

Prosecutorial Decision-Making and Discretion in America's Criminal Justice System

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## ABSTRACT

This research examines the decision-making processes of prosecutors and how they exercise discretion within the United States criminal justice system. Current literature has documented that government actors exercise an extraordinary amount of discretionary power that goes unchecked. While there is scholarship on the legal standards for prosecutors, there is virtually no qualitative research using intensive interviews which provide rich information about prosecutorial decision-making processes. I conducted interviews with prosecutors working in the state of Colorado and discovered that the most important factors that influenced decision-making processes included the seriousness of the offense, victim and defendant trauma, community safety and a victim's desires. Each of these factors along with a prosecutor's conception of justice contributed to how each prosecutor exercised their discretion regardless of which department they worked in. These findings are significant in understanding how cases progress through the American criminal justice system and may be used to better the development of legal standards.

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## INTRODUCTION

Prosecutorial discretion is the power that prosecutors hold when deciding whether to punish and how to punish a person who has violated the law. These decision-making processes have not been subjected to the kind of scholarly scrutiny that is necessary to understand how cases progress through the American criminal justice system. The research that has been published in current academic literature primarily focuses on the legal standards for prosecutors and rarely examines the factors that extend beyond mere legalities which can impact the decisions made on a case. Much of the research done on prosecutorial discretion and decision-making has become theoretically grounded, and there is virtually no qualitative research using intensive interviews which provide rich information about prosecutorial decision-making processes.

For the past few decades, America's criminal justice system has been criticized by academics and the general public for its poor performance. This includes giving defendants extremely harsh sentences for what are typically considered low-level offenses. For example, one man in Texas was sentenced to 70 years in prison for stealing a tuna fish sandwich from Whole Foods. Examining prosecutorial discretion and decision-making is necessary in order to have a complete understanding of how cases progress through the American criminal justice system and result in the punishments that defendants are given. While every actor in the criminal justice system exercises an extraordinary amount of discretionary power, it is the prosecutor who decides who will be charged and what charges to file.

There is a question regarding what causes such extreme punishments in America's criminal justice system, and for policymakers who aim to promote more nuanced prosecuting, the first step is to understand how prosecutors exercise their discretion and make decisions on a

case. In this research paper, I will present the results of interviews that were conducted with prosecuting attorneys within the state of Colorado. Understanding the factors that prosecutors consider when exercising their discretion is necessary to becoming fully informed, as is identifying the factors that contributed indirectly to their decision-making. What I found was that each factor that influenced the decision-making of prosecutor's remained consistent regardless of which department each prosecutor worked in, and the most important consideration when making decisions on a case was community safety.

## LITERATURE REVIEW

Current literature on prosecutorial decision-making has documented that prosecutors in the United States criminal justice system exercise an extraordinary amount of discretionary power that goes unchecked (Spohn 2018). While there is scholarship that analyzes the legal standards for prosecutors, the research conducted for this thesis is significant because there is little that academics know about how prosecutors exercise their discretion and make decisions on a case that extends beyond mere legalities. This literature review examines current knowledge about prosecutorial discretion and the effects that an individual prosecutor can have on a given case. The first topic that will be discussed is the initial decision to file or dismiss charges, which requires having probable cause and admissible evidence to support the charges beyond a reasonable doubt. The second topic I will discuss is a prosecutor's decision to plea bargain which accounts for up to 95 percent of all federal and state court cases (Spohn 2018). The final topic that will be discussed is the internal factors that influence prosecutorial decision-making, including the prosecutor's self-interest and their ideology.

The legal standard for prosecutors when it comes to the initial filing of charges requires that "a prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice" as stated by the American Bar Association's website.

A peer reviewed journal discusses the enormous power that prosecutors wield in what is arguably the most critical decision to make on a case: whether to file or dismiss charges. In the case of *Bordenkircher v. Hayes*, the Supreme Court disclosed that a prosecutor's decision to file charges or bring the case to trial rests entirely in their discretion given that there is probable

cause to believe the accused person committed an offense (Spohn 2018). There are no guidelines outside of standard legal doctrine for prosecutors to defer to when making the decision to file charges, and there are multiple reasons why a prosecutor may choose to dismiss the charges of a case. One reason why prosecutors will generally dismiss charges is either because they believe that the accused person is innocent, or it is likely that they would not get a conviction beyond a reasonable doubt (Spohn 2018). Another reason is because a prosecutor may not feel that it would be “in the interest of justice” if they decided to pursue the case, and this could be because the prosecutor thinks that the accused person has been punished enough or they are going to provide the prosecutor with information on a more serious case (Spohn 2018). It is important to note here that each of these reasons for dismissing a case are also not up to legal standard as stated by the American Bar Association above, which suggests ultimately that the first threshold for whether a prosecutor decides to file charges is if the case meets legal standards.

Case related factors outside of legal standards include a victim’s desires and a defendant’s characteristics. If the defendant has a criminal record, then it is more likely that the prosecutor will accept the case based on the belief that the allegations against them are true and that removing them from society is the just thing to do (Harding 2019). If the defendant’s prior criminal history is particularly heinous or violent in nature then this not only increases the likelihood that a prosecutor will file charges, but they will also prosecute those cases more harshly (Harding 2019). Having a criminal record or history of violence alone are not enough to guarantee that a prosecutor will file charges because variables such as the age of the defendant can always influence the choices a prosecutor makes. If the defendant is a juvenile who was involved in a fistfight, some prosecutors think it is best to handle these cases by explaining to each person involved that their actions are inappropriate following their arrest (Harding 2019).



They will also consider how their decisions may impact young defendants and whether having an adolescent with a felony conviction is a good outcome to have (Harding 2019).

For a prosecutor to consider the victim's desires depends almost entirely on the offense that was committed against the victim when deciding whether or not to file charges (Harding 2019). In cases involving a sex offense it is of serious concern to prosecutors what the victim's desire given it is possible that they can be harmed by the processes of a trial (Harding 2019). In cases involving domestic violence prosecutors will be less likely to consider a victim's desire to set the case aside but will still consider their willingness to testify (Harding 2019). This suggests that it is most likely because of the emotional attachment and relationship between a victim and offender in domestic violence cases that prosecutors are compelled to ignore the victim's desires to not file charges. Sometimes it is the characteristics of a victim alone that will bring a prosecutor to decide to dismiss a case altogether. For example, if the victim has a criminal record or a case that is currently pending then prosecutors will generally consider this a liability because it weakens the credibility of the victim (Harding 2019).

Prosecutor's will primarily assess the likelihood that a case will be convicted which is based on legal factors when making their decision whether to file charges or not. These legal factors include the seriousness of the offense, the strength of the evidence, and the culpability of the defendant (Spohn 2018). During the charging process prosecutors will reject a significant percentage of cases in order to "avoid uncertainty" because a conviction in that case is unlikely (Spohn 2018). This means that prosecutors are more likely to file charges in cases where the odds of conviction are good but dismiss cases where the odds of conviction are unlikely (Spohn 2018). It is these assessments of likelihood of conviction that ultimately influence a prosecutor's decision to file charges after it is certain that the case has met the legal standards in order to be

tried in court.

It is true of the United States criminal justice system today that over 90 percent of cases are resolved without ever going to trial (Spohn 2018). Plea bargaining is a practice used by prosecutors where an offer is made to the defendant to reduce the charges or punishments against him in exchange for a guilty plea. Often plea negotiations take place off court record and with no written documentation made about the promises that were given to a defendant (Spohn 2018). Spohn (2018) explains how economists, legal scholars, and psychologists argue that prosecutors “make decisions based on their assessment of the likely outcome should the case go to trial, which involves both a prediction regarding the probability of conviction at trial and an expectation that defendants who pled guilty will receive significant sentence discount relative to the sentence they would receive if convicted at trial” (p. 327). This means that if a prosecutor offers the defendant a sentence or punishment that is less than or equal to their expected conviction at trial then the defendant will likely accept the prosecutor’s deal and plead guilty to the crime they are accused of committing. Spohn (2018) further explains how there is mixed research on this with some findings suggesting that the cost-benefit analysis made by defendants is often overly simplistic.

Criminologists have also advanced arguments regarding the plea-bargaining process and guilty pleas using the focal concerns perspective. This perspective says that decisions on a case are made by focusing on three focal concerns: the culpability of the defendant; community safety; and concerns about practical constraints. In cases of plea bargaining specifically, the focal concerns perspective says that prosecutor’s make their decisions with respect to “doing justice” along with how likely it is a case will be convicted and not merely by how dangerous or culpable a defendant is (Spohn 2018). Spohn (2018) explains that the focal concerns perspective has been

criticized for using vague proxies to measure constructs like offender culpability and case convictability, but that it is still useful for hypothesizing about what factors may influence key outcomes (p. 328). Findings of criminological research that use the focal concerns perspective show that the factors which influence a prosecutor's plea-bargaining decision include "the type and quality of evidence against the defendant, the defendant's record, the characteristics of the victim, and seriousness of the offense" (Spohn 2018: 328). However, evidence against the defendant was found to be more important during the initial acceptance of a case rather than during plea bargaining (Spohn 2018).

Research on prosecutorial decision-making during the plea-bargaining process has found that a prosecutor's level of experience largely dictates their willingness to reduce charges in exchange for a guilty plea. Prosecutors with less experience are less likely to offer reduced charges to a defendant and negotiate with defense attorney's because they see all the defendants as equally culpable and are more likely to offer harsher sentences as a result (Stemen & Escobar 2018). More experienced prosecutors are generally less harsh and have a more proportionate approach to the plea-bargaining process because they are better able to differentiate between the severity of crimes that are committed and offer more lenient punishments (Stemen & Escobar 2018). Prosecutors with more experience are also more likely to view defense attorneys as a check on prosecutors and as a result they are "more willing to dismiss cases, engage in plea negotiations, and alter plea offers based on defense attorney input about the defendant's culpability and risk" (Stemen & Escobar 2018: 1172).

Prosecutors also aim to dispose of cases in a timely manner and those who have higher caseloads will be more likely to reduce charges in exchange for a guilty plea. Stemen and Escobar (2018) find that having a large caseload ultimately limits the amount of time that a

prosecutor can devote to any one specific case, and because of this restraint prosecutors will “alter their decision making based on their individual caseloads” (p. 1172). This means that prosecutors will offer generous plea deals or even dismiss cases altogether in order to resolve cases in response to their large caseloads (Stemen & Escobar 2018). Prosecutor’s may also be more likely to plea bargain when their caseload has a higher proportion of violent or felony cases. This means that when prosecutors evaluate the seriousness of a case, this is “partially determined by the overall seriousness of other cases currently on their caseload or with which they had experience in the past” (Stemen & Escobar 2018: 1172). This may result in prosecutors offering more generous plea deals because there is a high bar for determining how serious a case is (Stemen & Escobar 2018).

Scholars have found that there are internal factors which influence prosecutorial decision-making, including the prosecutor’s self-interest and their ideology. One reason why prosecutor’s pursue cases which have a higher likelihood of conviction is because their office may use rate of convictions as a measurement of success (Harding 2019). This provides economic incentive for prosecutors to pursue cases with a strong likelihood of conviction which may ultimately impact their decision to file charges and decision-making in general (Harding 2019). Some prosecutors are also elected into their positions and may make decisions on a case because of the effect it will have on their careers (Harding 2019). For example, “former Maryland U.S. Attorney Thomas DiBiagio instructed his staff to get him three ‘front page’ public corruption charges filed before November 6, which was within days of the presidential election that determined whether DiBiagio would keep a position in the White House” (Harding 2019: 202). This shows that a prosecutor’s self-interest may sometimes play a pivotal role in how they choose to exercise discretion and make decisions on a case.

How a prosecutor understands himself can influence what decisions he makes on a case in addition to serving his own interests. Prosecutors who maintain a strong pursuit of case convictions as their professional ideology are more likely to improperly weigh the other factors that are related to a case because of the focus on convictions (Harding 2019). This means that other factors that are taken into consideration when making decisions on a case are set aside or are considered less important because the prosecutor is focused exclusively on their rate of convictions (Harding 2019). As Harding notes, “when a prosecutor’s goal is to have the highest personal conviction rate, case weaknesses are merely obstacles rather than serious concerns of justice” (Harding 2019: 203). This shows that prosecutors who focus exclusively on case convictions may ultimately result in other case factors being disregarded in the decision-making process.

Other prosecutors who understand their role to be the pursuit of justice as their professional ideology seek more proportional outcomes for their cases (Harding 2019). This means that the severity of the crimes committed correlate to how severe of a punishment the prosecutor will give. Prosecutors who consider themselves justice-seeking are more comfortable filing less or no criminal charges when the defendant is not considered a threat to their community (Harding 2019). While a prosecutor’s professional ideology and understanding of himself can negatively influence their consideration for other case factors, this can also bring positive changes by improving how a prosecutor makes decisions when they are focused on the pursuit of justice (Harding 2019). “In sum, because of the overarching effect this factor has on other factors, this factor is likely the largest determinant of the quality of a prosecutor’s decisions over the course of his career” (Harding 2019: 203).

In conclusion, there are no guidelines outside of standard legal doctrine for prosecutors to

defer to when making the decision to file charges, and there are multiple reasons why a prosecutor may choose to dismiss the charges of a case. Plea bargaining is a practice used by prosecutors where an offer is made to the defendant to reduce the charges against him in exchange for a guilty plea and accounts for up to 95 percent of all federal and state court cases in the American criminal justice system. Scholars have also found that there are internal factors which influence prosecutorial decision-making, including the prosecutor's self-interest and their ideology.

## METHODS

The data for this research project was collected using open-ended and semi-structured interview questions for a qualitative analysis. A total of five interviews were conducted with prosecuting attorneys in the state of Colorado. I have decided not to disclose the specific location of the prosecuting attorneys' places of employment or use their real names in order to protect their identities.

### *A. IRB Approval*

Research that involves human subjects at the University of Colorado at Boulder must first be approved by the Institutional Review Board (IRB). The IRB is a committee that reviews a research proposal before the study is conducted to ensure that the methods that will be used are ethical. IRB approval for research involving human subjects is important because this ensures that the research project will protect the rights and welfare of the individuals participating as subjects. On October 8<sup>th</sup>, 2021, I submitted the following forms to the University of Colorado at Boulder's Institutional Review Board: HRP-211 Initial Application, HRP-502 Consent Template, Interview Questions, Protocol, and Recruitment Email. These forms described the purpose of my research project, its objectives, and the research study design. In addition, I also submitted interview scripts which listed my interview questions along with the recruitment material. My application was approved on the 1<sup>st</sup> of November, 2021. Following the approval of my application, I immediately started recruiting subjects in order to begin my data collection for this study.

## *B. Study Design*

The data collected in this study comes from five formal interviews with subjects who work as prosecuting attorneys in the state of Colorado. The interviews included open-ended and semi-structured questions which asked the subjects about how they made decisions on a case during each stage of the criminal justice process. For example, prosecutors were asked if they made decisions based solely on departmental policy or if there are situations where leniency is considered. Since there is an order to how cases progress through the criminal justice system, the questions were asked chronologically, and prosecutors were invited to share what they were thinking and feeling at each stage. Prosecutors were also invited to share if they had ever made a decision on a case that resulted in social repercussions, either from colleagues in their department or others. Each prosecutor was asked to think about if justice plays a role in their decision-making and what this means to them exactly. The purpose of each question was to gain a more detailed and nuanced understanding of how prosecutors exercise their discretion and make decisions on a case.

The tools that were used for the interview process were minimal. The location of the interviews took place at each prosecutor's office in the building where they worked. Before each interview began, a consent form was briefly summarized to the subjects out loud and copies were made for them to keep personally after they were signed voluntarily. Each prosecutor was interviewed only once, and the interviews lasted anywhere from 45 minutes to 2 hours. Again, a total of five formal interviews were completed for this study and all interviews were recorded using an audio recorder on a phone application. This sample size is realistic given the difficulty of recruiting prosecuting attorneys for academic research and precautions taken by some due to the COVID-19 pandemic. The interview questions were made to ensure that the objectives of



this study are met.

### *C. Target Population*

Participants were recruited for this research project using snowball sampling. The subjects who were interviewed are employed at a county government office in Colorado where I was a former intern. Since I had experienced working in the county government office, I was able to email my former supervisor and ask if prosecuting attorneys from each department would be willing to voluntarily participate in my study. After receiving consent to interview prosecutors from the county government office, subjects were referred to me through personal connections based on availability and willingness to participate.

Of the five prosecutors who were interviewed for this research project, two of the attorneys worked in district court, two other attorneys worked in juvenile court, and one attorney worked in the special victim's unit. All prosecutors were referrals from my former supervisor and all referrals were accepted. Although I previously worked at the county government office, I did not have personal relationships with any of the prosecutors who were selected specifically. So, this did not have an impact on the subject's answers or the data collected for this research project. The participants were also not asked questions about their colleagues, and the focus remained on each prosecutors' own opinions, beliefs, judgments and decision-making.

### *D. The Prosecuting Attorney Population*

Of the two attorneys who worked in district court, one female prosecutor was 35 years

old and has been working as a prosecutor for three years. The other district court attorney was a 45-year-old male and has been working as a prosecutor for about twelve years. The 10-year age gap provided a more diverse population for this study since early 30's is typically considered to be young for lawyers as they are more inexperienced. Of the attorneys who worked in juvenile court, one male prosecutor was 36 years old and has been working as a prosecutor for five years. The other juvenile court attorney was a 45-year-old female and has been working as a prosecutor for about twenty years. Again, this age gap provided a more diverse population for this study. The attorney who worked in the county government offices special victim's unit was a 30-year-old male and has been working as a prosecutor for about 5 years. The racial and ethnic distribution of the subjects identified as either White or Latino, and this variable had no impact on the study's results.

#### *E. Selection Criteria*

Subjects were required to be a current employee of the county government office where I was a former intern. If they were a former prosecuting attorney or retired, then the information they provided would not be as useful because their perceptions of the American criminal justice system may be outdated. Prosecuting attorneys were chosen instead of defense attorney's or judges because it is prosecutors who decide whether to press criminal charges or not, and there is very little that academics know about prosecutorial decision-making. For this research, first-hand knowledge and experience was necessary among the population.

When asking my former supervisor if prosecuting attorneys would be willing to voluntarily participate in my study, I requested that they ask multiple prosecutors from each

department. This is because there was an assumption that none of the prosecutors made their decisions on a case the same way if they worked in a different unit. All the prosecutors who agreed to participate in the study and were referred to me by my former supervisor were selected to participate in this research as they met the selection criteria standards.

#### *F. Recruiting Process*

Participants in this study were recruited through personal connections by emailing the county government office and asking if prosecuting attorneys would be willing to participate in the study. Those who volunteered were referred to me personally by my former supervisor who shared my interest in researching prosecutors by word-of-mouth through email.

Coercing subjects to participate in the study was avoided by explicitly stating that participation was voluntary and that there would be no repercussions if they declined to be interviewed. The vocabulary and tone used to recruit participants was positive and relaxed in an effort to avoid coercion as well. Since this study is not an experiment, questions were asked only if they were necessary to provide valuable information for the research project. Subjects were informed that if they agreed to participate, they were allowed to stop the interview at any time or refuse to answer specific questions. This prevented participants from feeling forced into participation, and all subjects answered all interview questions willingly as a result. The interviews took place in each prosecuting attorney's office to ensure that they felt comfortable and answered the questions honestly.

#### *G. Data Management*

The data security risk for this research project was determined as level 2 since identifiable information was provided by subjects with the expectation that confidentiality would be maintained. This means that the data collected for this study was stored on a password protected computer with the latest anti-virus and security updates installed. Immediately following the transcription of each interview, the audio recordings were permanently deleted, and I used pseudo names when transcribing the interviews to ensure that the information remains confidential. As the researcher, I am the only person who is aware of the subject's real identity, and no identifying information will be included in the research write-up or presentation for this project with the exception of the subject's employment in the state of Colorado. The original signed copies of consent forms were scanned and saved as PDF files to my computer, and both the transcribed interviews and consent form PDF files were stored and saved in a locked file on my locked personal computer. All participants have agreed to the release of information discussed in this research.

#### *H. Interview Questions*

The objective of the interview questions was to understand the different decision-making processes that prosecutors do through each stage of the criminal justice system. For example, when police officers file a petition, prosecutors were asked how they decide whether to take the case or when to drop charges. If a prosecutor decides to take the case, they were asked how they decide what charges to file. If a police officer ever petitioned for charges that a prosecutor was not comfortable with, they were asked how they handled this situation and what made the charges uncomfortable for them.

In each stage of the criminal justice system, prosecutors were asked what factors they were considering specifically and if this included things like strength of the evidence or seriousness of the offense. Other questions asked how prosecutors decide when to offer a plea bargain and the details of this decision. Prosecutors were also invited to share their own opinions, beliefs, and judgments about current laws and whether justice plays a role when they are exercising discretion or making decisions on a case. If they agreed that justice played some role in their decision-making, they were asked to define what they thought justice was or what justice meant to them.

## RESULTS

After transcribing each interview, I took note of common themes that were found in the interview responses and will be referring to these themes as decision-making factors. The data collected from my interviews with prosecuting attorney's included several factors that each prosecutor considered during the decision-making process on a case. Below are the key findings from my data collection.

### *A. Victim and Defendant Trauma*

One participant in my interview described how there are certain aspects to being a prosecutor that are difficult, and one of those aspects is talking with victims and defendants who have experienced significant traumas and hardships in their lives. I will be labeling this factor as *victim and defendant trauma* as one of the factors that influences prosecutorial decision-making and discretion. Mary was one participant who discussed how even in cases where it is a victimless situation, her goal as a prosecutor is to get the defendant the help that they need and to figure out the best way to bring about that outcome. For example, if the offender has a long history of substance abuse, she wants to make sure that they have the necessary support to address those issues and to hopefully prevent future crimes from occurring.

Mary thinks that most people we encounter are not psychopaths who do not have feelings or emotions. She thinks often defendants are just people who have made mistakes or have had horrible things happen to them, and that this shapes their responses to the outside world and the choices that they go on to make. Mary explained that "looking at somebody's past and trying to understand that as well as looking at what their current needs are is a huge part of the

information that I want to know and affects the decision that I'm going to make on a case." She describes being a prosecutor as sometimes seeing the "worst parts of humanity," and understanding the trauma that either the victim or defendant has experienced helps her decide what outcome would best fit the needs of those involved.

Another participant in this study, Brandon, describes how having compassion towards victims and defendants is essential for him to be able to do a good job. In violent cases or cases where a serious assault has occurred, Brandon says he has to consider how on the one hand you have someone who did something really bad, but on the other hand the person who committed the crime has been traumatized too. It is not uncommon for defendants in juvenile court cases to not have parents, or they may have parents who are abusive and have subjected the defendant to horrible things. Brandon explains how "[prosecutors] have to work with the victims who need the most help, and then the defendants and the juveniles who do this, who themselves have been in difficult situations." Prosecutors like Brandon and Mary show that the trauma that victims and defendants have experienced in their lives plays a role in how they choose to make decisions on a case.

### *B. Community Safety*

A second factor that prosecutors in my study considered during the decision-making process was whether the community would be protected if they decided to release the defendant back into society. I will be referring to this factor as *community safety* and it was unanimous among the prosecutors interviewed for this study that community safety was one of the biggest contributing factors to the decisions each prosecutor made on a case. Mary explains how some

cases have proof beyond a reasonable doubt factually speaking, but the case simply is not worth prosecuting because the community likely would not agree that a crime had occurred or that the person would be a risk to community safety. For example, there was a case where a purebred dog had gotten out of a salon and was wandering down the street when a woman had picked the dog up and took it home. Apparently, the woman made no effort to figure out who the owner of the dog was until she saw that the dog had been missing on the news. She then contacted the police department and reunited the puppy with its owner. Mary says that cases like this are not worth pursuing because the community likely would not agree that a crime had occurred.

Collin was a participant in this study who was asked what being fair meant to him as a prosecutor, and his response was that being fair means “making sure that the community is protected, and it is making sure that each defendant receives whatever services they need.” Collin explains how some defendants are different because they pose such a great risk to the community, and so sometimes prison is the only solution to those cases where community protection would be compromised.

Allison was a participant who explained that being a fair and ethical prosecutor meant remembering that her duty is not to seek convictions but to seek justice, and she thinks justice comes in many forms. She explains that a prosecutor’s job is to “protect the community” and to make sure that they are “addressing the harm to the victim and addressing the needs of the offender.” Allison stressed how important it is to make sure that as a prosecutor she is never losing sight of those three goals.

To elaborate on community safety as a factor in her decision-making process, Allison talked about a case where the offender was a student at a high school in Colorado and the victim was the sister of a girl whom he had become obsessed with. The offender in this case was a 15-



year-old juvenile who created a kill list involving multiple people. He had stolen his mom's car and drove to the victim's apartment where he stabbed the victim to death in the entryway of her apartment, and the sister whom he was obsessed with was in the shower during this time. After the offender had left the victim's apartment, he proceeded to drive to the house of the next person on his kill list where law enforcement had stopped him before he had time to harm anyone else. Allison explained that because of Colorado state laws for juveniles "at some point in time [the offender] is coming back into the community, and we asked ourselves, 'what do we need to do to give the community the best chance when that happens?'" She says that in this case her primary goal was to protect the community from future offenses by this particular individual, and to make sure that this individual gets the assistance they need so that they are not committing these types of offenses in the future.

Brandon discussed how community safety is essential to consider in cases where a serious crime has been committed. He says that some cases involve very serious situations and that as a prosecutor he must "protect the community" when those crimes occur. Brandon explains that doing the right thing when prosecuting a case includes a combination of addressing what the problem is or what is causing delinquency and how to address those issues. However, if the crime is serious enough to where it impacts the community as a whole, then he says that his goal is to protect the community because the needs of the offender is not his only consideration when making decisions on a case.

### *C. Seriousness of the Offense*

Another factor that each prosecutor in my study considered during the decision-making

process was the severity of the crime that was committed. I will be labeling this factor as *seriousness of the offense* as one of the factors that influences prosecutorial decision-making and discretion. This factor has been recognized by scholars who do criminological research using the focal concerns perspective and by other researchers who find that prosecutors will assess the likelihood that a case will be convicted using the seriousness of the offense as a factor (Spohn 2018). The seriousness of the offense was also discussed during my interviews with prosecutors at a county government office in Colorado.

Allison was a participant in this study who discussed how some cases are too violent for her to consider offering a plea deal. For example, in homicide cases she explained that it's far less likely she will consider making an offer to a defendant because of the "seriousness of what has been done." The defendant has "taken the life of another person and that person can never come back and their family can never get them back." Allison explains that the fact that a defendant has taken a life creates a situation in which she would have grave concerns about the safety of the community where that person would reside. In contrast to extremely violent cases, Allison discussed that plea bargaining is necessary and that it's not possible for every single case to go to trial. She thinks the vast majority of cases are ones where people have made a mistake, and so she is more likely to plea out those cases because they are less serious in nature.

Mary supported this idea that the seriousness of the offense plays a role in whether a prosecutor is going to offer a plea deal. She explains "in murder cases I'm probably not going to make an offer" whereas less serious crimes such as a drug charge is more likely to result in a plea bargain. Mary says that even crimes like burglaries and robberies are more likely than not to be given some kind of plea offer. However, an exception to the rule would be arson cases and that these types of cases will typically not get an offer either. Mary says that if she is going to

consider an offer on an arson case, then the defendant needs to give her a compelling reason or provide more information about themselves as to why she should do that because the crime is considered to be far more serious.

Brandon also supported this idea that the seriousness of the offense plays a role in whether a prosecutor is going to offer a plea deal. He says that if the crime is a serious crime and it affects the community in a significant way, then he is more likely to “introduce additional elements like punishment,” but that ultimately, he aims to address problems of delinquency in a rehabilitative way. For example, if a juvenile is a serial sex offender, Brandon considers those cases to be very serious and its necessary to introduce sanctions in those cases in order to protect the community. However, in most cases Brandon explains that he wants to get juvenile sex offenders to treatment because it is “very, very successful” and “the recidivism rate of juvenile sex offenders who have been treated is much lower than average.”

#### *D. Victim's Desires*

A fourth factor that each prosecutor in my study considered during the decision-making process was asking the victims in their cases what sort of outcome they would like to see happen to the defendant. I will be referring to this factor as the *victim's desires* and is one of the considerations that prosecutors take into account when they are making decisions on a case or exercising discretion. This factor has also been recognized by scholars who find that prosecutors who consider the victim's desires depends almost entirely on the type of offense that was committed against the victim (Harding 2019). The participants who were interviewed in my study have also discussed how victim's impact their input on a case, but that this also depends on

the crime that was committed.

Mary described a kidnapping case that came across her desk and she asked the court for more time to file charges so that she could sit down and talk with the victim because the story was confusing. She explains how it was not clear that the case was actually a kidnapping case, and after talking with the victim she decided to drop the case entirely because the victim did not want to press any charges. In cases of domestic violence, however, Mary explains that there is basically no discretion that prosecutors can use in the state of Colorado because the legislature dictates that prosecutors are obligated to pursue domestic violence cases regardless of what the victim wants as an outcome. She explains that the reason for this is really because of the nature of domestic violence and because of the “dynamics of that relationship” between the victim and defendant. Scholars have found that in cases involving domestic violence, prosecutors will be less likely to consider a victim’s desire to set the case aside but will still consider their willingness to testify (Harding 2019). This suggests that it is most likely because of the relationship between a victim and offender in domestic violence cases that prosecutors in most states are compelled to ignore the victim’s desires to not file charges, and is the same sentiment that Mary discussed during the interview.

Brandon discussed how in cases that involve serious offenses it’s not enough to only look at the needs of the juvenile, but to consider what the victim thinks should happen to the defendant as well. He gave an example of a case where the victim was so horribly assaulted by a juvenile that they are now going to be living the rest of their life with a disability. Brandon says that in cases similar to this “the moral compass kicks in and you’re like, ‘I’m sorry, but you don’t get to permanently disable a person without there being a consequence.’” As a prosecutor, Brandon thinks that it’s important to consider the kind of message he is sending when handling

serious cases, and part of that message includes letting the victims know that they are being heard and that the offender won't simply get away with the harm that they have caused to the victim.

While not related to the victim's *desires* directly, Nathan was a participant in this study who discussed how the victim does play a role in his decision-making process in general. Nathan explains that as a prosecutor "[we] can't be blind, you know? Not every victim is blameless in a case, and sometimes they play a role." He says that he sees this most often in cases where there has been a fistfight, "someone says something and someone says something else, then someone says something really egregious, and the other person will take matters into their own hands and go assault that person." In cases like this, Nathan explains that as a prosecutor it is necessary to understand the role that the victim played that led to the assault in the first place when deciding what charges to file and how to move forward with the case.

#### *E. Consistency*

A final factor that prosecutors in my study considered during the decision-making process was the equal treatment of defendants in order to maintain consistency when charging a case. I will be referring to this as the *consistency* factor and it is one of the considerations that prosecutors take into account when they are making decisions on a case or exercising discretion. Mary explains that it's important when working on a case to "not only look at the case itself, but also make sure that we're being consistent across the board so that people are being treated equally and fairly." She says that there are always going to be outliers in any circumstances, but that ultimately it is important to maintain consistency when filing charges.

Allison also supports this idea that you have to have some consistency in order to make sure that people are being treated fairly. She explains how there is a kind of “going rate” where generally speaking “this offense with these factors is going to equal this resolution” and how this is necessary to have some consistency, regardless of any other personal factors. However, Allison, like Mary, says that as a prosecutor you have to know when to deviate from that standard when it is appropriate.

#### *F. The Role of Justice*

In addition to the factors that prosecutors consider when exercising their discretion and making decisions on a case, they were also asked if justice plays a role in their decision-making and what this means to them. Some participants mentioned justice on their own when discussing other topics and were asked to elaborate on how they would define this term or what justice meant to them. While there was no unanimous definition for justice, and some participants were unable to give a clear answer on how to define justice or what they thought justice looks like, most prosecutors who were interviewed talked about justice as primarily pursuing community safety. One prosecutor in particular stated explicitly that pursuing justice should be the goal of the entire American criminal justice system.

Brandon mentioned early on in the interview that “you’re helping find justice for somebody who’s been aggrieved and holding someone accountable for what they’ve done.” After asking Brandon what he thought finding justice for someone looks like he stated, “sometimes justice is what the victim thinks and sometimes it’s way more than what the victim thinks.” He says that sometimes victims can be aggressive in what they would like to see happen

to a defendant, stating “sometimes the victim wants, you know, the death penalty for a theft case or something. And you’re like, no. That’s not justice. We’re not going to give somebody, you know, six years in jail because they stole.” Brandon seems to be suggesting that proportionality is a part of justice, but that also what the victim thinks is important for bringing about a just outcome as well. He says that the decisions he makes are on a case-by-case analysis. Brandon concluded his explanation by describing justice as “often feeling like a compromise” and that this is because he is “trying to balance the needs of the juvenile and the rehabilitation of the juvenile with the fact that they really harm society.”

When Mary was asked about justice, she said that she thinks it’s important to look at the victim and defendant who are involved in the case and to humanize them by trying to understand why that crime happened in the first place. Mary explains that she thinks “justice is both some level of accountability for what happened, but also a real focus on recognizing the humanity of everyone that’s involved.” She says, “I think it’s really easy to focus on [the defendant] as like, this bad, evil person who did something terrible” but that once she gets more information about the person who committed the crime, it’s impossible not to recognize that they are someone who has also had awful things happen to them. She thinks that people are not defined by the worst thing they have ever done and that sometimes it is difficult to decide what to do with a defendant. Mary explains that the decisions she makes are not always strictly by the book, and that it’s a matter of balancing all the different factors that come into play.

Allison discussed justice during the middle of the interview and stated that she thinks this should be the goal of the criminal justice system because there is no duty to pursue convictions. She says that her duty is to seek justice, and she thinks justice comes in many ways. This part of Allison’s interview was twofold and is the reason why her statements have been included in

multiple sections. She explains that a prosecutor's job is to "protect the community" and that every prosecutor should be seeking justice because "convictions are never justice if the individual is innocent, and a conviction might not be justice even in a situation where an individual is guilty." She thinks that you can address the harm in some other way, whether that be through diversion processes or through a deferred sentence process which holds them accountable without having a permanent conviction on the defendant's record. So, she is both describing justice as what should be the goal of every prosecutor and the criminal justice system in general, but also defining justice as community safety. Allison also says that she doesn't think making decisions on a case can be strictly by the book for any prosecutor if their goal is to pursue justice. She explains that "there's a general vibe of what type of offer you might make in a particular case, right? But every case is individual, every defendant is individual, and every circumstance is individual. So, you have to be willing to recognize the difference in cases and be able to justify why you're differing from what might be the standard approach."

Nathan described pursuing justice as "stepping into the defendant's shoes" to try to understand the situation that occurred and the motivations or experiences that that person is going through. Using assault cases as an example, he says that he asks, "how was this person experiencing it that led to that assault in terms of our pursuit of justice, right?" He explains that if someone is verbally attacking someone else and that person assaults the person who is being verbally abusive, he is hesitant about moving forward with the case because there could be a better option available. It may not be that the case should result in a criminal conviction, but rather restorative should take place where both the victim and defendant sit down and talk about why the situation got heated in the first place. Again, Nathan puts emphasis on understanding the motivations behind the defendant's action to be in better position to "make important decisions



about their case and to do the right thing.”

Collin was less forthcoming in the beginning of the interview about describing what justice meant to him personally as a prosecutor and deferred to the American Bar Association standards on the minimum requirements for charging. He quoted that you have ethical duties as a prosecutor to not charge a case in the interest of justice as stated by the American Bar Association. Later in the interview, Collin had made several comments about “doing the right thing” in relation to public safety. I asked Collin if he thought justice meant making sure that the community is protected, and he responded that this is correct and that it is also one of his primary considerations. I followed up by asking Collin what he thought the goal of the criminal justice system is, and he stated, “it is to be able to provide community safety and do the right thing for justice to be achieved.” He explains that some cases go through diversion while others are dismissed and that it all simply depends on the tools and information that he has available to him as a prosecutor.

While not originally part of my questionnaire, multiple prosecutors talked about fairness during the interviews and were asked to elaborate more on what they think it means to be fair. Collin explained that being fair means being “one-hundred percent honest, all of the time” and “one-hundred percent transparent, all of the time” whether this be with defense counsel or with a judge. He explains that being fair is both treating people similarly and making sure that the community is protected at the same time, and that the goal of the criminal justice system is “to be fair, and to be just.”

Brandon discussed how he thinks when it comes to sentencing that some judges in the county where he works are very “defense bended.” He explained that the judges in the particular county where he works will “bend over backwards to reduce sentences, eliminate charges, and

find in favor of the defense on every possible issue you can imagine.” Brandon says that there are some judges who don’t do this, and that they are much more “fair minded.” When Brandon was asked to elaborate more on what he meant by this, he explained how some people (judges) are more fair about saying they are going to do what the law says because it is what the law says. He concluded that “some people will distort the law in order to find for the defense” and how this is “very frustrating to deal with.”

### *G. Social Consequences*

Finally, all subjects were asked if they had ever experienced social repercussions from colleagues or others after making decisions on a case. Every participant responded positively that they have never had any experiences like this and that the county government office where they worked was great about allowing prosecuting attorneys to say no. Mary explained, “we’ve certainly had vigorous debates about things, but I can’t think of something that’s caused such a big rift that, like, people were actually mad at one another.” Mary says, “people are really really respectful,” so for those who have been working on a case since day one and who have looked at all the evidence, people are generous about letting them make their own call. When Brandon was asked if he had ever experienced any social consequences he stated, “no, never. I’m very happy to say that.”

## LIMITATIONS

More research on prosecutorial decision-making should be conducted with a larger sample size using a sampling method that is more generalizable. This is to guarantee that the conclusions hold true for the prosecuting attorney population as a whole. The five interviews that were conducted for this research is not enough to produce statistically significant results for the population, and more interviews with prosecuting attorneys is necessary. Snowball sampling is also limited as a sampling method because it is often not representative of the population. However, the prosecuting attorney population is one that is difficult to research and get access to, so having personal connections or networks to this population is helpful for financial and time constraints.

All the participants interviewed for this study also worked in the same county government office in Colorado, which may have produced a bias in the study due to the political climate of the community. For future research, more interviews would need to be conducted with several prosecutors from several different counties or jurisdictions. This is to ensure that there is more diversity in the study so that the politics of one specific community does not impact the study.

Another limitation to this study is that it is possible for social desirability bias to have occurred. Sometimes participants in research studies will give answers to questions that make others view them more favorably. Usually when this happens the participants will report more “good” behavior and report less “bad” behavior, or behavior that is considered undesirable. Since the prosecutors in this study were informed that they would be asked specifically about how they make decisions and exercise discretion on a case, it is likely that they gave answers which made them look good and fair to the general public. To avoid this, future researchers may want to

consider providing less of a lead into the content of the interview.

Despite these limitations, this research is still valuable to current literature on prosecutorial decision-making and discretion because it provides rich information about a prosecutor's opinions, beliefs, and judgments about specific concepts and current laws. My findings also contribute by identifying new factors and describing how they play a role in a prosecutors decision-making process. Research on prosecutorial decision-making matters because it is the first step to promoting more nuanced prosecuting and may be used to further understand harsh sentencings in America's criminal justice system.

## CONCLUSION

The purpose of this thesis is to examine the decision-making processes of prosecutors and how they exercise discretion within the United States criminal justice system. Prosecutorial discretion is the power that prosecutor's hold when deciding whether to punish and how to punish a person who has violated the law. Prosecuting attorneys were chosen instead of defense attorney's or judges because it is prosecutors who decide whether to press criminal charges or not, and there is very little that academics know about prosecutorial decision-making. This study focused on prosecutors who worked at a local county government office in the state of Colorado due to financial and time restrictions. Although this research collected data from a small sample size, the findings may be applied to the American criminal justice system in general to better the development of legal standards for prosecutors.

This research project was conducted by interviewing five prosecutors who worked at a county government office where I was a former intern in the state of Colorado, and subjects were required to be a current employee of the county government office. If they were a former prosecuting attorney or retired, then the information they provided would not be as useful because their perceptions of the American criminal justice system may be outdated and how they make decisions on a case may not be relevant to how the criminal justice system operates today. For this research, first-hand knowledge and experience was necessary among the population to understand how prosecutors make decisions on a case and exercise their discretion. The participants provided rich information about the factors that play a role in their decision-making as well as their own opinions, beliefs, and judgments about specific concepts and current laws.

The interviews were transcribed immediately following their completion, and emerging themes and factors were analyzed for a final analysis. The factors that prosecutors consider

during the decision-making process that were identified included: victim and defendant trauma, community safety, seriousness of the offense, a victim's desires, and consistency. In addition to the factors that prosecutors consider when exercising their discretion and making decisions on a case, they were also asked if justice plays a role in their decision-making and what this means to them. While there was no unanimous definition for what the prosecutors think justice is, most prosecutors talked about justice as primarily pursuing community safety. Multiple prosecutors also discussed fairness during the interviews and were asked to elaborate more on what they think it means to be fair, although this was not originally part of my questionnaire.

For *victim and defendant trauma*, I found that some prosecutors think it is crucial to look at the past experiences of victims and defendants because it affects the decision they are going to make on that case. For example, if the offender has a long history of substance abuse, some prosecutors want to make sure that the offender has the necessary support to address those issues in order to prevent future crimes from occurring. The participants described how there are aspects to being a prosecutor that are difficult, and one of those aspects is talking with victims and defendants who have experienced significant traumas and hardships in their lives.

For the *community safety* factor, I found that it was unanimous among the prosecutors interviewed for this study that community safety was one of the biggest contributing factors to the decisions each prosecutor made on a case. Each prosecutor either described their goal as making sure that the community is protected or that they think a case is not worth pursuing because the community likely would not agree that the offender would be a risk to community safety. For example, there was a case where a dog had gotten out of a salon and was wandering down the street when a woman had picked the dog up and took it home. Apparently, the woman made no effort to figure out who the owner of the dog was until she saw that the dog had been

missing on the news. She then contacted the police department and reunited the puppy with its owner. One prosecutor stated that cases like this are not worth pursuing because the community likely would not agree that a crime had occurred.

For *seriousness of the offense*, I found that the severity of the crime committed will largely dictate whether a prosecutor chooses to offer a plea bargain or take a case to trial. Participants stated that if the crime was serious enough to where it impacted the community in a significant way, then they are more likely to introduce some form of punishment. However, for lower-level offenses such as a drug charge, prosecutors are more likely to plea out these types of cases because they are less serious in nature.

For the *victim's desires* factor, I found that for a prosecutor to consider the victim's desired outcome on a case depends almost entirely on the type of offense that was committed against the victim. For example, in cases of domestic violence that there is basically no discretion that prosecutors can use in the state of Colorado because the legislature dictates that prosecutors are obligated to pursue domestic violence cases regardless of what the victim wants as an outcome. However, prosecutors have declined to pursue specific cases because the victim did not want to press any charges against the defendant.

For *consistency* as a final factor, I found that prosecutor will consider the equal treatment of defendants in order to maintain consistency when charging a case. Some prosecutors maintain that you have to have some consistency when prosecuting in order to make sure that people are being treated fairly in the criminal justice system, regardless of any other personal factors. However, they also recognize that it is important to know when to deviate from the standard approach when it is appropriate.

The data collected in this research project contributes to the literature on prosecutorial decision-making processes. There is very little that academics know about prosecutorial decision-making since it is difficult for scholars to find prosecuting attorneys who are willing to be subjected to the kind of scholarly scrutiny that is necessary to understand how cases progress through the American criminal justice system. As a result, current literature is limited in its knowledge of prosecutorial decision-making processes that extend beyond mere legalities. This data may be used to understand what causes such extreme punishments in America's criminal justice system and provides a steppingstone for policymakers who aim to promote more nuanced prosecuting.



## APPENDICES

### A. Interview Guide

Prosecutor's information:

How old are you?

How long have you been working as a prosecutor?

- 1.) When the police file a petition, how do you decide whether to take the case or not?
  - a. How do you decide when to drop charges?
  - b. If the case is taken, how do you decide which charges to file?
    - i. Is this based on departmental policy?
    - ii. Or, do you consider leniency?
- 2.) Has a police officer ever petitioned for charges that you were not comfortable with?
  - a. How did you handle this situation?
  - b. What made the charges uncomfortable for you?
- 3.) How do you decide when to offer a plea bargain?
- 4.) In each of these stages:
  - a. Did you experience any social consequences, either from colleagues or others?
  - b. How did you feel?
  - c. What factors were you considering?
    - i. Strength of the evidence?
    - ii. Seriousness of the offense?
    - iii. Defendant's characteristics?
    - iv. Victims desires and characteristics?
- 5.) Finally, how would you define what *justice* is?
  - a. Do you think this plays a role when you are exercising discretion or making decisions?

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