, and defendant rehabilitation. In a unit guided by legal sufficiency, prosecutors examine police reports to determine whether there is proof to satisfy all of the legal elements of the crime. In an office guided by system efficiency, prosecutors look beyond the legal elements to consider whether

22. 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, 60–68 (1981).

cases have the potential for speedy and early resolution.[23] Where trial sufficiency is the guiding principle, the prosecutor also assesses the likely success of the case at trial before finalizing whether and how to charge a case. And lastly, offices that focus on defendant rehabilitation look for opportunities to divert an offender out of the justice system entirely. While sometimes these approaches work in tandem, typically attorneys responsible for filing cases see one approach as paramount, and the choice of one policy over another influences how many cases are accepted for prosecution at the outset.

Institutional office patterns also influence compliance with *Brady* disclosure mandates. For instance, in one study of seven state-level prosecutor offices, Ellen Yaroshefsky and Bruce Green documented office-level variation in attitudes toward prosecutorial disclosure obligations.[24] They concluded, "[W]hen it comes to pre-trial disclosure, the principal influences on prosecutors' decision making are likely to be organizational factors."[25] In other words, an office's culture and approach to regulating and supervising line attorneys heavily supplements the individual prosecutor's own professional values when the prosecutor is deciding how diligently to comply with state and federal disclosure rules. Yaroshefsky and Green were able to distinguish robust disclosure jurisdictions (many of which had open file office policies) from narrow compliance jurisdictions, where individual prosecutors assumed much more autonomy when making the disclosure decision. In the latter, as the "narrow" moniker suggests, liberal disclosure was not the common practice; this behavior reflected and reinforced a heightened sense of adversarialism with the local defense bar.[26] Moreover, junior prosecutors were discouraged from making broader disclosures by senior prosecutors on a regular basis.[27]

Here it is not my purpose to articulate the precise set of factors, or their relative weight, an office ought to adopt when instructing its prosecutors in whether to file a case or to decline, in whether to seek bail, in how to design

23. The "focal concerns" perspective in criminology adds texture to the system efficiency approach. Offices motivated by focal concerns focus on three things when making filing decisions and plea offers: (1) the blameworthiness of the offender, (2) the dangerousness of the offender, and (3) the practical constraints and consequences for offenders and organizations if the case is handled in a certain way. *See, e.g.*, Jeffrey T. Ulmer ET AL., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427, 431–52 (2007).

24. Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, *in* 269 LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT (Leslie C. Levin & Lynn Mather eds. 2012).

25. *Id.* at 270.

26. *Id*. at 280.

27. *Id.* at 281.

plea offers, or in how to manage disclosure. I am less worried about the risk of leveling up[28] where the office is under the leadership of a reform-minded attorney who is committed to racial justice, to fairness, and to reducing rates of incarceration (both pre-trial and post-trial).[29] Because the leadership has embraced these principles, the baselines agreed upon should be far lower than what we see in more regressive or conventional offices. My point is to say that the reform prosecutor ought to decide which approach—or combination of approaches—she would like her line prosecutors to adopt, and then instruct them on how to make that approach come to life in their everyday decision-making. If consideration of system resources or immigration consequences will be important, for example, the leader needs to tell prosecutors which resources and consequences merit attention, and at what point in their decision-making those resources and consequences should exert an influence.

In calling for reformist prosecutors to insist on consistency in the prosecutorial calculus, I am building on factor-based approaches that various authorities have advanced to tighten up the prosecutor's discretion at the time of filing.[30] The State of Washington provides guidance to its county-level prosecutors, for instance, through a statute that contains a non-exhaustive list of reasons a prosecutor may choose not to file a case despite evidentiary sufficiency.[31] That prosecution would be contrary to legislative intent, that the statute is antiquated, or that the defendant is pending conviction on unrelated charges would all support the decision not to file.[32] The National District Attorneys Association (NDAA), in its National Prosecution Standards manual, likewise articulates several possible grounds to support a declination decision, including doubt as to guilt, concern about possible improper motives of the victim, and undue hardship caused to the accused.[33]

Yet legislative provisions and NDAA guidelines tend to be quite generic; they authorize almost any decision a prosecutor would like to make

28. RANDALL KENNEDY, RACE, CRIME AND THE LAW 344 (1997).

29. *See* FAIR AND JUST PROSECUTION, *supra* note 15.

30. *See, e.g.*, THE NAT'L DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS MANUAL § 4-1.3 (AM. BAR ASS'N 2010). THE ABA STANDARDS ON THE PROSECUTION FUNCTION (AM. BAR ASS'N 2017) [hereinafter ABA STANDARDS] likewise articulate guidelines for prosecutors to follow when making charging decisions (see, for example, standards 3-4.3 and 3-4.4), and instruct that sentencing recommendations ought not to be left to the discretion of the individual prosecutor but rather should be guided by clearly articulated office policies (see standard 3-7.2(d)).

31. WASH. REV. CODE, § 9.94A.411(1).

32. *Id.* John Pfaff has recently called for legislatures to adopt more specific guidelines for prosecutors to follow. John Pfaff, *Prosecutorial Guidelines*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 101, at 101 (Erik Luna ed. 2017).

33. *See* NAT'L DISTRICT ATTORNEYS ASSOCIATION, s*upra* note 30.

in a given case and provide little by way of constraint. For that reason, they are easy to adopt and provoke little resistance in the prosecutorial community. Heartier forms of constraint appear in policies promulgated at the office level. The Florida State Attorney's Office for the Fourth Judicial Circuit, for example, recently instituted written policies and procedures to ensure the "fair, uniform, efficient and transparent handling of all homicide cases by the office."[34] Those procedures include creating a Grand Jury Indictment Review Panel to review all cases in which the assigned Assistant State Attorney wants to seek an indictment for capital murder. The goal is "to allow proper, individualized consideration of the facts and law relevant to each particular case, set within a framework of consistent and even-handed application of Florida law," and to curtail the impact of "arbitrary or legally impermissible factors" such as race, gender, ethnicity, sexual orientation and religion.[35] Some reformist DAs have likewise promulgated office policies to ensure that their line assistants implement certain criminal justice reforms, such as Larry Krasner's February 2018 memo to his Philadelphia prosecutors instructing them to decline to file certain charges (in the absence of significant criminal history), to charge lesser rather than greater offenses for some crimes, and to be flexible in considering diversion for other charges.[36]

To be sure, the desire for consistency is not just a state-level enterprise. At the federal level, the Principles of Federal Prosecution of Business Organizations, adopted by the Department of Justice in 2015, is a well-known effort to guide U.S. Attorneys across the country in their handling of white-collar prosecutions against corporate defendants. While the manual begins with a focus on general principles, it gives the prosecutor specific

34. OFFICE OF THE FLORIDA STATE ATT'Y, ANNUAL REPORT FOR THE FOURTH JUDICIAL CIRCUIT, HOMICIDE POLICIES AND PROCEDURES at 6 (2017), https://www.sao4th.com/wp-content/uploads/2018/02/SAO4th-Annual-Report-2017.pdf.

This call for more transparent decision-making resonates more broadly, as the MacArthur Foundation is supporting a partnership between prosecutors in Chicago, Jacksonville, Milwaukee and Tampa to collaborate with researchers at Florida International University and Loyola University Chicago. *See* Besiki L. Kutateladze et al., *Prosecutorial Attitudes, Perspectives, and Priorities: Insights from the Inside*, CTR. ADMIN. JUSTICE, FLORIDA INT'L UNIV. (Dec. 2018), https://caj.fiu.edu/news/2018/prosecutorial-attitudes-perspectives-and-priorities-insights-from-the-inside/report-1.pdf.

35. OFFICE OF THE FLORIDA STATE ATT'Y, ANNUAL REPORT FOR THE FOURTH JUDICIAL CIRCUIT, HOMICIDE POLICIES AND PROCEDURES at 6 (2017), https://www.sao4th.com/wp-content/uploads/2018/02/SAO4th-Annual-Report-2017.pdf.

36. *See* Memoradum from Larry Krasner to Assistant District Attorneys, *supra* note 6. These principles can also be found in the guide recently published by FAIR AND JUST PROSECUTION, *supra* note 15.

factors to consider in order to "proper[ly] treat[] the corporate target" at the investigation, charging and plea offer stages.[37]

Prosecutorial approaches to process consistency in some ways mirror the trend toward structured sentencing that began three or four decades ago. Following a period in which indeterminate sentencing schemes were the norm and concerns about discrimination surfaced repeatedly, the federal government and many states adopted sentencing guidelines to help structure the decision-making process used by trial judges in criminal courts.[38] The respective guidelines that emerged during this period differ in the degree to which their provisions are mandatory, but they all identify up front which factors judges ought to take into account, and the relative weight of each factor, when designing an appropriate sentence post-conviction.[39] The guidelines and rubrics have rightfully been criticized for levelling up baseline sentences too much,[40] but they have also been shown to improve predictability and transparency and to reduce discrimination between similarly situated offenders, at least in the state courts.[41]

37. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.000 ET SEQ. (2015), https://www.justice.gov/jm/title-9-criminal. The "Factors to be Considered" portion can be found in 9-28.300. *Id.* The list is meant to be illustrative, rather than exhaustive. Note that office-level policies are not subject to public debate and thus may be underinclusive when it comes to concerns that defenders might raise. *See* Pfaff, *Prosecutorial Guidelines*, *supra* note 32. Guidelines enacted at the legislative level may have a more comprehensive sweep. *Id*. The risk of underinclusiveness strikes me as reduced in a reformist office, though, because leadership has already publicly committed to enact policies that will reduce incarceration rates, increase the number of diversion programs and keep abreast of racial justice concerns.

38. *See, e.g.*, Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194–96 (2005). One commentator has argued that a "coherent sentencing law system" depends upon "pre-determined rules and principles" to replace "idiosyncratic intuitions of sentencers." Mirko Bagaric, *Consistency and Fairness in Sentencing*, 2(1) CAL. CRIM. L. REV. 1, 84 (2000).

39. *See* Frase, *supra* note 38 at 1194-1204. This phenomenon has not been limited to the United States. The Sentencing Council in the United Kingdom, launched in 2010, is responsible for developing sentencing guidelines and monitoring their use, to promote greater consistency in sentencing. *See* COURTS AND TRIBUNALS JUDICIARY, https://www.judiciary.uk/you-and-the-judiciary/sentencing/ (last visited Sept. 11, 2019).

40. *See* Frase, *supra* note 38 at 1209–1211, (noting that protecting public safety has been identified as the primary goal of sentencing commissions, and certain states used their guidelines systems explicitly to increase sentence severity for certain crimes but failed to consider the costs of that approach). *See also* Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715 (2008). In reformist offices I am less concerned about the levelling up phenomenon because the leadership has rejected the binary between public safety and a smaller carceral state. It therefore should set reasonably low baselines compared to what we see in more regressive offices.

41. NAT'L CENTER FOR STATE COURTS, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES (2008), https://www.ncsc.org/~/

Where inconsistency characterizes the prosecutorial thought calculus at different stages of a case (or among different prosecutors working for the same office), problems arise: unpredictability, lack of transparency, and discrimination among offenders all interfere with the office's obligation to do justice for the defendant and victim populations. Because the reform prosecution platform has already identified those concerns as among the most challenging issues in criminal justice, modern prosecutors ought to enthusiastically embrace initiatives that can mitigate them. But in addition to these concerns, inconsistency in the prosecutorial calculus can cause inefficiency and frustration within the prosecutorial enterprise itself. Don Stemen and Bruce Frederick, for example, found high levels of frustration among prosecutors in one Southeastern county; they were encouraged to file broadly but then complained that lack of courtroom space prevented them from taking cases to trial—which forced them to give fire sale plea offers.[42] A different outcome might have prevailed if system resources factored into the filing calculus at the start of the case.[43]

B. Which Decisions Would Benefit from Advance Coordination?

Having covered the basics of a coordinated approach to decision-making in the prosecutor's office, we can now consider a second-level concern in the "consistency about what?" inquiry: Which decisions ought to be subject to the calculus? In the criminological literature referenced above, the relevant prosecutorial thought process concerns only the charging/declination decision and the plea offer; it does not seem to extend further than those functions. While theorists recognize that a given approach

media/Microsites/Files/CSI/Assessing%20Consistency.ashx. *But see* Amy L. Anderson & Cassia Spohn, *Lawlessness in the Federal Sentencing Process: A Test for Uniformity and Consistency in Sentence Outcomes*, 27(3) *JUSTICE QUARTERLY* 362–393 (2010) (finding that even after the imposition of the federal sentencing guidelines in a study of three U.S. district courts, many federal judges continued to arrive at decisions regarding the appropriate sentence in different ways, by attaching differential weights to several of the legally relevant case characteristics and legally irrelevant offender characteristics). Similar disparities were found by Mona Lynch in her recent study of how drug cases were handled in three different federal district courts in different parts of the U.S. *See* MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016). Lynch's study draws our attention to prosecutorial choices and prioritizes in each district, rather than to exercises of judicial discretion.

42. Stemen & Frederick, *supra* note 20, at 46–47. The county that was the subject of this study was kept anonymous for purposes of confidentiality.

43. Such was the approach taken by the New Orleans District Attorney's Office about two decades ago, when the leadership adopted tighter filing standards to dramatically reduce plea bargaining. Ronald F. Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55(1) STANFORD L. REV. 29 (2002).

to filing or plea offers often has consequences for prosecutorial relationships with the defense bar and with local law enforcement,[44] the calculus does not explicitly reach that far. But what if "relationships" were a piece of the calculus itself, instead of just a dependent variable subject to influence by different approaches to filing and plea practices? If we were to elevate professional relationships into the status of an independent variable, prosecutors in the office would receive instruction from the leadership about how to build and manage such relationships, which would in turn further the modern goals of the office. For that reason, I advocate for explicitly including professional relationships in the calculus that a reformist leader ought to design and promote in her office.[45]

Concerning the relationships with the defense bar, recent scholarship has pointed out that early career prosecutors tend to have highly adversarial relationships with defense attorneys, while more seasoned prosecutors think of defenders as their colleagues across the aisle.[46] If office leadership set expectations for how all prosecutors in the office ought to behave vis-à-vis the local defense bar, the high levels of adversarialism shown by junior prosecutors would likely dissipate far more quickly. Setting and reinforcing

44. PAMELA UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT (1978); *see also* Mellon et al., *supra* note 22, at 60–68.

45. The 2017 version of the ABA Standards for the Prosecution Function speak to prosecutor relationships beyond the specific case-handling aspect of the prosecutor's job. ABA STANDARDS, *supra* note 30. For example, standard 3-3.2(a) sets limits on the cozy relationship between prosecutors and law enforcement ("The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel."), and standard 3-3.2(b) advises that the prosecutor's job includes teaching officers about compliance ("The prosecutor should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias."). *Id.* Standard 3-3.3(d) opens the aperture even further, instructing prosecutors on the importance of creating relationships with the court and defense counsel:

The prosecutor should develop and maintain courteous and civil working relationships with judges and defense counsel and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system. Prosecutors should cooperate with courts and organized bar associations in developing codes of professionalism and civility and should abide by such codes that apply in their jurisdiction.

Id.

46. *See, e.g.*, Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutor's Syndrome*, 56(4) ARIZ. L. REV. 1065 (2014); Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation and Wrongful Conviction Practice*, 42(3) LAW & SOC. INQ. 648 (2017); Stemen & Frederick, *supra* note 20, at 59. *Contra* Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERK. J. CRIM. L. 335 (2015) (finding high levels of adversarialism among senior prosecutors who respond to habeas requests from defense counsel in the Los Angeles County DA's Office).

expectations in this regard should happen at the time of hiring and throughout. For example, leadership and senior prosecutors should be wary of job applicants who do not manifest a commitment to reformist practices. If a newly hired prosecutor shows aggressive prosecution tendencies once on the job, leadership and senior attorneys should work hard to smooth out those rough edges while the new colleague is still in a probationary period of employment.[47]

Tone-setting is not just about manifesting a sense of collegiality when attorneys are around each other, or about promptly returning phone calls (although both of those things are important for information flow and fair case resolution); it covers a consistent approach to one's disclosure obligations as well.[48] Since much of the scholarship about prosecutorial responsibility for wrongful convictions points to disclosure violations as a central cause,[49] a modern prosecutor would want his or her line prosecutors to demonstrate consistently strong respect for the government's disclosure obligations under the U.S. Constitution, the state constitution and relevant statutory provisions. Robust compliance with disclosure obligations and an openness to conducting post-conviction inquiries into police and prosecutor error would go a long way toward advancing the image of the prosecutor as a true minister of justice.[50]

When it comes to influencing prosecutor relationships with local law enforcement, a calculus that governs filing strategies certainly can have an effect. For example, if legal sufficiency as a filing approach gives way to other concerns, fewer cases will be filed initially.[51] And filing fewer cases means more frequently telling police officers what they do not want to hear. Saying "no" to a seasoned police officer can be difficult for any prosecutor;

47. Stemen & Frederick, *supra* note 20, at 21 (observing that the Southern County prosecutor's office tried to avoid hiring prosecutors who expressed overly punitive attitudes, and used roundtable discussions to "correct" wayward opinions); *see also* Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutor's Syndrome*, *supra* note 46 (describing techniques that can be used to teach early career prosecutors how to develop a sense of proportionality and perspective). Stephanos Bibas' call for offices to pay attention to values at the time of hiring and throughout the prosecutor's career in the office is in accord. Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2009).

48. Yaroshefsky & Green, *supra* note 24.

49. *See, e.g.*, BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).

50. *See* ABA STANDARDS, *supra* note 30, standard 3-5.4 (stating disclosure obligations), standard 3-8.1 (stating that the duty to defend conviction is not absolute), standard 3-8.3 (discussing duty in the face of newly discovered evidence); *see also* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009); Sklansky, *supra* note 15.

51. Mellon et al., *supra* note 22, at 60–68.

it poses particular problems for early-career prosecutors, who do not yet have the confidence in their own judgment and may feel pressured to go along even if they have concerns about the underlying police work.[52] Here, clear guidance about the weight of law enforcement relationships in the prosecutorial calculus, communicated by the office leadership, would be beneficial. The early career prosecutor could rely on those standards to bolster his own judgment about a case's deficiencies, or could use those standards to explain to the officer why filing would be problematic. The prosecutor would also know that his supervisor would back him up if the officer were to complain, because the supervisor would refer to the same calculus. In other words, the prosecutorial calculus of the office would provide both the framework that underlies the filing decision and the range of communication strategies a prosecutor can use to ease the conversation with the officer—or at least to get it started in a productive way.

C. Is There Room for Flexibility?

A desire for consistency ought not to morph into a sense of rigidity. It is no doubt true that guidelines reduce the amount of discretion a decision-maker possesses; that is the point of having them. As noted by the National Center for State Courts in the context of judges:

> At the conceptual level, desired consistency in sentencing outcomes clashes with desirable judicial discretion because they involve quite different fundamental assumptions. On the one hand, consistency posits that the most relevant criteria for classifying cases are identifiable and applicable to all cases. On the other hand, discretion posits that cases are sufficiently different to make it nearly impossible to establish a common means of comparison in each individual case.[53]

The "creative tension"[54] between consistency and discretion exists at the prosecutorial level as well. Prosecutors regularly claim that it would be impossible to create a handbook of rules to cover all of the situations they face and the wide range of cases that cross their desks. Cases are unique and complex, and a system of inflexible rules tends to create an environment in

52. Wright & Levine, *The Cure for Young Prosecutor's Syndrome*, *supra* note 46; Stemen & Frederick, *supra* note 20, at 63–65.

53. NAT'L CTR. FOR STATE COURTS, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES, *supra* note 41, at 4.

54. *Id.* at 4.

which gamesmanship is encouraged, or defense attorneys advocate for alternative charges to be filed so that the rules will not apply. Stringent rules also sometimes frustrate judges, whose attempts to achieve creative solutions are stymied when prosecutors claim their hands are tied by the office rules.[55]

Because consistency and discretion need to co-exist in a professional environment, the prosecutorial calculus ought to be understood as a set of defaults, rather than as a tight coil. No prosecutor wants to be "roboticized" by office mandates.[56] When a prosecutor wants to alter the calculus for decision-making in the unusual case, she can explain why to her supervisor—in advance—or roundtable it with other members of her team or unit to get their take on whether a deviation is necessary or wise. Additionally, we would not need to require symmetrical treatment in how requests for deviations are handled. Upward deviations from leniency defaults could be strongly discouraged, even as the office remains more open to considering downward deviations from standard outcomes that result in harsh treatment.[57] In a world where prosecutors notoriously want "100% discretion and 100% guidance,"[58] the flexible prosecutorial calculus provides both.

Moreover, as John Pfaff recently wrote in the context of advocating for legislative guidelines to shape prosecutor decision-making, imposing guidelines will not cause a sea change in the *substance* of what prosecutors are doing every day. Guidelines will instead influence the *manner* in which that substance is achieved, by increasing transparency:

> Prosecutors already are called on to assess risk, and amenability to treatment, and how those relate to both incapacitation and deterrence and moral blameworthiness; and they are already required to balance all the various competing goals of the criminal justice system. And—let us be completely clear here—they are already doing so using a proprietary actuarial model: the one in their head.[59]

55. Stemen & Frederick, *supra* note 20, at 28–29.

56. *See* Memorandum from Larry Krasner, quoted in BAZELON, *supra* note 6, at 166.

57. Here I agree with John Pfaff that the office commitment to leniency rules ought to be firmer than its commitment to stringency rules; that is, we ought to allow more wiggle room for prosecutors to seek exceptions to rules that impose severe consequences and less wiggle room to deviate from the rules that point toward lenient outcomes. John Pfaff, *supra* note 32, at 117. This approach ought to reduce some of the anxiety that a guidelines structure sometimes causes in the defender population.

58. Stemen & Frederick, *supra* note 20, at 18 (quoting chief prosecutor in Northern County).

59. Pfaff, *supra* note 32, at 117.

Subjecting prosecutorial decision-making to an office-wide calculus brings the process out of their heads and into the open. It forces the office to consider the value of these respective variables in an ex ante setting, and it encourages line prosecutors to have open discussions with each other about how factors should be weighed, and when exceptions are warranted.

D. What about Consistency in Outcomes?

Consistency in outcomes ought to be a goal as well, but it ought to be secondary to consistency of process for a number of reasons. First, due to the wide variety of cases, as well as the circumstances of defendants and victims, the best we can ever hope to achieve is consistency within a range in outcomes, not pinpoint precision. Second, prosecutors control only those outcomes that come from their office—suggested bail amounts, charges, sentence recommendations, and plea offers. Prosecutors do not control the actual bail amount set by the court, or the sentence received by a defendant either after trial or after an unstructured plea.[60] Hence, when faced with similar kinds of cases, prosecutors ought to make similar recommendations for pre-trial release and sentencing, and to file (or decline to file) similar charges. This is to ensure that the office speaks with one voice about how certain behavior is regarded in the jurisdiction, irrespective of which prosecutor is assigned the case or which courtroom is adjudicating the matter. But the prosecutorial position is just the beginning. Final outcomes on bail or sentence remain the judge's responsibility, and judges ought to remain accountable for those decisions.

Third, once an office prioritizes process consistency, the outcomes we care about—prosecutors' bail recommendations, declination decisions, diversion recommendations, charges, plea offers, and sentence recommendations—should stay within a fairly predictable range. To the extent they occur, deviations from the range would likely flow from deviations in thought processes; they would not just spontaneously appear, or be driven by personality differences or bias among line prosecutors. In other words, nontraditional recommendations normally would be traceable to an approved change in the decisional calculus, where the prosecutor making the nontraditional recommendation would have already sought the advice/consent of his supervisor or peers. Because the deviation in thought

60. This point has been aptly made by Jeff Bellin, who argues that although scholars complain that prosecutors have nearly unlimited discretion, prosecutors only get to impose their views about bail and sentencing when judges go along with them. *See* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019). Declination of charges, by contrast, is one decision that belongs solely to the prosecutor.

process would already have been discussed at the office level, a second, independent audit at the outcome stage would be unnecessary.[61]

Fourth, if prosecutors get the message that their performance will be judged based on specific observable outcomes rather than on the thought process they employ when making professional decisions, some might be inspired to massage the record to make themselves look better. A focus on outcomes can create incentives for line attorneys to appear compliant with the office philosophy despite holding obstructionist views, or to appear more successful at implementing office policies than the facts would support. Line attorneys might, in essence, try to manipulate the outcome data to hide their neglect of process.[62] This is not a concern that is unique to prosecutors, to be sure. The current fetish for data-driven policy and rewards has inspired other kinds of professionals to fudge data—or to manipulate facts to produce better final data—to cover up for underlying failures in the system.[63]

61. We need to remain alert to the risk that predetermined factors sometimes provide a veneer of objectivity that can mask subjective choices made earlier in the process (a criticism of risk assessment tools that are used in the pretrial release context). *See, e.g.*, Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21-47 (Erik Luna ed. 2017). Even so, I believe a calculus that guides decision-making by real people in real time has the capacity to be more responsive than a rigid set of variables applied by a computer according to a preset algorithm. Moreover, because here we are concerned with prosecutors in a reformist office identifying the factors and their relative weights, they are less likely than their conventional counterparts to blindly incorporate factors that exacerbate patterns of racial and class injustice.

62. Data manipulation might include creating false records of attempts to contact the victim about a proposed plea strategy, or deeply unenthusiastic arguments before the court in support of the office's official position that the attorney does not endorse. Short of full manipulation or rebellion, we might see a kind of collective "shoulder-shrugging" about the new policies and approaches, as opponents just bide their time waiting for the next wave of innovative ideas to supplant the current wave. *See, e.g.*, Lauren Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61(2) B.C. L. REV. 524, 567 (2020) (describing why it is difficult to impose new policies on a resistant workforce).

63. In the law enforcement context, some New York City Police Department officials were altering police reports for the purpose of manipulating statistics in the Department's COMSTAT crime tracking system; *see* Chris Francesci, *NYPD report confirms manipulation of crime stats*, REUTERS (Mar. 9 2012), https://www.reuters.com/article/us-crime-newyork-statistics/nypd-report-confirms-manipulation-of-crime-stats-idUSBRE82818620120309. For an example that falls outside the criminal justice system, consider the pressures imposed by No Child Left Behind and the culture of standardized testing of students to evaluate teacher performance, see Valerie Strauss, *How and Why Convicted Atlanta Teachers Cheated on Standardized Tests*, WASH. POST (Apr. 1, 2015) https://www.washingtonpost.com/news/answer-sheet/wp/2015/04/01/how-and-why-convicted-atlanta-teachers-cheated-on-standardized-tests/. The U.S. Securities and Exchange Commission sometimes adopts policies or manipulates data reports to hide the fact that its enforcement initiatives have not been particularly successful. Jonathan Macey, *The Distorting Incentives of the US Securities and Exchange Commission,* 33 HARV. J.L. & PUB. POL'Y 639 (2010). Gamesmanship can also

Finally, we need to be thoughtful about what outcomes we place in the spotlight. Observers have noted that we have a tendency to value the things we measure,[64] making those metrics very difficult to abandon later on and other data nearly impossible to see. This insight cautions that leadership ought to think carefully about which metrics to employ when evaluating attorney compliance with new policies. Racing to implement a heap of new ideas all at one time—with no clear path to gauging meaningful acceptance of those ideas among the workforce—can undermine the long-term success of even the most promising proposals.

This caution may be particularly salient in an office that employs people of variable abilities (that is, in any prosecutor's office). Prosecutors differ in their trial skills, their negotiation skills, and their people skills. Surely they will differ in their ability to correctly and swiftly implement any new program put forth by the leadership that tries to alter their entrenched ways of doing things. Leaders may struggle with how to respond to good faith efforts that fall short, particularly from prosecutors who otherwise possess a strong set of skills in the courtroom or with victim groups. A focus just on outcomes—without respect to process—risks alienating and denigrating otherwise valuable members of the staff.

Part II: Consistency with Whom? Setting Office-Wide Standards While Respecting Localism

Having established that consistency in thought process is the principal goal, we next need to decide which set of prosecutors ought to be subject to the progressive prosecutor's calculus. In this part I argue that every member of a prosecutor's office needs to follow the calculus, irrespective of job assignment or level of seniority. Only office-wide acceptance of the prosecutorial calculus can generate more consistency across individual prosecutors, across units, and across courtrooms in the jurisdiction. But the elected prosecutor's reach is more limited when it comes to prosecutors who work in other jurisdictions. Her authority does not and cannot extend outside her office (for political and economic reasons). Moreover, she would be wise to steer clear of subjecting her office to statewide norms that are inconsistent with the reform agenda. Efforts to bring the entire state under

occur in the context of national security. *See* Matt Mazzetti & Mark Apuzzo, *Inquiry Weighs Whether ISIS Analysis Was Distorted*, N.Y. TIMES (Aug. 25, 2015), https://www.nytimes.com/2015/08/26/world/middleeast/pentagon-investigates-allegations-of-skewed-intelligence-reports-on-isis.html.

64. Donella Meadows, *Indicators and Information Systems for Sustainable Development*, THE SUSTAINABILITY INSTITUTE (Sept. 1998), http://donellameadows.org/wp-content/userfiles/IndicatorsInformation.pdf.

one prosecutorial calculus risk diluting the efforts of reformers before their views gain majority acceptance across the state.

A. How Far Should Consistency Extend within the Office?

State prosecutor's offices in the United States come in a variety of shapes and sizes. As scholars have observed previously, the assumption that all prosecutor offices are large, pyramidal-shaped bureaucracies is false.[65] While the most researched offices can be characterized that way, in fact most prosecutor offices in the U.S. consist of the Elected and just a handful of other attorneys. Aside from size, offices vary in the degree to which they embrace specialized units (as opposed to general trial teams), as well as in their use of horizontal versus vertical approaches to charging and case handling. These variations in size and organizational structure influence the pathways through which new messages travel, and the amount of time it takes for those messages to filter down. Despite these differences, reform leaders in any kind of office need to reach line attorneys and supervising attorneys at every level, and in every assignment, in order for a consistent prosecutorial calculus to take hold.

For example, in offices that contain specialized units to handle certain kinds of crimes (sex crimes, white collar crimes, drug crimes, for example),[66] we might expect the leaders of those units to be the primary source of information and communication with the unit attorneys. This would also be the case for leaders of general trial teams, or midlevel office supervisors (often called "deputy chiefs") who approve charges and plea offers in various courtrooms. Leaders of these units and teams must be on board with the prosecutorial calculus articulated by the new office leadership; if they contradict or second-guess it, they will create confusion among the line attorneys who work below them and undermine the elected leader's authority.[67]

65. Kay L. Levine & Ronald F. Wright, *Prosecution in 3D*, 102(4) J. CRIM. L. AND CRIMINOLOGY 1119 (2012); Kay L. Levine & Ronald F. Wright, *Place Matters in Prosecution Research*, 14(2) OHIO STATE J. OF CRIM. LAW 675 (2017).

66. *See generally* 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); 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. 2 (2011).

67. Larry Krasner of Philadelphia likewise endorses providing "multi-generational training" to his staff. BAZELON, *supra* note 5, at 167. *See also* Beth McCann, Courtney Oliva & Ronald Wright, *Prosecutor Office Culture and Diversion Programs* (2019) (unpublished manuscript on file with author) (discussing what it takes to secure line prosecutors' cooperation with new diversion programs).

If the office leadership is concerned about the willingness of supervisory level prosecutors to go along with the reformist program, radical steps—like demotions and firing—might ensue. Such was the path taken by Larry Krasner when he assumed leadership of the Philadelphia District Attorney's Office and faced resistance from many career prosecutors who found themselves under his command. He fired 31 attorneys who could not or would not subscribe to his vision of how to do the job differently.[68] Resistance need not provoke such a severe response, of course. A milder approach would be to realize, as Lauren Ouziel has recently observed, that long-time career servants of the office might be resistant to new ways of doing things simply because they prefer to leave politics to the politicians. Moreover, many career civil servants have developed "system justifications" to explain and fortify established work patterns. If newly elected leaders were to invite recalcitrant veterans to participate in conversations about why new approaches are necessary (rather than stripping them of authority at the first sign of resistance), they might ultimately be able to get the veterans on board.[69]

Whether the response to resistors appears harsh, mild, or somewhere in between, the office leadership should not automatically squelch unit-level initiatives that make sense for a particular unit. Conceivably, unit leaders might want to tailor, or add to, the general office calculus to make more specific guidelines for the kinds of crimes the unit handles.[70] That is, a unit that addresses drug crimes would need to eliminate the "consult the victim" factor in the general office calculus, whereas the sex crimes unit might want to add more weight to that factor than the general calculus provides. Scrutiny of law enforcement tactics for constitutional issues might loom large in the drug unit but be less prominent in a white-collar crime division. Unit adjustments should be permitted and welcomed, as long as they make sense for the caseload and are approved by the office leadership. These kinds of variations should be discouraged among the general felony trial teams, where the composition of their respective caseloads is the same; no unit-specific crimes justify adjustments in the overall calculus at the trial team level.

68. Krasner famously said of this decision, "When the pirates take over the ship, some of the crew is going over the side." BAZELON, *supra* note 5, at 161. Bazelon likewise notes that when Kim Foxx took over the Cook County State's Attorney's Office in Chicago, she fired three dozen lawyers who were promoted by the previous chief prosecutor. BAZELON, *supra* note 5, at 368.

69. Ouziel, *supra* note 62.

70. *See* Stemen & Frederick, *supra* note 20, at 19–31 (describing the creation of unit level rules in Southern County that supplement or help to operationalize the general office policy to "do justice" or "do the right thing").

In offices that embrace a horizontal model of prosecution, where there is one charging bureau that files all cases for the office, the prosecutorial calculus for charging (the factors that ought to be weighed in the decision, plus the weight that each factor deserves) should apply to all attorneys in that bureau, but it does not stop there. While prosecutors elsewhere in the office are not filing cases, they do handle those cases at later stages. They therefore need to understand and adopt the calculus in determining bail recommendations and plea offers, to make sure they are not undercutting the filing team. If they are regularly seeking to undercut the filing team because cases are not nearly as strong as the filing team believes, this ought to prompt an office-wide conversation to bring the two groups into alignment. In offices that embrace a vertical model of prosecution, each prosecutor files his or her own set of cases and then handles them throughout the process; the calculus for filing, bail and plea offers would need to be front and center for each attorney with a similar caseload. Under either model the point is to coordinate the prosecutorial calculus at various stages, such that early decision-makers engage in downstream thinking about the consequences of their choices, and later decision-makers do not undermine earlier ones purposefully or inadvertently.

B. What Reaction Can We Expect from the Defense Bar to Increased Consistency?

If an office-wide prosecutorial calculus takes hold, there will be more conformity across the board in terms of case treatment, which could be both positive and negative for defense attorneys who work with the office. On the plus side, defense attorneys will receive, and should come to anticipate, more or less the same treatment from whichever prosecutor is handling a given case. That, in turn, should reduce disparities that might otherwise stem from any particular prosecutor's idiosyncrasies, background, and biases, and should increase certainty in plea negotiations. On the negative side, once the calculus is in place, creative defense lawyering might fall by the wayside, as defense attorneys come to realize that they cannot make much headway by pointing to individual features of clients or cases. This loss would be particularly acute when substantive justice concerns suggest a particular defendant ought to receive better treatment than other offenders in the same category.

Conceiving of the calculus as a set of defaults rather than rigid rules should allow for exceptions in exceptional cases. But the objective would be to keep those exceptions fairly limited, to move away from the "just this once" mentality that takes hold in so many cases today and renders exceptions a regular feature of the landscape for anyone who asks for them.

Furthermore, by establishing the calculus up front, we signal that exceptions, when granted, should include documentation and discussion; they should no longer emerge from backroom deals or off-the-record phone calls. In so doing, we could limit the ability of biases—both explicit and implicit—to influence the outcomes of cases, biases that have long privileged defendants of means and disadvantaged those from vulnerable groups.[71]

C. Should We (Can We) Aim for Consistency Across Jurisdictions?

Identifying disparities across counties (in terms of how major crimes are handled) has been a mainstay of criminology research; this variation has emerged even among serious felony cases.[72] A high degree of localism exists because each prosecutor's office has roots in a specific political and economic ecosystem, and no two ecosystems are alike. The ecosystem includes such features as the strength of the local defense bar and the orientation of the local bench toward encouraging plea bargaining.[73] Additionally, caseload size, prosecutors' trust in the local police force, the demographic character of the jurisdiction, funding sources, and the values of the underlying community can all influence policies adopted by the prosecutor's office and the prosecutor's ability to get the job done.[74] As Levine and Wright have noted previously, "Because the prosecutor's office is only one institution in a much larger community of socio-legal actors with competing interests, these external relationships bear heavily on the results that prosecutors tend to get with their discretionary power."[75] These relationships tend to shape a range of decisions made by prosecutors, including filing standards,[76] approach to disclosure obligations,[77] and plea bargaining strategies.[78]

71. *See* ABA STANDARDS *supra* note 30, at standard 3-1.6 (stating that the prosecutor ought to strive to eliminate reliance on explicit and implicit bias wherever possible).

72. *See, e.g.*, Jeffrey T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427 (2007) (documenting the correlation between community demographics and prosecutorial willingness to file charges with mandatory minimum sentences); Wright, *supra* note 18.

73. UTZ, *supra* note 44; *see also* ROY FLEMMING ET AL., THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES (1992) (arguing that prosecutor leadership style needs to account for office status relative to the defense bar and the bench).

74. Mellon et al., *supra* note 22, at 6–68.

75. Levine & Wright, *supra* note 65, at 1130.

76. Mellon et al., *supra* note 22, at 60–68.

77. Yaroshefsky & Green, *supra* note 24.

78. UTZ, *supra* note 44.

Given this degree of local variation in the political and economic landscape, is it possible or smart for reform prosecutors to expect consistency across jurisdictions? Probably not, for two reasons: First, to the extent it has triumphed, the reformist prosecutorial agenda has achieved validation through local popular election. But the elected reformer DA received majority support in her district only; she thus has no mandate or authority to impose her agenda elsewhere. Second, modern goals are likely to be diluted if made to fit within a larger statewide organization or made to compete for a place on the state legislative platform, assuming the modern agenda is the minority position in the state. It will take a very long time (if it happens at all) for that agenda to move into the majority spotlight; in the interim, it will almost always lose to the conventional majority position. In that setting, reformist ideas would remain just ideas—remaining at odds with actual policy because the conservative headwinds would remain dominant.[79]

Despite those headwinds, I would encourage reformist prosecutors to speak about their ideas openly and enthusiastically outside their own jurisdictions. Conventional prosecutors have long proselytized the benefits of a strict law and order approach to justice; it's time for the counter-narrative to claim space on the airwaves as well. Over the past decade, the soundness of new approaches to criminal justice has become apparent to people on all points of the political spectrum, albeit for different reasons. Discontent with the status quo has thus provided fertile ground for innovative ideas to take root in both urban and rural areas, in coastal regions and Midwestern plains. Reform prosecutors need to keep the conversation going, tending and watering their ideas in order for them to spread and thrive.

Conclusion

Reform-minded prosecutors ought to emphasize the value of consistency in the prosecutorial thought process, what I have called the "prosecutorial calculus." With consistency of process at the forefront, line prosecutors would make decisions about declination, diversion, charging,

79. Recently, two self-identified progressive prosecutors have left their statewide district attorneys associations, due to irreconcilable conflicts in policy. *See* Chris Palmer, *Philly DA Larry Krasner withdraws office from statewide prosecutors group*, PHILADELPHIA INQUIRER (Nov. 16, 2018), https://www.inquirer.com/philly/news/crime/philadelphia-da-district-attorney-larry-krasner-withdraws-pdaa-20181116.html and Evan Sernoffsky, *Central California DA quits state association over its opposition to criminal justice reforms*, S.F. CHRON. (Jan. 16, 2020), https://www.sfchronicle.com/crime/article/Central-California-DA-quits-state-association-14981879.php. For a recent explanation of the counter position (that prosecutors ought to transcend localism and apply the same standards throughout the state), see Bruce A. Green and Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. UNIV. L. REV. 805–62 (2020).

bail, plea offers, and relationships with other criminal justice professionals in accordance with standards set by the office leadership. They would retain the ability to seek exceptions in exceptional cases but would mostly speak with one voice about the office's values and priorities. While consistency of outcomes would likely flow from consistency of thought process, it would not be regarded as an independent measure of prosecutorial compliance with the leadership's vision. The prosecutorial calculus would also help to operationalize the office's commitment to transparency and equal treatment of defendants, which are hallmarks of the reformist vision.

I have also argued that, while consistency ought to be a guiding principle, it ought not to transform itself into rigidity. Justice is at its peak when laws and procedures reflect a balance of generality and specificity.[80] In the case of the prosecutor's office, this offers two important lessons. First, internal office guidelines resonate more deeply and successfully with the line attorneys when they appear to support norms emanating from below. Where there is a strong connection between policies dictated from the top and workplace patterns that make sense to courtroom attorneys, line attorneys will be more inclined to believe that such guidelines provide proper instruction for decisions they make every day.[81] Relatedly, hydraulic pressures exist in any bureaucratic system; if the office forces consistency in a heavy-handed way that seems out of step with how line prosecutors want to do their jobs, urges and pressures for specificity will bubble up to the surface and inspire employees to evade office norms or even engage in outright rebellion.

Finally, when considering the success of the prosecutorial calculus, office leaders need to remain alert to the inherent limitations found in the population charged with implementing it. Prosecutors are actual people, replete with a range of motivations, talents, and career aspirations.[82] Implicit biases and system justifications may get in the way of even the well-meaning prosecutor's amenability to new ideas, at least at first. Lasting change is likely to take time and patience, two traits that are in short supply during electoral cycles that arise every four years. But undoing the harms imposed by past generations in furtherance of a more compassionate, responsible future is a decades-long project that will be well worth the effort.

80. Maggie Blackhawk, *Equity Outside the Courts*, 121 COLUM. L. REV. __ (2020) (unpublished manuscript) (on file with author).

81. Beth McCann, et al., Prosecutor Office Culture and Diversion Programs (2019) (unpublished manuscript) (on file with author).

82. Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018).

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