

The author(s) shown below used Federal funds provided by the U.S. Department of Justice and prepared the following final report:

**Document Title: The Anatomy of Discretion: An Analysis of
Prosecutorial Decision Making – Summary
Report**

Author: Bruce Frederick, Don Stemen

Document No.: 240335

Date Received: November 2012

Award Number: 2009-IJ-CX-0040

This report has not been published by the U.S. Department of Justice. To provide better customer service, NCJRS has made this Federally-funded grant final report available electronically in addition to traditional paper copies.

**Opinions or points of view expressed are those
of the author(s) and do not necessarily reflect
the official position or policies of the U.S.
Department of Justice.**



The Anatomy of Discretion

An Analysis of Prosecutorial Decision Making

Summary Report to the National Institute of Justice

Bruce Frederick, Principal Investigator
Vera Institute of Justice

Don Stemen, Principal Investigator
Loyola University Chicago

Vera Institute of Justice
November 2012

Suggested citation:

Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making*. New York: Vera Institute of Justice, 2012. Available at <http://www.vera.org>.

© 2012 Vera Institute of Justice. All rights reserved.

An electronic version of this report is available for download on Vera's web site, www.vera.org.

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

This study was supported by grant #2009-IJ-CX-0040 from the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Points of view expressed in this report are those of the authors and do not necessarily represent the official position of the U.S. Department of Justice or the views of the district attorneys in participating jurisdictions.

Acknowledgements

Many people helped make this study possible. First and foremost, we would like to thank the district attorneys in Southern County and Northern County for providing us access to their offices and data files and for consistently supporting and facilitating our efforts. We would especially like to thank the staff in both counties for generously contributing their time and thoughtful insights throughout two years of research.

At the National Institute of Justice, our grant officer, Linda Truitt, provided support, encouragement, and critical assistance—and displayed extraordinary patience in helping us work through unanticipated difficulties in the management of the project. We are also grateful to Vera Institute Director Michael Jacobson, Associate Research Director Siobhan Carney, and the many current and former Vera staff who supported us throughout this project. We would especially like to thank Christine Scott-Hayward and Kathryne Brewer, who wrote the original proposal; April Bang and Olivia Sideman who helped enormously with project administration and logistics; Stephen O’Neil and Kevin Alligood, who assisted with on-site coordination and original data collection; General Counsel Karen Goldstein and Legal Department staff for assistance with contracts, data sharing agreements, and human subjects research protocols; Maureen Christensen and Shelley Azumbrado for invaluable assistance with budgeting and fiscal management for the project; Michael Mehler for recording and editing video podcasts; and Director of Communications Robin Campbell, writer and editor Alice Chasan, and Communications Department support staff for their hard work and commitment to the difficult task of making this research accessible to a broad audience.

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.

Table of Contents

Executive Summary.....	2
Further Discussion of Findings	6
Appendix: Research Design and Methods	17
Notes	26

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?

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.