

## PROSECUTING IN THE SHADOW OF THE JURY

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**ABSTRACT**—This Article offers an unprecedented empirical window into prosecutorial discretion, drawing on research between 2013 and 2017. The central finding is that jurors play a vital role in federal prosecutors' decision-making, professional identities, and formulations of justice. This is because even the remote possibility of lay scrutiny creates an opening for prosecutors to make commonsense assessments of (1) the evidence in their cases, (2) the character of witnesses, defendants, and victims, and (3) their own moral and professional character as public servants. By facilitating explicit consideration of the fairness of their cases from a public vantage point, I argue that imagined jurors serve as an ethical resource for prosecutors.

Part I reviews contemporary legal and interdisciplinary research on the declining number of jury trials and prosecutorial discretion in the United States. Part II describes the ethnographic research method deployed in this case study. Part III presents the empirical findings of this study with attention to how hypothetical jurors inform prosecutors' evaluations of their cases, evidence, investigations, and plea agreement discussions. Part IV considers several explanations for hypothetical jurors' perceived relevance to prosecutors' work beyond their instrumental and strategic value. Part V concludes that the United States Attorney's Office that is the subject of this study models the democratizing potential of lay decision-makers, even in hypothetical form. This finding offers a powerful rationale for fortifying the United States jury system and brings a novel perspective to the study of prosecutorial ethics.

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Rebecca Roiphe, Ellen Yaroshefsky, Samuel Levine, Maybell Romero, Jessica Roth, Lauren Ouziel, Cynthia Godsoe, Peter Joy, Tamara Lave, Janet Moore, Jenny Roberts, Bennett Gershman, Jennifer Laurin, Anna Roberts, Carissa Byrne Hessick, Andrew Davies, Sanjay Chhablani, Lawrence Solan, Robin West, Gregory Klass, Leslie Gerwin, Michael Frisch, John Mikhail, Naomi Mezey, Girardeau Spann, Louis Michael Seidman, Ann Southworth, Stephen Gillers, Shu-Yi Oei, Samuel Issacharoff, Kelly McKowen, the Georgetown University Law Center Fellows Seminar and Workshop, the New York University Lawyering Scholarship Colloquium, and the Princeton University Program in Law and Public Affairs. I would also like to thank Meredith McBride, Kendra Doty, Josh Cowin, the editorial staff of the *Northwestern University Law Review*, and an anonymous peer reviewer. This research was supported in part by grants from the Fulbright Foundation and the National Science Foundation (Grant SES-1535350).

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## INTRODUCTION

Despite the infrequency of jury trials in the United States,<sup>1</sup> references to jurors pervade federal prosecutors' work from the earliest stages of their case preparation. This includes prosecutors' discretion to decline cases, modify investigations, indict defendants, and encourage guilty pleas. These

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<sup>1</sup> See DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 327–35 (2016) (providing statistics showing the decline in jury trials from 1962–2013); SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 25–48 (2016) (describing how the jury's role has declined in America as compared to its more powerful role in the eighteenth century); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255, 1257–59 (2005) (including data that shows the steady decline in jury trials in both state and federal courts).

references are pervasive because the mere possibility that a case will proceed to trial prompts attorneys to construct the pursuit of justice around the imperative of appealing to the common sense of an imagined public.

This consideration of hypothetical jurors is underappreciated by scholars. Many commentators assume that the decline in the overall number of trials necessarily diminishes lay decision-makers' impact on the legal system.<sup>2</sup> Without disputing this view, this Article contributes much-needed nuance by examining the role that jurors play in the organization of prosecutions in the United States and, more specifically, as an ethical resource for federal prosecutors. Its point of departure is the decline of the American jury trial. Although practitioners and legal scholars have bemoaned this fact and its implications for individual defendants,<sup>3</sup> there remains dispute about the influence of the *right* to a jury trial on the operation of our justice system.

Emerging from this broader project, this Article is the first to document the presence of jurors in federal prosecutors' decision-making as they assess evidence, witnesses, and ongoing investigations with colleagues and supervisors. Prosecutors use hypothetical jurors as a strategic resource to anticipate potential trial jurors' reactions to evidence, arguments, and theories of the case. Many also rely on hypothetical jurors to present impersonal critiques of supervisors' approaches to cases and evidence. In the process of invoking jurors' perspectives, a number of prosecutors give expression to justice considerations that reorient their exercises of discretion. They also benefit from the democratizing potential of hypothetical jurors, which broaden the knowledge repertoires deemed relevant to their work and prompt collaborative decision-making.<sup>4</sup>

This Article proceeds in five Parts. Following this Introduction, Part I offers an overview of the legal scholarship that bears on this study, focusing on empirical attention to declining criminal jury trial numbers in the United States and the concurrent rise in plea agreement dispositions. Part II describes the qualitative research methods deployed in this research. Part III presents the Article's central finding that Assistant United States Attorneys

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<sup>2</sup> See, e.g., Robert M. Ackerman, *Vanishing Trial, Vanishing Community?: The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 176–77 (linking the rarity of jury trials to the perception that the judicial branch of government is elitist and remote from citizen participation).

<sup>3</sup> See, e.g., Stephan Landsman, *So What?: Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 974–76 (2004) (speculating about changes in the legal landscape, such as the privatization of dispute resolution or a move toward an inquisitorial system, in the event that American trials were to disappear).

<sup>4</sup> See *infra* Part IV.

(AUSAs)<sup>5</sup> assess, adjust, and prepare their cases with continual reference to hypothetical jurors' perspectives. This data is analyzed in Part IV with attention to factors that contribute to jurors' salience in prosecutors' work. Finally, Part V provides recommendations for integrating hypothetical jurors and potential areas for further study.

## I. REVIEW OF RELEVANT LITERATURE

This inquiry into how federal prosecutors reference hypothetical jurors builds on prior empirical and theoretical scholarship exploring the evolution of the jury trial and the role of the prosecutor. To appreciate the implications of the present study and how it adds nuance to ongoing scholarly discussions, it is helpful to consider recent developments in the prevalence of jury trials and prosecutorial discretion.

### A. *Contributing Factors and Effects of Declining Jury Trial Numbers*

Legal and interdisciplinary scholars have documented a steady decline in federal criminal and civil jury trials over the last century.<sup>6</sup> In 2010, 97.4% of federal criminal cases were resolved by guilty pleas rather than bench or jury trials.<sup>7</sup> In 2017, 2.15% of federal criminal defendants that went to trial had their cases decided by juries.<sup>8</sup> Facing a similar, but more precipitous decline, 0.76% of federal civil cases were resolved by jury trials in 2015,<sup>9</sup>

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<sup>5</sup> I use the "AUSA" acronym and titles "federal prosecutor" and "prosecutor" interchangeably, in conformity with colloquial usage.

<sup>6</sup> See, e.g., ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 82–88 (2009); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460–65 (2004) (focusing on civil litigation).

<sup>7</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.5.22.2010 (2010), <https://www.albany.edu/sourcebook/pdf/t5222010.pdf> [<https://perma.cc/JJ9B-7D5S>] (showing that the remaining cases that resulted in conviction were resolved by jury trial (2.3%) or bench trial (0.29%)).

<sup>8</sup> ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2017, at tbl.D-4 (2017), [http://www.uscourts.gov/sites/default/files/data\\_tables/fjcs\\_d4\\_0331.2017.pdf](http://www.uscourts.gov/sites/default/files/data_tables/fjcs_d4_0331.2017.pdf) [<https://perma.cc/84AM-LP77>] (showing that, out of 75,344 total reported federal criminal cases that reached trial in 2017 (resulting in a conviction or an acquittal), 1618 were tried by juries).

<sup>9</sup> ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2015, at tbl.4.10 (2015), [http://www.uscourts.gov/sites/default/files/table4.10\\_0.pdf](http://www.uscourts.gov/sites/default/files/table4.10_0.pdf) [<https://perma.cc/CP2U-MJAH>] (showing that, out of 274,362 total reported federal civil cases that were terminated in fiscal year 2015 (with the exception of land condemnation cases), 2091 were tried by juries).

falling to 0.65% in 2017,<sup>10</sup> and 0.60% in 2018.<sup>11</sup> The jury trial rate for civil cases has remained below 1% since 2005.<sup>12</sup> Mirroring this trend, the number of citizens summoned to serve as federal jurors between 2006 and 2016 declined by 37%.<sup>13</sup>

State criminal and civil jury trials have followed a similar trajectory. Based on a 2009 stratified sample of forty of the largest seventy-five counties in the country, data collected by the Bureau of Justice Statistics (BJS) shows that 2% of felony convictions result from trials,<sup>14</sup> with the rest obtained through guilty pleas.<sup>15</sup> Corroborating this finding, a survey of state criminal and civil dispositions in fifteen and sixteen jurisdictions, respectively, reported that 1.1% of criminal cases and 0.5% of civil cases were resolved by jury trials in 2009.<sup>16</sup>

In light of the downward trend these statistics reveal, researchers have sought explanations for the decline in jury trials. In so doing, they have paired empirical studies with claims about the implications of diminished lay participation in the legal system in both the civil and criminal contexts. In the Sections that follow, I will examine each facet of the legal system in turn.

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<sup>10</sup> ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2017, at tbl.C-4 (2017), [https://www.uscourts.gov/sites/default/files/data\\_tables/fjcs\\_c4\\_0331.2017.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fjcs_c4_0331.2017.pdf) [https://perma.cc/ZM9F-Q7QF] (showing that, out of the 286,738 total reported federal civil cases that were terminated during the twelve-month period ending March 31, 2017 (with the exception of land condemnation cases), 1878 were tried by juries).

<sup>11</sup> ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-4—U.S. DISTRICT COURT—CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS (MARCH 31, 2018), at tbl.C-4 (2018), <https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2018/03/31> [https://perma.cc/F496-UK4C] (showing that, out of the 286,585 total reported federal civil cases that were terminated during the twelve-month period ending March 31, 2018 (with the exception of land condemnation cases), 1706 were tried by juries).

<sup>12</sup> MARC GALANTER & ANGELA FROZENA, POUND CIVIL JUSTICE INST., THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS 3–4 (2011), <http://www.poundinstitute.org/sites/default/files/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf> [https://perma.cc/E26Z-CY7R].

<sup>13</sup> John Gramlich, *Jury Duty Is Rare, but Most Americans See It as Part of Good Citizenship*, PEW RESEARCH CTR. (Aug. 24, 2017), <http://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship> [https://perma.cc/Y3US-ZUJ7] (noting that in 2006, 307,204 citizens were summoned for jury service—a figure that declined to 194,211 citizens summoned in 2016).

<sup>14</sup> BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES, at tbl.21 (Dec. 2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [https://perma.cc/96VU-Q2XJ].

<sup>15</sup> *See id.*

<sup>16</sup> VICTOR E. FLANGO & THOMAS M. CLARKE, REIMAGINING COURTS: A DESIGN FOR THE TWENTY-FIRST CENTURY 68 tbl.4A1, 69 tbl.4A2 (2015) (capturing the declining percentage of case dispositions by bench and jury trial between 1976 and 2009).

*1. The Decline of the Jury Trial in Civil Litigation*

Scholars have attributed the trend away from civil jury trials to the expansion of pretrial procedure, growing and changing caseloads, pleading reform, and the proliferation of private alternatives to public dispute resolution.<sup>17</sup> In response to claims that pleading requirements fail to satisfy their notice-and-disclosure function for civil litigants, the drafters of the Federal Rules of Civil Procedure implemented a series of pretrial discovery techniques that effectively replaced trials.<sup>18</sup> Derived from English nonjury equity courts, these discovery procedures allow parties to compel the production of paper (and now, electronic) documents<sup>19</sup> and require another party, under oath, to answer oral questions<sup>20</sup> and respond to written questions.<sup>21</sup>

The scope of discovery was expanded in 1946 when Rule 26 was amended to encompass material “reasonably calculated to lead to the discovery of admissible evidence” and again in 1970 to include “relevant” material, defined broadly in the Supreme Court’s decision in *Oppenheimer Fund, Inc. v. Sanders*.<sup>22</sup> In response to critics of liberal discovery rules and growing dockets, amendments in the 1970s and 1980s increased judges’ managerial power, allowing the court to limit discovery requests deemed burdensome or wasteful of parties’ resources.<sup>23</sup> This included a revision of Rule 16 that made “facilitating settlement” an explicit aim of pretrial conferences.<sup>24</sup> In practice, the discovery rules thus did more to prepare parties for settlement than for trial by laying out the strengths and weaknesses of cases to the parties involved.<sup>25</sup>

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<sup>17</sup> See, e.g., HALE, *supra* note 1, at 335–41.

<sup>18</sup> John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 542–45 (2012). Reference to “discovery” encompasses the methods parties use to obtain evidence from one another—including requests for the production of documents, answers to interrogatories, etc.—under the rules of civil procedure.

<sup>19</sup> FED. R. CIV. P. 26(b)(1).

<sup>20</sup> *Id.* 30(a)(1).

<sup>21</sup> *Id.* 33(b)(3).

<sup>22</sup> *Id.* 26(b)(1); *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (“The key phrase in this definition—‘relevant to the subject matter involved in the pending action’—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” (quoting *Hickman v. Taylor*, 329 U.S. 495, 503 (1947))).

<sup>23</sup> SCOTT DODSON, *NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS?* 33 (2013). Those who study “managerial judging” have underscored judges’ unreviewable discretion to resolve cases with an eye toward efficiency rather than the benefits of public adjudication. See, e.g., Judith Resnik, *Managerial Judges: The Potential Costs*, 45 PUB. ADM. REV. 686, 688–89 (1985).

<sup>24</sup> FED. R. CIV. P. 16(a)(5).

<sup>25</sup> Langbein, *supra* note 18, at 547–48.

Declining trial numbers have also been attributed to the growth in civil case filings and shifting judicial caseload during the twentieth century. This has included, for example, the rise of employment discrimination and other civil rights cases, which are more likely to be resolved by summary judgment than the tort and contract cases they replaced.<sup>26</sup> Furthermore, the increasing complexity of and preparation time required by civil litigation often lead parties to rely on extensive discovery rather than long-postponed trials to glean facts from the various institutional litigants who may be involved in cases.<sup>27</sup> In federal court, others have noted that growing *criminal* caseloads and the Speedy Trial Act's call for the prompt resolution of such cases create additional pressure to dispose of civil matters before trial.<sup>28</sup>

The heightened pleading standard after *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* may also reduce the number of civil jury and bench trials.<sup>29</sup> In the wake of these decisions, legal scholars have posited that the Court's higher "plausibility standard" for relief will lead to the dismissal of weak cases that would benefit from discovery and proceed to trial.<sup>30</sup> Some have demonstrated this claim empirically, focusing on *Iqbal*'s adverse effects on particular litigants (i.e., individuals as opposed to government and corporate actors)<sup>31</sup> and impact on civil rights cases.<sup>32</sup> Though the

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<sup>26</sup> HALE, *supra* note 1, at 336–37.

<sup>27</sup> Langbein, *supra* note 18, at 571.

<sup>28</sup> See, e.g., Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 48–51 (1996). The Speedy Trial Act of 1974, which was amended in 1979, provides that a trial must begin within seventy days from the date an indictment or information is filed, or a defendant against whom a charge is pending appears before an officer of the court. 18 U.S.C. § 3161(c)(1).

<sup>29</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that the parallel conduct of telecommunications companies—which did not compete with one another in particular markets—without evidence of an agreement, was insufficient to state a claim of conspiracy under the Sherman Antitrust Act); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (dismissing a complaint for purposeful and unlawful discrimination on the grounds that it did not demonstrate that the petitioners adopted and implemented a post-9/11 detention policy for the purpose of discriminating based on race, religion, or national origin).

<sup>30</sup> See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 870–71 (2010) (writing, with respect to *Iqbal*, that the Court dismisses “not only clearly meritless suits, but also suits that might merely be described as weak but that are not meritless (i.e., suits with too low a probability of trial success). An example is a negligence case in which the defendant’s conduct is within the range that a jury could properly deem unreasonable . . .”); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 838 (2010) (“The new procedural regime would exchange our current false positives for an unknown number of false negatives.”).

<sup>31</sup> See Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122 (2015) (noting that between 2006 and 2010 individual plaintiffs were more likely to have their cases dismissed than governmental and corporate plaintiffs).

<sup>32</sup> See, e.g., Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 241 (2011–2012) (noting that

Administrative Office of the United States Courts identifies cases that are terminated before trial, it does not provide additional information that would indicate how many of these cases settle.<sup>33</sup> Further empirical research is thus required to differentiate cases that are dismissed, resolved by summary judgment or judgments on default, or resolved through other private agreements in the wake of *Twombly* and *Iqbal*.<sup>34</sup>

Finally, scholars have also observed the plethora of evolving dispute resolution techniques that have replaced trials.<sup>35</sup> This includes bureaucratic organizations' internalization of adjudication processes<sup>36</sup> and "alternative dispute resolution" (ADR)—defined broadly as the use of a third-party neutral decision-maker outside the courtroom.<sup>37</sup> In some cases, disputants agree to ADR through contractual agreements including, for example, those related to motor insurance, employment, construction, and agreements typical of the healthcare and banking industries.<sup>38</sup> Regardless of the source of the agreement, ADR removes disputes from the civil trial context and away from the jury.

Scholars have highlighted the implications of the dramatic fall in the number of civil jury trials for ordinary litigants' access to courtrooms for private disputes and the growing privatization of a historically democratic facet of the U.S. justice system.<sup>39</sup> Though the civil context presents

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"motions to dismiss challenging the sufficiency of the pleadings are much more common since *Iqbal*, and far more cases are being dismissed after the release of that decision than before").

<sup>33</sup> See Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 580–81 (2004).

<sup>34</sup> See *id.* at 571.

<sup>35</sup> See, e.g., Stewart Macaulay, *Private Government*, in LAW AND THE SOCIAL SCIENCES 445, 473 (Leon Lipson & Stanton Wheeler eds., 1986) (challenging neat distinctions between "public" and "private" approaches to dispute resolution).

<sup>36</sup> See, e.g., Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 942–43 (1999) (describing four ways that legal rulemaking has been internalized, including through the increased (1) "legalization" of firms, (2) use of ADR within and between organizations, (3) power of in-house counsel, and (4) internalization of "legal enforcement" through private security personnel).

<sup>37</sup> See Elizabeth Rolph, Erik Moller & Laura Petersen, *Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles*, 1996 J. DISP. RESOL. 277, 278 (1996).

<sup>38</sup> See *id.* Stewart Macaulay has also characterized the use of internal dispute resolution procedures in corporate contexts as part of a parallel criminal justice system. See Macaulay, *supra* note 35, at 450–51. Though corporations may avoid the reputational damage associated with public legal proceedings, the wrongly (or rightly) accused may also face more relaxed evidentiary restrictions than they would see in court. See *id.* Likewise, critics of mandatory arbitration clauses that appear in contracts lament the fact that many consumers not only unwittingly sign away their right to a day in court but also forfeit their right to participate in class action suits. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 10–11 (2000).

<sup>39</sup> See, e.g., Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1553–55 (2016) (arguing that class action bans in standard contracts

distinctive equity and privatization issues, it shares in common with criminal trial scholarship critical attention to the decreased presence of lay decision-makers.

## 2. *The Decline of the Jury Trial in Criminal Prosecution*

In the criminal context, the most recent available data from a sampling of the seventy-five largest counties revealed that in 2009, only 2% of defendants with felony convictions were tried by juries.<sup>40</sup> In 2014,<sup>41</sup> 1730 defendants were convicted by juries, whereas 76,163 pleaded guilty.<sup>42</sup> In federal court this figure is similar; in 2018, juries rendered verdicts in 1.88% of cases.<sup>43</sup> The historical emergence and pervasiveness of plea agreements as a means of dispute resolution has been attributed to shifting sentencing regimes in the United States, affecting parties' incentives to secure swift and certain conviction over unpredictable jury verdicts.<sup>44</sup> Proponents of plea agreements point to their practical necessity in light of courts' limited resources and significant caseloads.<sup>45</sup> For some, plea agreements are

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have had the effect of keeping poor litigants off the federal docket); *see also* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 309 (2004) (noting that mandatory arbitration, for example, undermines the goal of democratic governance to imbue citizens with decision-making autonomy).

<sup>40</sup> REAVES, *supra* note 14, at 24 tbl.21. For misdemeanor convictions this figure is so low that the Bureau of Justice Statistics does not report a percentage. *Id.*

<sup>41</sup> This is the most recent year for which the Bureau of Justice Statistics has federal data.

<sup>42</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING STATISTICS (2014), <http://www.bjs.gov/fjsrc> [<https://perma.cc/Y3PA-3E8Q>] [hereinafter 2014 FEDERAL CRIMINAL CASE STATISTICS].

<sup>43</sup> ADMIN. OFFICE OF THE U.S. COURTS, TABLE D-4—U.S. DISTRICT COURT—CRIMINAL FEDERAL JUDICIAL CASELOAD STATISTICS (MARCH 31, 2018), at tbl.D-4 (2018), <https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2018/03/31> [<https://perma.cc/6B2U-LQ97>] (showing that, out of the 76,432 total reported federal criminal defendants whose cases were disposed of during a twelve-month period ending March 31, 2018, 1436 were tried by juries).

<sup>44</sup> *See, e.g.*, LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 2 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/R5LK-R2D4>] (noting that judicial sentencing constraints and the risk associated with unpredictable jury verdicts prompts defendants to plead guilty and contributes to prosecutors' discretion).

<sup>45</sup> *See Santobello v. New York*, 404 U.S. 257, 260 (1971) (Chief Justice Burger arguing that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities”); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1038 (2000) (noting that plea bargaining's efficiency made it appealing to prosecutors in the mid-nineteenth century); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 21 (1978) (lamenting Supreme Court opinions of the 1970s that presented plea bargaining as an expedient alternative to honoring historical values undergirding the American adversarial legal system, including the central role of lay participation therein); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 469–70 (2013) (outlining perceived advantages of plea bargains including their speed and efficiency).

believed to offer an expedient and equitable alternative to trials.<sup>46</sup> Others claim that guilty pleas can disparately punish similarly situated defendants by pointing to idiosyncrasies between verdicts rendered by jurors and sentences imposed by judges.<sup>47</sup>

To this end, some proponents of plea agreements have analogized them to the bargaining process that precedes civil settlement negotiations, which similarly take place in the “shadow” of a potential trial.<sup>48</sup> According to this logic, plea agreements reflect the prosecutor’s interest in maximizing the deterrent effects of a punishment while conserving resources, and the defendant’s interest in minimizing his or her sentence. Taking this bargaining model as a point of departure, some critics highlight obstacles to the creation of efficient and voluntary agreements, including the contention that prosecutors’ superior knowledge about the strength of cases results in asymmetrical relationships vis-à-vis defendants, which can cause defendants to imprudently waive their right to a jury trial.<sup>49</sup>

Interdisciplinary legal scholars are increasingly devoting attention to prosecutors’ discretion to prosecute (or decline to prosecute) cases, which, as the empirical portion of the Article shows, is a significant but largely

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<sup>46</sup> See generally Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners’ (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737 (2009) (outlining a defendant’s choice to enter into a plea bargain and the positives and negatives associated with that alternative); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (describing how plea bargains in criminal cases are like settlements in civil cases in that they exist outside of the shadow of the norm).

<sup>47</sup> See, e.g., Bar-Gill & Ben-Shahar, *supra* note 46, at 738–39 (arguing that prosecutors’ plea bargaining practices hinder coordinated responsive action on the part of defendants that would undermine this technique, given that prosecutors do not have the resources to try all defendants in court); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEG. STUD. 289, 303 (1983) (“Inequality thus is built into the system at the outset. At subsequent stages, the government may select procedural rules that permit mistaken decisions and thus treat identical cases differently.”).

<sup>48</sup> See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2467–68 (2004) (critiquing the prevalence of the “shadows of trials” approach to plea bargaining for failing to consider numerous “legally irrelevant factors” that can result in skewed or inequitably allocated punishment).

<sup>49</sup> See, e.g., Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083, 1101 (2015) (arguing that contemporary plea bargaining practice affords the defendant “no substantive right against overwhelming force” by a prosecutor who can legally exercise charging discretion); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713 (1988) (explaining the asymmetry between the bargaining positions of the prosecutor and defendant due to the prosecutor’s superior knowledge and the “time and investigative resources available” to her); see also Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT’L CRIM. JUST. REV. 22, 25–26 (2002) (commenting that critics of plea bargaining have highlighted prosecutors’ “unilateral determination of the level of defendants’ criminal culpability”—undermining plea bargaining’s theoretically equitable “give-and-take” character); Stuntz, *supra* note 46, at 2569 (highlighting the added obstacle to efficient bargaining inherent to the opacity of the plea bargaining process).

opaque barrier to trial.<sup>50</sup> The pressures of public election for both judges and prosecutors may also take an unpredictable toll on attitudes toward jury trials; in the criminal context, guilty pleas may promise insulation from public scrutiny of politically controversial disputes.<sup>51</sup> Literature on criminal and civil case terminations in advance of trial thus emphasizes the benefits of public dispute resolution for litigants and lay decision-makers alike.<sup>52</sup>

In both the civil and criminal context, jury trials are rare and statistically in decline. But to understand the function juries continue to play in the organization of prosecutions, it is important to consider another contributing factor: prosecutorial discretion.

### B. Dimensions and Effects of Prosecutorial Discretion

Federal prosecutors exercise broad discretion in their work.<sup>53</sup> Their jobs entail negotiating the meaning and limits of federal laws that range from prohibitions on organized crime, gang violence, and terrorism to the prosecution of politicians who accept bribes. They can contribute to decisions on how to investigate cases,<sup>54</sup> what charges to bring,<sup>55</sup> and how to

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<sup>50</sup> See, e.g., JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 134–36 (2017) (noting the dearth of empirical data on prosecutorial decision-making: “Despite the power of prosecutors, there is almost no data or research on what drives them”); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390 (2008) (characterizing the prosecutor’s discretion *not* to prosecute as contributing to the “lawless potential of prosecutorial discretion,” which confers a “sovereign prerogative” on such an official).

<sup>51</sup> See John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 270 (1979) (“Not only was the nontrial solution of plea bargaining more rapid than bench trial, it also protected the weak, elective American trial bench from the moral responsibility for adjudication and from the political liability of unpopular decisions.”); Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 ANN. REV. L. & SOC. SCI. 131, 135 (2005) (noting a theory of plea bargaining’s increasing prevalence that links the practice to public elections for prosecutors in the mid-nineteenth century).

<sup>52</sup> See, e.g., Gilles, *supra* note 39, at 1537 (explaining how the unavailability of class action litigation is disproportionately more harmful to low-income groups); see also HALE, *supra* note 1, at 405–07 (outlining the value of jury service for participating jurors as well as the criminal justice system more broadly).

<sup>53</sup> See Candace McCoy, *Prosecution*, in THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 663, 673 (Michael Tonry ed., 2011) (describing prosecutors’ wide charging discretion as well as offices’ (and individuals’) highly variable criteria for declining to prosecute cases depending on local legal culture); see also KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 228–29 (1969) (“The American assumption that prosecutors’ discretion should not be judicially reviewable developed when executive functions were generally unreviewable. The assumption is in need of reexamination in the light of the twentieth-century discovery that courts can review executive action to protect against abuses while at the same time avoiding judicial assumption of the executive power.”).

<sup>54</sup> See, e.g., Cmty. for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201–02 (D.C. Cir. 1986) (asserting prosecutors’ discretion to make investigative decisions).

<sup>55</sup> See United States v. Batchelder, 442 U.S. 114, 124 (1979) (noting that the decision of “what charge to file or bring before a grand jury” is one that typically rests “in the prosecutor’s discretion”). Prosecutors

approach plea negotiations.<sup>56</sup> Importantly, in the criminal context, they decide when to dismiss complaints and indictments<sup>57</sup> or request downward departures from the Sentencing Guidelines in exchange for defendants' assistance.<sup>58</sup>

In practice, the factors that contribute to prosecutorial decision-making are complex, variable, and under-studied. With the exceptions of quantitative research related to filing decisions and trial dispositions<sup>59</sup> and of insights of prosecutors who choose to publicize their firsthand experience,<sup>60</sup> limited data exists. Emergent social science and journalistic research suggests that organizational constraints can limit individual lawyers' autonomy to make decisions in particular office environments.<sup>61</sup> This includes the hierarchical positioning of supervisors within units and divisions with the capacity to approve and reallocate work responsibilities.<sup>62</sup> These types of organizational differences, of course, vary between offices and districts.

Legal scholars have also observed a relationship between sentencing regime changes and prosecutors' exercise of discretion during plea agreement discussions.<sup>63</sup> The Sentencing Reform Act of 1984 aimed to reduce disparate sentences among similarly situated defendants by requiring

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also have discretion to bring charges in federal (rather than state) court, where a conviction may result in a longer sentence. *See, e.g.*, *United States v. Davis*, 15 F.3d 526, 530 (6th Cir. 1994) ("The fact that a greater sentence will result from a federal conviction than from a state conviction alone does not provide a basis to challenge an indictment.").

<sup>56</sup> *See* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840–41.

<sup>57</sup> *United States v. Valle*, 697 F.2d 152, 154 (6th Cir. 1983) ("The fundamental principle of separation of powers requires that the executive branch alone, not the judiciary, wield the authority to dismiss prosecutions for reasons other than legal insufficiency or an abuse of the prosecutorial function.")

<sup>58</sup> *Prosecutorial Discretion*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 233, 236 n.687 (2012).

<sup>59</sup> *See* John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1250 (2012) (analyzing data collected by the National Center for State Courts, which has records on criminal court felony filing numbers for thirty-four states between 1994 and 2008, and noting the dearth of available data on prosecutorial decision-making).

<sup>60</sup> *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 678 (1995) (noting that the basis of the author's transformed academic opinion of federal prosecutors stemmed from his previous employment as an AUSA).

<sup>61</sup> *See* Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 269, 279–89 (Leslie C. Levin & Lynn Mather eds., 2012); *see also* Jeffrey Toobin, *Casualties of Justice*, *NEW YORKER* (Jan. 3, 2011), <https://www.newyorker.com/magazine/2011/01/03/casualties-of-justice> [<https://perma.cc/P4GG-54M5>] (discussing Nicholas Marsh's participation in the prosecution of Senator Ted Stevens and noting the behind-the-scenes front office decisions that shifted prosecutors' roles in the trial).

<sup>62</sup> *See* Yaroshefsky & Green, *supra* note 61, at 282–84; *see also* Toobin, *supra* note 61.

<sup>63</sup> *See, e.g.*, GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 210, 212 (2003) ("[I]n any plea negotiation, the prosecutor's power to promise the defendant a particular sentence in exchange for his plea would be greater than before . . .").

that judges impose sentences recommended by the United States Sentencing Commission.<sup>64</sup> Though designed by Congress to reduce judicial discretion during sentencing,<sup>65</sup> critics have argued that the Sentencing Guidelines and the mandatory sentencing schemes, in particular, increase prosecutors' influence on defendants' charges and plea agreements.<sup>66</sup> Though judges have tended to depart downward from sentence recommendations since the *United States v. Booker*<sup>67</sup> decision made guidelines advisory,<sup>68</sup> their discretion to sentence *above* the guidelines range can increase prosecutors' leverage during plea agreement discussions.<sup>69</sup>

Others contend that prosecutorial discretion can be an engine of reform.<sup>70</sup> After former Attorneys General Eric Holder and Loretta Lynch implemented a "Smart on Crime" initiative that called on prosecutors to consider defendants' individual characteristics when bringing charges, there was a demonstrable shift in charging decisions.<sup>71</sup> Prosecutors directed attention to violent offenses and avoided those that triggered mandatory minimum sentences.<sup>72</sup> This outcome may be viewed as evidence that policy

<sup>64</sup> See Edward M. Kennedy, *The Sentencing Reform Act of 1984*, 32 FED. B. NEWS & J. 62, 63 (1985).

<sup>65</sup> See William Braniff, *Local Discretion, Prosecutorial Choices and the Sentencing Guidelines*, 5 FED. SENT'G REP. 309, 309 (1993) ("Congress' main purpose in establishing the Sentencing Commission [was] to . . . avoid[] unwarranted sentencing disparities among defendants with similar criminal records . . .").

<sup>66</sup> See Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 132–36 (2018) (highlighting that prosecutors have increased influence on defendants' charges and plea agreements as evidenced by the uptick in the total amount of plea agreements, the emphasis on sentencing hearings, and the more collaborative interactions between the prosecution and defense counsel that has ensued following the enactment of the Sentencing Guidelines and *United States v. Booker*, 543 U.S. 220 (2005)); Kate Stith & Jose A. Cabranes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 11 FED. SENT'G REP. 187, 187 (1998) (arguing that mandatory sentencing schemes "inevitably shift power toward prosecutors" who know the sentencing rules in advance and can adjust the charging decisions, among others, accordingly).

<sup>67</sup> 543 U.S. 220 (2005).

<sup>68</sup> Norman C. Bay, *Prosecutorial Discretion in the Post-Booker World*, 37 MCGEORGE L. REV. 549, 550 (2006).

<sup>69</sup> See *id.* at 574.

<sup>70</sup> See Roger A. Fairfax, Jr., *The "Smart on Crime" Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 909 (2012) (contending prosecutors' responsibility to seek justice extends to improving the criminal justice system more broadly).

<sup>71</sup> See Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 825 (2017) (citing Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to the United States Attorneys & Assistant Attorney General for the Criminal Division (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-convict-enhancements-in-certain-drugcases.pdf> [<https://perma.cc/2W69-3UUU>]).

<sup>72</sup> See Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants* (Mar. 21, 2016), <https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal>

initiatives can influence lawyers' decisions. However, the policies prosecutors consider when making decisions about indictments to bring or sentences to recommend are not limited to defendants' individual characteristics.<sup>73</sup> Given this room for variation and independent considerations, writing on prosecutorial discretion is inexorably bound up in discussions of prosecutorial ethics, often emphasizing the potential for misconduct and abuse of power.<sup>74</sup>

In light of falling public jury trial numbers and renewed concern about the extent and ends of prosecutorial discretion, it is important to evaluate the factors that influence prosecutors' decisions to indict and what sentences to recommend. The present study addresses such gaps by focusing on prosecutors' preparation of criminal and civil cases.

## II. METHODS

This Article draws on research in a United States Attorney's office. It included semi-structured interviews with 133 AUSAs.<sup>75</sup> I carried out these interviews incrementally and cross-sectionally over a five-year period, beginning in May of 2013.<sup>76</sup> The interviews encompassed prosecutors with varying levels of jury trial experience in both the criminal and civil divisions of the office, and irrespective of whether a particular AUSA was involved in a trial at the time.

To protect their privacy, I assigned a randomly generated two-letter code to each interviewee (e.g., AA, AB, AC . . . ) so as not to identify them,

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prosecutors-are-focused-more-significant-drug-cases-and [https://perma.cc/SVC4-HA3G] (noting the decrease in federal drug cases involving low-level, nonviolent drug offenders).

<sup>73</sup> For example, elected and appointed prosecutors, both state and federal, often take a resource-conscious approach to managing their caseloads. Fairfax, *supra* note 70, at 909.

<sup>74</sup> See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 16 (2007) (noting that even well-meaning prosecutors' routine work can result in unjust charging decisions and plea agreements, among other examples); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996) (arguing that prosecutors must stop abusing their discretion and make more responsible public policy choices in order to limit their use of already scarce prison resources).

<sup>75</sup> Semi-structured interviews, as deployed in this study, were characterized by open-ended interview questions that were not guided by a strict set of written questions or prompts. I asked all interviewees who consented to participate in the study to generally comment on the types of cases they worked on, the extent to which they had tried cases before juries, and the nature of their legal practice before working at the U.S. Attorney's Office. All interviewees and the cases they described have been anonymized for the purpose of conveying their generalized reflections and decision-making processes.

<sup>76</sup> This meant that in the course of my doctoral study I attempted to contact and sit down with each AUSA in the Office's criminal and civil division to the extent possible. My selection of interviewees was often informed by the recommendation of past interviewees that I contact particular colleagues by email. With the exception of former AUSAs who were not employed in the Office during the research period, most interviewees took place in person and ranged from ten minutes to two hours.

their cases, or the district in which they work by name or other identifying characteristic. I also modified easily identifiable features of cases and redacted specific dates of office activities and interactions. To the extent that quotations appear in this Article, they have been modified. The purpose of these references is to highlight and tease out generalizable formulations that emerged as typical and representative of AUSAs who dealt with similar cases, experiences, and ethical questions.

With the support of a National Science Foundation (NSF) grant, I returned to the office between 2015 and 2017 to conduct additional interviews, which took place at various points during prosecutors' involvement in cases at different stages of preparation. During this period of follow-up study, my selection of interviewees was influenced by court proceedings and interactions I observed during meetings I was invited to participate in. The generalized reflections that were shared with me in these contexts are de-identified and anonymized for the purposes of my analysis here.<sup>77</sup>

The study was governed by an Institutional Review Board (IRB)-approved protocol titled "An Ethnographic Study of Lay Participation in the United States Criminal Justice System." Following the convention of ethnographic studies, and in accordance with the protocol, oral consent was obtained from all interviewees with the understanding that I would not include any information that would make it possible to identify them in any publication or presentation.

The insights gleaned from this research offer crucial insight into legal technique and decision-making. It therefore answers the call of legal scholars who highlight the value of empirical legal research to the study of case preparation and trial practice.<sup>78</sup> Among its distinctive strengths, qualitative research can impact judicial decision-making.<sup>79</sup> Anthropological studies of trial proceedings and legal practice since the mid-twentieth century have

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<sup>77</sup> To the extent I cite interactions with AUSAs, I intend to synthesize general and representative types of statements, interests, and concerns they raised. Throughout this study I distinguish interviews from other contact I had with AUSAs both in and out of the office. References to "discussions" thus encompasses both one-on-one conversations with prosecutors as well as my participation in conversations in the context of group meetings.

<sup>78</sup> See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 135 (2002); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68, 69 (1981) ("[D]ebate about the right to jury trial in complex [civil] cases is informed more by intuitions and assumptions than by systematic knowledge.").

<sup>79</sup> See, e.g., Richard Ashby Wilson, *Expert Evidence on Trial: Social Researchers in the International Criminal Courtroom*, 43 AM. ETHNOLOGIST 1, 2–3 (2016) (noting the more prevalent citation and greater influence of qualitative social science research in international criminal court opinions than quantitative social science expertise).

included ethnographic research on American capital trials,<sup>80</sup> asylum proceedings,<sup>81</sup> tribal courts,<sup>82</sup> international tribunals,<sup>83</sup> and the particular social contexts in which litigants articulate grievances.<sup>84</sup> In the context of this study, in particular, anthropological research methods were essential. This is because the impact of the *right* to a jury trial on legal practice is an empirical question that cannot be answered by caseload statistics or quantitative research alone, due to its implications for our entire legal culture. In addition to its practical fact-finding role, the jury has long been inflected with distinct values, commitments, and perceived incentives for litigants.<sup>85</sup> This includes the jury system's status—or at least aspiration—to be a truly democratic institution that places power in ordinary people's hands so long as minimal requirements related to citizenship, age, literacy, and residency are met.<sup>86</sup>

In contextualizing attorneys' decisions, ethnographic research, like the trial itself, can bring greater transparency to the work of individual prosecutors who exercise wide discretion in their work with limited public oversight.<sup>87</sup> Unlike research on the legal profession that utilizes post hoc surveys or questionnaires related to hypothetical cases, this focus on the professional self-understanding of prosecutors turns its attention outward to social explanations of decision-making rather than toward “invisible,” internal, or unconscious domains of judgment.<sup>88</sup> It thus offers a window into the process by which individual prosecutors articulate rationales for their conduct. In the absence of such an approach, studies of prosecutorial discretion can misleadingly presume that prosecutors are monolithic law

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<sup>80</sup> See generally ROBIN CONLEY, *CONFRONTING THE DEATH PENALTY: HOW LANGUAGE INFLUENCES JURORS IN CAPITAL CASES* (2016).

<sup>81</sup> See Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 *LAW & SOC. INQUIRY* 63, 81–88 (2001).

<sup>82</sup> See generally JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT* (2008).

<sup>83</sup> See RICHARD ASHBY WILSON, *WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS* 192–215 (2011).

<sup>84</sup> See CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* 117 (1986); LAWRENCE ROSEN, *BARGAINING FOR REALITY: THE CONSTRUCTION OF SOCIAL RELATIONS IN A MUSLIM COMMUNITY* 29 (1984).

<sup>85</sup> See generally JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994).

<sup>86</sup> *Id.* at 2.

<sup>87</sup> ANN SOUTHWORTH & CATHERINE L. FISK, *THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE* 356–57 (2014); McCoy, *supra* note 53, at 682.

<sup>88</sup> See, e.g., David Luban, *The Conscience of a Prosecutor*, 45 *VAL. U. L. REV.* 1, 22 (2010) (describing a case in which a prosecutor makes the personal decision to throw a case assigned to him by a supervisor due to his conviction that the case was unjust).

enforcement agents, rather than individuals who attempt to conscientiously carry out their duties.<sup>89</sup>

A common thread in anthropological studies of the law is their use of ethnography, which has encompassed court observation,<sup>90</sup> interviews,<sup>91</sup> archival research,<sup>92</sup> and linguistic analysis.<sup>93</sup> Building on the work of legal anthropologists attentive to lawyers' everyday work,<sup>94</sup> this Article demonstrates that focused and localized ethnographic analysis can valuably contribute to understandings and assessments of meaningful lay participation in the U.S. legal system.

Researchers who advocate and deploy such an approach emphasize its dialogic and reciprocal form, as it is unconstrained by the conventional power dynamics of formal interviews.<sup>95</sup> After speaking with AUSAs as part of this study, I generated anonymous notes, which I coded based on themes in the general types of reflections shared with me. For example, when AUSAs used the phrase "jury appeal," as discussed in the next Section, I highlighted and assigned a searchable code (e.g., "jury appeal") to sections

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<sup>89</sup> See James Laidlaw, *Agency and Responsibility: Perhaps You Can Have Too Much of a Good Thing*, in *ORDINARY ETHICS: ANTHROPOLOGY, LANGUAGE, AND ACTION* 143, 152 (Michael Lambek ed., 2010); see also SOUTHWORTH & FISK, *supra* note 87, at 336.

<sup>90</sup> See SUSAN F. HIRSCH, *IN THE MOMENT OF GREATEST CALAMITY: TERRORISM, GRIEF, AND A VICTIM'S QUEST FOR JUSTICE* 149–79 (2006) (describing a national security prosecution that the author participated in as a witness despite having conflicting views about the theories advanced and punishment sought by the government).

<sup>91</sup> See WILSON, *supra* note 83, at 192–215.

<sup>92</sup> See TOBIAS KELLY, *THIS SIDE OF SILENCE: HUMAN RIGHTS, TORTURE, AND THE RECOGNITION OF CRUELTY* (2012).

<sup>93</sup> See, e.g., GREGORY M. MATOESIAN, *LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL* 5 (2001) (delineating focus of research as an examination of the way that "linguistic processes of persuasion participate in the ongoing construction and contestation of legal reality"); ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 3 (2007) (describing the researcher's "focus on language as the window to legal epistemology").

<sup>94</sup> See MATOESIAN, *supra* note 93, at 106 ("I show how legal discourse actually unfolds in the situated details of communicative practice. . . . In the process, I hope to illuminate taken-for-granted legal processes and language use as an interactive phenomenon of power."); SUSAN URMSTON PHILIPS, *IDEOLOGY IN THE LANGUAGE OF JUDGES: HOW JUDGES PRACTICE LAW, POLITICS, AND COURTROOM CONTROL*, at xii (1998) (noting that "the spoken law really has an interpretive life and a culture of its own and is not just a reflection of the written law" in describing her empirical attention to judges' real-time discourse); RICHLAND, *supra* note 82, at 7 ("[W]e can only reach a proper understanding of notions of custom and tradition in contemporary tribal jurisprudence by exploring them in the circumstances of their use, as they both shape and are shaped by the courtroom talk that forms the center of contemporary tribal law.").

<sup>95</sup> See CHARLES L. BRIGGS, *LEARNING HOW TO ASK: A SOCIOLINGUISTIC APPRAISAL OF THE ROLE OF THE INTERVIEW IN SOCIAL SCIENCE RESEARCH* 7 (1986); RENATO ROSALDO, *CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 207 (1993).

of notes for later aggregation and analysis. This allowed me to identify unprompted patterns in AUSAs' reflection about their cases.

Case studies of prosecutorial practice and strategy in particular jurisdictions have been deployed by interdisciplinary legal scholars to great effect.<sup>96</sup> The U.S. Attorney's Office that is the focus of this study was located in a district that contained a mix of rural and urban counties and had a varied caseload. The general types of criminal cases that were described to me in the course of conversations about voir dire ranged from those involving allegations of employment discrimination to capital murder—characteristic of offices in numerous federal jurisdictions across the country.

The aim of this case study is thus to highlight and consider the implications of prosecutors' attention to jurors, which they viewed as a central feature of their jobs. Future research and analysis of prosecutorial decision-making may fruitfully explore whether these insights have more generalized application to state prosecutors' offices and defense attorneys' work, among other legal and nonlegal settings.

### III. FINDINGS

The study revealed two categories of information that help explain the role of the lay public in prosecutorial decision-making: first, factors that prosecutors understood to influence jury appeal and second, the interventions of hypothetical jurors in prosecutorial techniques.

#### *A. Factors That Influence Jury Appeal*

Prosecutors explained that they often grounded concerns about their cases in jurors' likely opinions of them.<sup>97</sup> As prosecutors decided whether to bring charges against a defendant, for example, there was frequent talk of the "jury appeal" of evidence and witnesses.<sup>98</sup> In some prosecutors' formulations, assessing jury appeal was likened to asking, "If I were a juror,

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<sup>96</sup> For case study research on the subjects of plea agreements, for example, see THEODORE N. FERDINAND, *BOSTON'S LOWER CRIMINAL COURTS, 1814–1850*, at 36–37 (1992) (describing the study's focus on the "professionalization of the bench" in Boston and shifting role of the lower courts in light of this); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 9 (2000) ("The weaknesses of the literature on criminal courts convinced me that a city rather than a larger political jurisdiction was the appropriate unit for study . . ."); and Mary E. Vogel, *The Social Origins of Plea Bargaining: An Approach to the Empirical Study of Discretionary Leniency?*, 35 *J.L. & SOC'Y* 201, 209 (2008) (pinpointing the emergence of plea bargaining in Massachusetts in the 1830s and 1840s based on data gathered from Boston's lower court).

<sup>97</sup> See, e.g., Interviews with CO, DH, DN & EQ, AUSAs (2013–2017). As described in the methods section, each AUSA I spoke to as part of my doctoral research was randomly assigned a two-letter code, the key of which is confidential as per IRB requirements.

<sup>98</sup> See, e.g., Interviews with AH, AI, AN, AU, AZ, BF, BN, BR, BS, CB, CE, CR, CV, CW, CZ, DB, DE, DH, DK, DO & DU, AUSAs (2013).

what would I think?” or a practice of weighing whether a “hypothetical juror” would feel that a case should not be prosecuted even if it legally could be.<sup>99</sup> As a practical matter, discussion of jury appeal offered a resource for articulating concerns and ambivalence about cases from a position of detachment.<sup>100</sup> These concerns sometimes informed prosecutors’ decisions to dismiss cases.<sup>101</sup>

Prosecutors also described cases they felt lacked jury appeal. They frequently cited allegations of “structuring” as examples of such cases. In structuring cases, defendants are charged with deliberately limiting the increments of money involved in bank transactions to avoid triggering a federal reporting requirement.<sup>102</sup> As stand-alone cases, some prosecutors worried they would not appeal to hypothetical jurors.<sup>103</sup> One theme in a number of prosecutors’ reflections on the subject was the difficulty of explaining to jurors that a law that might *sound* like a tedious regulatory requirement had an important rationale. When charging a defendant with structuring some prosecutors would therefore go out of their way to charge another underlying crime—like a larger financial scheme or terrorist plot, for example.<sup>104</sup> When structuring cases were charged on their own, however, jurors were imagined to be less receptive. Another prosecutor suggested that jurors might worry that their *own* failure to fill out paperwork be considered a violation of the law, making them reluctant to view a similarly situated defendant as blameworthy.<sup>105</sup> As several commentaries on structuring suggested, prosecutors did not automatically prosecute violations of federal law, citing future jurors’ attitudes as grounds for their decisions.

Commonsense sources of skepticism and concern about a case were thus projected onto external decision-making agents. It was not enough to demonstrably prove that a federal law had been broken. The future jurors these (and other) prosecutors imagined might feel that such a crime did not warrant punishment. Reference to hypothetical jurors thus aided

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<sup>99</sup> See, e.g., Interviews with BF & BK, AUSAs (2013); see also ABRAMSON, *supra* note 85, at 7 (reflecting on the exercise of prosecutorial discretion with future jurors’ hypothetical interpretations in mind).

<sup>100</sup> Anna Offit, *With Jurors in Mind: An Ethnographic Study of Prosecutors’ Narratives*, LAW, CULTURE & HUMANITIES (forthcoming 2019) (manuscript at 5–6) (on file with *Northwestern University Law Review*).

<sup>101</sup> See, e.g., Interviews with DH & DN, AUSAs (2013). In 2014, federal prosecutors in the U.S. dismissed 6822 cases—a figure that does not reflect the number of cases that were referred elsewhere or set aside as investigations were underway. 2014 FEDERAL CRIMINAL CASE STATISTICS, *supra* note 42.

<sup>102</sup> See 31 U.S.C. § 5324(a)(3) (2012) (prohibiting any person from structuring transactions “with one or more domestic financial institutions” for the purpose of evading reporting requirements).

<sup>103</sup> See, e.g., Interviews with AE, BI & BZ, AUSAs (2013).

<sup>104</sup> See, e.g., Interview with BZ, AUSA (2013).

<sup>105</sup> See, e.g., Interview with BI, AUSA (2013).

formulations of the *de minimis* character of cases; even cases that technically *could* be prosecuted were not always perceived as justifying expending the resources of the office.<sup>106</sup>

An example of such a case involved the circulation of fake prescription pads by a retired pharmacist. Here, law enforcement agents intended to put a tracker on the packages containing the counterfeit prescriptions before they were confiscated.<sup>107</sup> Prosecuting the unlawful receipt of one individual's prescription pads without further evidence of illegally obtained drugs or victims, however, was not something the prosecutor who learned about this case imagined future jurors would care about. This contrasted with a jury-appealing case he did imagine—involving a more coordinated effort to prosecute a major pharmacy chain for supplying prescription drugs to a drug trafficking ring.<sup>108</sup>

Other factors that contributed to prosecutors' perceptions of jury appeal included the intelligibility of the evidence they would present to jurors, the credibility of potential witnesses, and the sympathy jurors might feel for the defendants or victims of alleged crimes.

#### *1. Intelligibility of Alleged Crimes and Evidence*

Prosecutors often interpreted the questions that grand jurors raised about their cases as indicative of future trial jurors' sources of confusion.<sup>109</sup> If grand jurors asked hundreds of questions, a prosecutor explained, she would take that as a warning that twelve future trial jurors might have broader concerns.<sup>110</sup> Though federal prosecutors are not constitutionally

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<sup>106</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9(b) (AM. BAR ASS'N 1993):

The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

<sup>107</sup> See, e.g., Interview with BS, AUSA (2013).

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., Interviews with AL, AN, BD & DT, AUSAs (2013).

<sup>110</sup> See, e.g., Interview with AE, AUSA (2013).

required to present exculpatory evidence to grand jurors,<sup>111</sup> the office that was the subject of this study conformed to a stricter internal policy mandated by the Department of Justice.<sup>112</sup> As a result, grand jurors' reactions to unfavorable evidence were seen as offering practical guidance. Prosecutors explained that grand jurors were often viewed as a guide for what trial jurors might do. This sometimes led them to ask grand jurors what they thought about particular pieces of evidence and how their presentation could be made more persuasive.<sup>113</sup> Grand juror presentations also helped prosecutors gauge how "relevant"<sup>114</sup> their evidence would seem to jurors at trial.<sup>115</sup> Prosecutors thus kept track of grand jurors' questions, making note of what they might need to address through their later questioning of witnesses.<sup>116</sup>

Those who worked on cases involving allegations of bribery were particularly attuned to the difficulty of explaining why their cases should matter to jurors. This was true, for example, of a case in which a local police officer accepted money from people he knew well. Jurors might interpret these kinds of transactions, some worried, as a hospitable gesture among individuals who knew each other well. Another prosecutor encouraged agents to record conversations whenever possible because the challenge of proving a defendant's state of mind boiled down to jurors' competing interpretations of language.<sup>117</sup>

Unlike gun cases or child abuse prosecutions that appeared to have "clear-cut bad guys," prosecutors noted that politicians accepted money all the time. The challenge was to prove they took money in exchange for carrying out official acts.<sup>118</sup> For this reason, prosecutors focused on making the significance of public corruption cases apparent to jurors in order to combat jurors' potential perceptions of "how business gets done" in politics. In the context of preparing such cases, prosecutors thus imagined the impressions and interpretations of future jurors continually.<sup>119</sup>

In the context of discussions about voir dire and jury appeal, some felt they had no choice but to prosecute cases that would be unappealing to the

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<sup>111</sup> See Ali Lombardo, Note, *The Grand Jury and Exculpatory Evidence: Should the Prosecutor Be Required to Disclose Exculpatory Evidence to the Grand Jury?*, 48 CLEV. ST. L. REV. 829, 857–61 (2000) (arguing that a duty should be imposed on prosecutors in Ohio to disclose exculpatory evidence to grand jurors).

<sup>112</sup> See, e.g., Interview with DT, AUSA (2013).

<sup>113</sup> See, e.g., Interview with DS, AUSA (2013).

<sup>114</sup> See, e.g., Interview with BF, AUSA (2013).

<sup>115</sup> See, e.g., Interview with BT, AUSA (2013).

<sup>116</sup> See, e.g., Interviews with DS & DT, AUSA (2013).

<sup>117</sup> See, e.g., Interview with AE, AUSA (2013).

<sup>118</sup> See, e.g., Interviews with AF & DB, AUSAs (2013).

<sup>119</sup> See *supra* note 118.

jurors they imagined. This included national security cases in which agents could not legally divulge the investigative techniques they deployed to lay decision-makers (and sometimes prosecutors) due to statutory constraints.<sup>120</sup> Some prosecutors considered jurors' incomplete access to—or lack of awareness of—classified information and evidence-gathering methods when deciding whether a case should be prosecuted.<sup>121</sup>

One illustrative commentary emphasized the importance of analyzing cases with reference to the evidence jurors would actually see rather than the full universe of evidence known to those organizing a prosecution.<sup>122</sup> In some cases this meant prosecuting suspected terrorists with a lesser offense like tax evasion while considering how such cases might “look” to a jury.<sup>123</sup> Cases that involved prosecuting drug dealers or gang members were also cause for concern due to jury considerations. The effect of aggregating defendants under a racketeering law, for example, led some prosecutors to worry that jurors would lack sympathy for victims who engaged in violent criminal activity themselves.<sup>124</sup>

Other prosecutors viewed hypothetical jurors' anticipated indifference to their cases as a challenge, because their job was to *make* jurors care. The onus should be on a prosecutor, the theory went, to explain the consequences of behavior that might seem innocuous to a lay outsider.<sup>125</sup> Other prosecutors shared the view that *any* case could be made to appeal to a juror if it could be presented as bringing a defendant's greed to light.<sup>126</sup> To the extent that particular white-collar crimes were unfamiliar to jurors, the burden of explaining why they should be taken seriously rested with the prosecutor who might try them. Hypothetical jurors thus prompted reflection on how to articulate the societal implications of different allegations of wrongdoing. By one prosecutor's account, this exercise involved asking herself, “Why should I care about this? From someone shoplifting bubble gum to committing murder—and everything in between.”<sup>127</sup>

## 2. *Credibility of Witnesses*

Another common theme in prosecutors' reflections on recurrent jury concerns related to perceptions of witness credibility and character. This is because prosecutors often selected or substituted witnesses for one another

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<sup>120</sup> See, e.g., Interview with CY, AUSA (2013).

<sup>121</sup> See, e.g., Interview with CD, AUSA (2013).

<sup>122</sup> See, e.g., Interview with CY, AUSA (2013).

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., Interview with AY, AUSA (2013).

<sup>125</sup> See, e.g., Interview with BT, AUSA (2013).

<sup>126</sup> See, e.g., Interview with CW, AUSA (2013).

<sup>127</sup> See, e.g., Interview with BQ, AUSA (2013).

based on jurors' anticipated impressions of them. To this end, a majority of the prosecutors I interviewed or assisted with case preparation reflected on the question of whether jurors would like or dislike particular witnesses, including those who were otherwise providing evidence that was important to a case.<sup>128</sup>

When there was concern that a witness might come across as abrasive, rude, or incredible, prosecutors considered how to elicit information on direct examination that might change these impressions.<sup>129</sup> Even an honest person might *appear to a juror* as if he were not telling the truth.<sup>130</sup> Rather than critique a witness's testimony on its own terms, prosecutors framed their guidance in terms that emphasized what a shame it would be if police officer witnesses, for example, lost future cases because jurors did not believe their testimony. Time and again, concern about jurors' potential skepticism toward law enforcement officers informed prosecutors' discussions of whom they should choose to testify.<sup>131</sup>

Prosecutors also described their efforts to anticipate jurors' responses to cooperating witnesses. In light of such witnesses' own criminal conduct and interest in reducing their punishment, AUSAs expected jurors to have difficulty taking them at their word.<sup>132</sup> This led some to feel reluctant about taking cases to trial that relied exclusively on the testimony of a cooperator and view corroboration of such testimony through law enforcement agents' records, for example, to be essential.<sup>133</sup> To the extent that prosecutors suspected that jurors would dislike "scumbag" cooperators, some worried that their testimony might "tank" if jurors were to view their potential for a reduced sentence to be unjust.<sup>134</sup> Others worried that laypeople might fail to understand why a cooperating witness could be—or *should* be—essential to prosecutions at all.

Such a concern arose in a case that relied on the testimony of a cooperator who was a foreign national who had failed to register as a sex offender under federal law. Before committing to put this witness on the

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<sup>128</sup> See, e.g., Interviews with AA, AY, BQ & DI, AUSAs (2013).

<sup>129</sup> See, e.g., Interview with BZ, AUSA (2013).

<sup>130</sup> See, e.g., Interview with CX, AUSA (2013).

<sup>131</sup> See, e.g., Interview with BT, AUSA (2013); Anna Offit, *Peer Review: Navigating Uncertainty in the United States Jury System*, 6 U.C. IRVINE L. REV. 169, 177 (2016) (describing AUSAs' awareness that a number of prospective jurors reported negative encounters with law enforcement agents during voir dire questioning).

<sup>132</sup> See, e.g., Interviews with AK, BI, CG, DO & DP, AUSAs (2013).

<sup>133</sup> See, e.g., Interview with CG, AUSA (2013). References to "records" in this context could refer to phone records, for example, or other official documents prepared in the routine course of law enforcement agents' work.

<sup>134</sup> See, e.g., Interview with AE, AUSA (2013).

stand, prosecutors expressed concern about how evidence of this witness's past wrongdoing might "play" to future jurors.<sup>135</sup> In this context, prosecutors assigned to the case were relieved to discover a family conflict at the heart of the defendant's wrongdoing; while residing outside the United States, he had impregnated a younger teenage cousin. Though his underlying sex crime did not cast the cooperator in a flattering light, the context of his prior conviction amidst familial strife was imagined to be more palatable to future jurors.

Although this case, like most in the office, did not proceed to trial, jurors' imagined misgivings about the cooperating witness informed prosecutors' case preparation. One prosecutor, for example, indicated that knowledge of witnesses' strengths and weaknesses was an essential part of considering the type of impact evidentiary presentations might have on jurors.<sup>136</sup> This case contrasted with others in which prosecutors felt that cooperating witnesses could not take the stand under any circumstance due, for example, to the incendiary and indefensible nature of emails that might come to light during trial, calling their character into question.<sup>137</sup>

Despite believing that cooperating witnesses would testify truthfully as a condition of the leniency prosecutors could ask of a sentencing judge, prosecutors worried that jurors would view cooperators less generously. As laypeople understand them, cooperators might appear to be murderers testifying to get less jail time—or people who convinced others to commit crimes to help the government build a bigger case.<sup>138</sup> Though prosecutors conceded their own inclination to believe witnesses whom they met and spoke with dozens of times, they acknowledged the difficulty that knowledge of numerous lies might pose for jurors who would not be satisfied by the corroboration, for example, of other drug dealers.<sup>139</sup> One prosecutor approached this concern by attempting to put *herself* in the position of a juror hearing such a witness for the first time without the benefit of protracted pretrial contact. This imaginative exercise helped her prepare cases, recognizing that jurors would understandably be skeptical, particularly in light of judges' explicit instructions that cooperating witnesses' desire for leniency could present a conflict of interest and should be weighed carefully in evaluating their credibility.<sup>140</sup>

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<sup>135</sup> See, e.g., Interview with DN, AUSA (2013).

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., Interview with BG, AUSA (2013).

<sup>138</sup> See, e.g., Interviews with AG, AK, AZ & CG, AUSAs (2013).

<sup>139</sup> See, e.g., Interview with CQ, AUSA (2013).

<sup>140</sup> See, e.g., Interview with AE, AUSA (2013).

Stories of acquittals in cases with highly unappealing cooperators were shared, anecdotally, as warnings of the perils of disregarding jurors' possible perceptions of witnesses before indicting defendants.<sup>141</sup> One prosecutor's recollection of a particularly offensive cooperating witness revealed an overriding concern with the "optics" of cases to lay onlookers. Part of the evidence in an illustrative case involved a cooperator who used racist language in a text message, which, a prosecutor thought, inherently undermined the case. Any attempt at justifying or minimizing such language, he explained, would be a "sideshow" if the case proceeded to trial and, further, made his support for this witness's credibility personally uncomfortable and indefensible.<sup>142</sup> As a general matter, attention to jurors' perceptions of testimony as offensive prompted some AUSAs to ask cooperators to think about the language they used during investigations. One prosecutor, for example, explicitly told a witness not to curse because—although this was not improper or illegal—it might not look good to future jurors.<sup>143</sup>

Prosecutors also evaluated case agents' character and credibility with jurors in mind. As an agent sat across the table from him, one prosecutor noted that he routinely considered how grand jurors and potential trial jurors might react to particular witnesses.<sup>144</sup> Though this AUSA recognized the abstractness of this calculation, because he could not possibly anticipate a jury's ultimate makeup, he viewed this assessment comparable to assimilating the impression of a "random person off the street" into his own evaluation.<sup>145</sup>

Arising from this same concern about jurors' poor opinions of witnesses, prosecutors sometimes perceived other law enforcement agents' approaches to cases as insufficiently oriented toward trials, despite the necessity of interagency collaboration. Recognizing agencies' different criteria for professional advancement, some prosecutors noted that quantitative indices of successful investigations—like arrests—could trump other considerations.<sup>146</sup> Amplifying this view, another prosecutor explained that he would not recommend arresting a target unless he was certain he could win at trial.<sup>147</sup>

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<sup>141</sup> See, e.g., Interview with AZ, AUSA (2013).

<sup>142</sup> See, e.g., Interview with BG, AUSA (2013).

<sup>143</sup> See, e.g., Interview with CF, AUSA (2013).

<sup>144</sup> See, e.g., Interview with AP, AUSA (2013).

<sup>145</sup> See, e.g., Interview with DB, AUSA (2013).

<sup>146</sup> See, e.g., Interview with AM, AUSA (2013). I understood this type of reference to statistics as encompassing a law enforcement agent's quantitative record of arrests that might lead to his or her professional advancement.

<sup>147</sup> See, e.g., Interview with AP, AUSA (2013).

Some prosecutors thus viewed part of their job as convincing agents who were otherwise focused on making arrests to anticipate trials. In some cases, prosecutors worried that the professional recognition conferred on agents for making probable cause-based arrests encouraged them to keep investigations moving—and that in their zeal to make such arrests agents might pay less attention to other evidentiary issues they would face at trial.<sup>148</sup> Likewise, some agents who perceived prosecutors to move cases quickly expressed appreciation, viewing speed as a sign of competence and efficiency.<sup>149</sup> One AUSA indicated that she perceived it to be her job to consider how evidence would “hold up” to jurors’ scrutiny at trial.<sup>150</sup>

In another illustrative account, a prosecutor recalled a meeting in which prosecutors’ and case agents’ supervisors met to discuss (and resolve) divergent opinions about a case involving the sale of fraudulent lottery tickets. This prosecutor’s supervisor planned to assess the case’s strength and get everyone on the “same page.”<sup>151</sup> Though the prosecutor thought the evidence in his case was strong, he noted its complexity. By contrast, from the supervising AUSA’s and agent’s perspectives, the case was a “slam dunk.”<sup>152</sup>

Talk of fictive jurors thus made character assessment a central feature of prosecutors’ case preparation. In addition to encompassing the assessment of potential *witnesses’* character traits, prosecutors readily scrutinized the evidentiary orientations of colleagues who carried out investigations and made arrests. Points of personal disagreement and competing interpretations of the same evidence were thus attributed to detached and hypothetical lay critics.

### 3. *Sympathy for Defendants and Victims*

Another common theme in prosecutors’ reflections on jury selection and trial preparation was concern that defendants might elicit sympathy.<sup>153</sup> To this end, a prosecutor recalled a case in which a defendant sounded sympathetic during the same video recordings that would be played to jurors as evidence of her wrongdoing. While accepting under-the-table payments, for example, this defendant asked her accomplices intimate and empathetic questions about members of their families. Upon seeing these warm exchanges, the prosecutor assigned to the case imagined that future jurors

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<sup>148</sup> See, e.g., Interview with AO, AUSA (2013).

<sup>149</sup> See, e.g., Interview with BS, AUSA (2013).

<sup>150</sup> *Id.*

<sup>151</sup> See, e.g., Interview with EM, AUSA (2013).

<sup>152</sup> *Id.*

<sup>153</sup> See, e.g., Interviews with AJ, AQ & CH, AUSA (2013).

would be drawn to her.<sup>154</sup> Likewise, laypeople were imagined to be forgiving of those who broke laws to keep electricity running in their businesses, employed people during a recession, or looked like scapegoats for more culpable individuals who were not indicted.<sup>155</sup> A defendant who fraudulently gave tax refunds to a poor family, for example, might look more like “Robin Hood” than a criminal.<sup>156</sup>

Prosecutors’ descriptions of two criminal cases illustrated the role of hypothetical jurors in shaping their own perceptions of defendants. In the first of these cases, a defendant was charged with failing to report the death of his mother and continuing to accept civil service retirement benefits on her behalf. The defendant worked as a government mail clerk and used the money to support himself and his unemployed niece. Despite this additional income, the prosecutor assigned to the case recalled that the defendant was elderly and lived in poverty.<sup>157</sup> In light of these financially precarious circumstances, the prosecutor took into account whether charging the defendant *before* his planned retirement might preclude him from receiving pension benefits in the event he was convicted of a felony. Furthermore, though some jurors might perceive the defendant to be receiving a great deal of money, the prosecutor said he recognized that it was “very little month-to-month.”<sup>158</sup> The country’s difficult economic climate, he worried, would make for an unsympathetic jury. Hypothetical jurors’ potentially *unjust* characterization of the evidence, as he understood it, thus guided his sense of what a just result would entail for the defendant.<sup>159</sup>

In a second case, a prosecutor imagined that jurors’ views might mirror those of colleagues she consulted as proxies. A defendant’s distraction on a family camping trip in a national park led to the drowning of an unsupervised child. The U.S. Attorney at the time assigned the case to a prosecutor who recognized its sensitivity. Taking seriously her discretion to prosecute it, the AUSA immediately set to work informally surveying colleagues on the likely reactions of future jurors—a practice referred to by others as “jury testing.”<sup>160</sup>

This prosecutor’s first impulse was to speak with members of the defendant’s family for a window into the way others assessed her character. Was she generally viewed as absentminded? Irresponsible? The consensus

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<sup>154</sup> See, e.g., Interview with AL, AUSA (2013).

<sup>155</sup> See, e.g., Interviews with AT & BH, AUSAs (2013).

<sup>156</sup> See, e.g., Interviews with AP & BO, AUSAs (2013).

<sup>157</sup> See, e.g., Interview with CE, AUSA (2013).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., Interview with EM, AUSA (2015).

seemed to be that she was a conscientious mother—and heartbroken by the incident.<sup>161</sup> Based on this discovery, the AUSA worried about the polarizing nature of the case for future jurors. Though some sympathized with the defendant, who had surely suffered, others felt the prosecutor had an obligation to demand justice on behalf of a victim who could not speak for himself and whose death could easily have been prevented.<sup>162</sup>

Drawing on her peers' divided opinions, she imagined jurors engaged in a similarly intractable debate during their deliberations. Though she personally felt the case was worthy of prosecution, it seemed clear that twelve people were unlikely to agree on the defendant's guilt.<sup>163</sup> When the case was ultimately resolved with a guilty plea, the prosecutor was relieved—though she disagreed with the judge about the defendant's ultimate punishment. Although both of these cases—like most in the office—were resolved by guilty plea rather than jury trial, the prosecutors assigned to them eagerly assessed the defendants and victims in their cases with continual reference to jurors.<sup>164</sup>

In describing other examples of the role of hypothetical jurors, prosecutors worried that defendants might appear to be more sympathetic in cases with unsympathetic victims. The Internal Revenue Service (IRS) came up as a frequent example cited by several prosecutors who referred to unrelated cases. One prosecutor explained the challenge of combatting an attitude that he worried jurors would share. Recognizing, with humor, the likelihood of negative juror attitudes toward the IRS, he “bent over backwards” to appear fair.<sup>165</sup> Another colleague who tried tax cases lamented the fact that jurors often failed to distinguish between the IRS and his own employer, the Department of Justice. Regardless of the truth of their beliefs, he said, he worried jurors would dislike the agency they *thought* he worked for.<sup>166</sup>

In addition to thinking about whether a defendant might elicit sympathy, prosecutors also considered other emotional responses defendants might elicit. In light of jurors' anticipated moral outrage, prosecutors sometimes expressed ambivalence about prosecuting cases that involved allegations of child pornography.<sup>167</sup> In one case, a prosecutor recalled a story in which a prospective juror reportedly responded to a judge with violent

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<sup>161</sup> See, e.g., Interview with CH, AUSA (2013).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See, e.g., Interview with DH, AUSA (2017).

<sup>165</sup> See, e.g., Interview with CX, AUSA (2013).

<sup>166</sup> See, e.g., Interview with BH, AUSA (2013).

<sup>167</sup> See, e.g., Interviews with BW, CJ & CW, AUSAs (2013).

outrage upon hearing the allegations in such a case.<sup>168</sup> Another prosecutor described a case in which a target found with child pornography worked as a youth baseball coach. Though the case differed from those typically tried in federal court, consideration of jurors' perceptions of the defendant's conduct and victims' vulnerability informed the decision to prosecute him.<sup>169</sup>

In a white-collar case, a prosecutor took comfort in the fact that jurors would likely find the defendant in her case distasteful. She explained that she had been told that the defendant was a "dick." He was tall, looked imposing, and wore expensive suits. It would be great for her case, she thought, if he brought the lack of contrition that characterized his everyday demeanor into the courtroom with him.<sup>170</sup> This, after all, might bolster the government's arguments about his greed. She compared the case to another she tried in which the defendant was an elderly woman who would flaunt her wealth outside of court while hobbling into court with a walker during trial.<sup>171</sup> The trial team shared similar concerns about a defendant's appearance in advance of jury selection in a public corruption case. Here, they described the defendant as someone who looked as though he had stepped out of a fashion magazine. He presented himself like a person with modest beginnings, having "pulled himself up from his bootstraps."<sup>172</sup>

As these examples suggest, hypothetical jurors gave prosecutors a framework for scrutinizing the jury appeal of their cases. This analysis could then serve as a metric for measuring the intelligibility of charges, a basis for contesting the credibility of witnesses, and a standard for considering which defendants were worthy of prosecution. As a morally malleable construct, hypothetical jurors also aided prosecutors' management of ongoing investigations, evaluations of the sufficiency of available evidence, and approaches to plea agreement discussions.

### *B. Interventions of Hypothetical Jurors in Prosecutorial Technique*

By prosecutors' accounts, criminal cases fell into two broad categories: "reactive" and "proactive." In "reactive" cases, an alleged crime had taken place (e.g., a person was stopped at an international airport with a fake passport) and was phoned in to an on-duty prosecutor. The prosecutor who received this call was tasked with evaluating it and recommending a course of action to his or her supervisor. A relevant consideration when assessing these potential cases was a future jury's likely reaction to them and the

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<sup>168</sup> See, e.g., Interview with BQ, AUSA (2013).

<sup>169</sup> See, e.g., Interview with CZ, AUSA (2013).

<sup>170</sup> See, e.g., Interview with AC, AUSA (2015).

<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., Interview with FB, AUSA (2016).

evidence involved. Because the prosecutors “on duty” to evaluate such cases would be assigned to them from intake through trial, they emphasized the importance of considering the cases’ shortcomings with reference to lay decision-makers.<sup>173</sup>

“Proactive” cases, in contrast, reached prosecutors (either directly or through their supervisors) as investigations were ongoing. These cases required collaboration with law enforcement agents who made arrests, searched targets’ homes, interviewed potential witnesses, and continued to gather evidence. Over the course of these working relationships, prosecutors sometimes advised agents about the weight, necessity, and admissibility of evidence, as well as their own ability to prove each element of the crimes they would charge. In conjunction with case agents, prosecutors made decisions about investigative techniques with hypothetical jurors’ perspectives in mind—including at the earliest phases of an investigation—and assessed whether adequate evidence had been gathered. Prosecutors were also alert to whether they could explain the significance of their evidence to jurors, which informed their discussions of potential plea deals.<sup>174</sup>

### *1. Investigating Criminal Cases*

Most prosecutors indicated in semi-structured interviews that they regularly considered jurors’ impressions of evidence as investigations were underway.<sup>175</sup> This prompted greater reflexivity as prosecutors evaluated the investigations-in-progress that agents presented to them.<sup>176</sup> To this end, a prosecutor reflected that jurors served as a check on his personal decision-making process that prompted him to ensure he had enough “at every stage” with an eye toward what evidence would be presented to jurors at trial.<sup>177</sup> According to this AUSA, case preparation was tethered to a future hypothetical trial in which jurors were the arbiters of even the most preliminary assessments of evidence. Prosecutors then used this framework to figure out organizational strategies for their investigations—ranging from the selection and preparation of witnesses to decisions about particular investigative techniques to employ or avoid.<sup>178</sup>

This focus extended to prosecutors’ discretionary decisions related to witnesses a prosecutor would try to “flip”—or have cooperate against the

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<sup>173</sup> See, e.g., Interview with BV, AUSA (2013).

<sup>174</sup> See, e.g., Interviews with BU & BQ, AUSAs (2013).

<sup>175</sup> See, e.g., Interview with AM, AUSA (2013).

<sup>176</sup> See, e.g., Interview with BF, AUSA (2013).

<sup>177</sup> See, e.g., Interview with AW, AUSA (2013).

<sup>178</sup> See, e.g., Interview with BG, AUSA (2013).

target of a prosecution—as well as to considerations of which individuals might testify on the government’s behalf. As a general rule, informed by the intuitions they imputed to lay decision-makers, prosecutors were reluctant to ask individuals with large roles in criminal schemes to testify against those in lower level roles.<sup>179</sup> In a fraud case, for example, a prosecutor lamented the fact that a low-level employee had been charged.<sup>180</sup> Amplifying this sentiment, other colleagues worried that future jurors would be as leery of company leaders turning on subordinates as they would be of family members testifying against one another.<sup>181</sup>

Consideration of future jurors also extended to prosecutors’ views on how the targets of their investigations should be monitored and arrested. One prosecutor described his horror upon learning that a law enforcement agent had been following a lawyer in an airplane. Among the reasons he put an end to the investigation, he cited jurors’ likely intuition that this approach to monitoring a target was out of sync with reasonable law enforcement practices. He concluded that a future juror, like him, would wonder whether an agent deploying this technique under the circumstances was out of his mind.<sup>182</sup>

Other prosecutors’ ideas about how targets should be apprehended reflected their understanding of ethical norms they believed future jurors would share. As an example, a prosecutor described a white-collar case that involved a business owner who was suspected of being involved in a fraudulent scheme. After learning that another law enforcement agent planned to arrest this individual at work, he proposed an alternative that he believed would be more palatable to future jurors. His impulse was to imagine a jury, months down the road, hearing a defendant argue that he was innocent—did nothing wrong—yet had arresting agents destroy his career and humiliate him in front of his coworkers. At the end of the day, this prosecutor recognized that it would be left to him to defend aggressive tactics in front of jurors, which strengthened his sense of the importance of orienting one’s work around jurors from the inception of the case through its conclusion.<sup>183</sup>

Ideas about jurors’ potential interpretations also intervened as prosecutors considered whether particular investigative approaches might violate lay citizens’ ideas about fair evidence-gathering practices. Here, again, jury concerns effectively amended the enforcement of federal laws,

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<sup>179</sup> See, e.g., Interview with DE, AUSA (2017).

<sup>180</sup> See, e.g., Interview with DH, AUSA (2017).

<sup>181</sup> See, e.g., Interviews with AA & DN, AUSAs (2017); see also Offit, *supra* note 100, at 19.

<sup>182</sup> See, e.g., Interview with AM, AUSA (2013).

<sup>183</sup> *Id.*

and particularly in the context of drug crimes. Two undercover narcotics investigation practices that were subject to scrutiny due to jury-related concerns included offering to sell drugs to suspected drug dealers and offering resources to rob other drug dealers. In the first type of case, prosecutors worried that agents' deployment of a tactic known as a "reverse"<sup>184</sup>—in which undercover agents posed as drug dealers and arrested drug-purchasing targets—would be perceived by jurors as unfair.<sup>185</sup> When law enforcement agents offered to put drugs in people's hands as a way of combatting their circulation, prosecutors thought jurors would be skeptical. Although no drugs actually changed hands during these investigations, prosecutors were more confident that jurors would see the criminality of targets' conduct as outweighing the distasteful circumstances of such arrests when agents offered to sell drugs for large sums of money.<sup>186</sup>

Another investigative technique that prosecutors scrutinized with reference to jurors was designed to target violent criminals. Referred to in some jurisdictions as a "home invasion reversal," such investigations often began with an undercover agent alerting targets to an opportunity to rob a local drug dealer's stash, which in reality was a location controlled by the agent. The agents would set a time and place for the theft. Recognizing that hypothetical jurors might perceive this technique as deceptive or inducing otherwise law-abiding people to commit crimes,<sup>187</sup> the prosecutors who weighed in on these investigations asked the agents they worked with to give targets several opportunities to change their minds and walk away, on video, before arresting them. In some cases, investigations were abandoned altogether. When a target whom agents approached to carry out a robbery arrived on a bicycle and appeared harmless to an AUSA, for example, this prosecutor recommended the investigation be called off, imagining future jurors' potential concerns about entrapment or government overreaching. When targets arrived with bulletproof vests, weapons of their own, and plastic wrist ties to immobilize victims, however, future jurors were believed

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<sup>184</sup> Or "reverse sting" operation. See Adam Longo, *Police "Reverse Sting" Operations Under Scrutiny by AZ Supreme Court*, CBS 5 PHOENIX (Apr. 28, 2013), [https://www.azfamily.com/news/police-reverse-sting-operations-under-scrutiny-by-az-supreme-court/article\\_a52049a6-7f37-54f6-a3d0-fe7bb50d56f9.html](https://www.azfamily.com/news/police-reverse-sting-operations-under-scrutiny-by-az-supreme-court/article_a52049a6-7f37-54f6-a3d0-fe7bb50d56f9.html) [<https://perma.cc/V8TK-MF2Q>].

<sup>185</sup> See, e.g., Interview with AH, AUSA (2013).

<sup>186</sup> *Id.* (noting that law-abiding citizens were less likely to walk around with \$500,000 in cash than drug dealers).

<sup>187</sup> Prosecutors I spoke with about this tactic cited a *USA Today* article that described "home invasion" prosecution techniques in detail as evidence that future jurors—and laypeople generally—had likely formed impressions about them. See Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA TODAY (June 28, 2013), <http://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109> [<https://perma.cc/V9J9-U8S5>].

to perceive the defendants as dangerous and violent and therefore approve of the tactics used to arrest them.<sup>188</sup>

By prosecutors' accounts, the gaze of imagined jurors thus created a professionally acceptable opening for prosecutors to articulate extralegal and subjective concerns about ongoing and planned investigations.

## 2. *Approaching Plea Agreement Discussions*

Prosecutors' assessments of the strength of their evidence, perceived seriousness of the cases charged, and unsympathetic character of defendants often entered plea agreement discussions explicitly. A federal prosecutor who tried drug and violent crime cases that involved wiretap evidence, for example, routinely explained to defendants that in his eleven years of experience he had never seen a jury acquit a defendant in federal court. He indicated that in these cases deliberations would not be long because wiretap and video evidence would make it easy for jurors to understand.<sup>189</sup> Appealing to the accessibility and clarity of the evidence to future jurors, he then invited defendants to elicit their attorneys' perspectives on how jurors would likely view the case.

Another prosecutor who tried gang cases made similar appeals during plea agreement discussions. To the extent that jurors would see evidence that the defendant committed violent crimes near an elementary school, a prosecutor recalled conveying to a defendant that jurors' disdain for the defendant would be immediate.<sup>190</sup> Unlike some of his colleagues, who imagined particular types of people who might be empaneled as jurors, this prosecutor imagined his future jurors as a generalized "collective." He pictured an "abstract model jury in [his] head" all intently listening to everything he had to say. To the extent that he viewed evidence in his cases as strong, he imagined that jurors would do the same.<sup>191</sup>

In a tax fraud case, another prosecutor encouraged a defendant to consider how a jury would view her conduct if the case went to trial. A large part of his interactions with the defendant thus involved imagining jurors' likely perspectives.<sup>192</sup> In this AUSA's view, a future jury would have "no patience" for a person who sought to enhance her material well-being by stealing federal tax dollars. The defendant's ultimate decision to accept a plea offer, in his view, was prompted by the adoption of his narrative about fictive lay decision-makers.

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<sup>188</sup> See, e.g., Interview with CV, AUSA (2013).

<sup>189</sup> See, e.g., Interview with AD, AUSA (2017).

<sup>190</sup> See, e.g., Interview with DH, AUSA (2013).

<sup>191</sup> See, e.g., Interview with AD, AUSA (2013).

<sup>192</sup> See, e.g., Interview with AF, AUSA (2013).

When prosecutors felt that cases or charges lacked jury appeal, pursuing plea agreements was a potential source of anxiety.<sup>193</sup> To this end, prosecutors contended that it was best to negotiate plea deals from the position of being prepared to try a case.<sup>194</sup> As one AUSA put it, cases with “zero jury appeal” could lead *judges* to take a hostile attitude toward cases, let alone jurors.<sup>195</sup> Another prosecutor said that he felt he “knew” when he would not have the jury on his side and that proceeding to trial would be risky.<sup>196</sup>

As a matter of office practice, the plea deals that prosecutors proposed to defendants during initial proffer or “show and tell” meetings did not improve from those they would offer as trials approached. When prosecutors learned information about defendants that they believed would make them seem more sympathetic—or less culpable—to jurors, this approach could shift.<sup>197</sup> During an interview, one prosecutor indicated that these decisions regarding the judgment of hypothetical jurors were “defendant-specific.”<sup>198</sup> And individual prosecutors could have different impressions of the relevance of these subjective assessments to plea discussions.<sup>199</sup>

In other cases, prosecutors’ approaches to plea agreement discussions focused on locally and regionally specific attitudes of their anticipated lay decision-makers. A notable example of this was a case that involved an alleged assault of a child. The lead prosecutor assigned to the case took seriously the fact that prospective jurors in his region of the country would be likely to view a teacher’s use of physical discipline as problematic. Had the case been tried in another part of the country, he explained, their venire would have encompassed people with different approaches to punishing children.<sup>200</sup> Because the lead prosecutor felt that the jurors summoned to court would characterize excessive physical discipline as abusive, he felt that he could approach plea agreement discussions with confidence.<sup>201</sup> Conceptions of a just plea agreement were thus informed by the trial team’s

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<sup>193</sup> RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 5–6 (2006); *see also* Interviews with DB & CJ, AUSAs (2017) (describing in general terms how the character of a cooperator could influence charging decisions and mentioning a judge’s tendency to push for plea deals in child pornography cases due to the perceived responses of jurors).

<sup>194</sup> *See, e.g.*, Interview with CX, AUSA (2013).

<sup>195</sup> *See, e.g.*, Interview with AZ, AUSA (2013).

<sup>196</sup> *See, e.g.*, Interview with DH, AUSA (2013).

<sup>197</sup> *See, e.g.*, Interview with DN, AUSA (2017).

<sup>198</sup> *See, e.g.*, Interview with DH, AUSA (2017).

<sup>199</sup> *See* HERBERT S. MILLER, WILLIAM F. McDONALD & JAMES A. CRAMER, *PLEA BARGAINING IN THE UNITED STATES*, at xviii (1978) (“Assistant prosecutors may differ in their conclusions about the strength of the case and the seriousness of the offender.”).

<sup>200</sup> *See, e.g.*, Interview with AY, AUSA (2017).

<sup>201</sup> *Id.*

consensus that they could prove the case before particular jurors they imagined, too.

#### IV. ANALYSIS

Having established that federal prosecutors routinely invoke hypothetical jurors in their work, this Article now considers why this might be the case in light of the infrequency of trials. First, hypothetical jurors influence how prosecutors carry out their work in terms of trial preparation, collaboration, and navigating the norms of professional responsibility. Second, hypothetical jurors help inform understandings of justice.

##### *A. Effects of Prosecutors' Consideration of Hypothetical Jurors*

Although the chances of particular cases proceeding to trial were low, federal prosecutors continued to use hypothetical jurors in their work. This research suggests that this imaginative exercise played three roles: prosecutors' invocations of hypothetical jurors (1) had instrumental value in the event a case proceeded to trial, (2) contributed to prosecutors' collaborative work, and (3) functioned as an ethical resource.

##### *1. Hypothetical Jurors Have Instrumental Value if Cases Proceed to Trial*

A first and obvious explanation for jurors' salience in case preparation is lawyers' instrumental interest in anticipating how jurors might respond to evidence and witnesses if there is any chance that a case would proceed to trial. To this end, a prosecutor explained that, despite having learned at a trial advocacy center that only four percent of cases went to trial, she wanted to be prepared.<sup>202</sup> Anticipating the possibility that a case would be tried in court was thus analogized by some to preparing for an emergency.<sup>203</sup> Prosecutors sought to make sure that from the moment a defendant was indicted, a case could weather the contingencies attendant to trial. This is because change during trial preparation was continual. A prosecutor explained in this vein that at a moment's notice a case involving a cooperating witness could be

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<sup>202</sup> See, e.g., Interview with AO, AUSA (2013). Echoing this sentiment, numerous colleagues underscored the importance of assessing cases from hypothetical jurors' perspectives from the earliest stages of an investigation. They described the practice, for example, of maintaining notebooks dedicated to jury-specific considerations in civil cases despite knowledge that ninety-nine percent of cases would be resolved without trials. In criminal cases, they emphasized the importance of considering jurors before cases were indicted and explained that examining cases with jurors in mind could serve as a check on a case that might have been oversold to an AUSA by another law enforcement agent, for example. See, e.g., Interviews with AE, AP, AS, BF, BL & BY, AUSAs (2013).

<sup>203</sup> See, e.g., Interviews with AE, AP & AS, AUSAs (2013). Due to the fact that it was not clear which cases in the office would resolve through pleas, prosecutors found themselves considering the possibility of proceeding to trial earlier on in investigations.

turned on its head if that witness was unexpectedly arrested on the eve of trial.<sup>204</sup>

In the process of defending the United States in a civil suit, another AUSA made a point of referring to a record of communications between an air traffic controller and pilot as a “partial transcript” rather than a transcript. If the case went to trial, he reasoned, this distinction would emphasize the incompleteness of the interactions that jurors would learn about in court. The plaintiff, in contrast, referred to an edited version of the transcript that made it appear as though the airplane at issue was the sole focus of the employee’s attention rather than one of eight planes for which he was responsible.<sup>205</sup>

Numerous AUSAs in both the office’s civil and criminal divisions agreed that among the reasons to think about juries early in a case was the possibility that the weakest target of an investigation would exercise his or her right to a jury trial.<sup>206</sup> In this vein, one prosecutor recalled losing a case because a “small fish” in a group of many targets chose not to plead guilty.<sup>207</sup> In other instances, prosecutors were assigned to cases long after defendants were indicted and cooperators chosen (and interviewed) by colleagues at other federal agencies. In one such case, a prosecutor regretted that instrumental calculations about how to present evidence to jurors often intervened late in his preparation. He explained his need to pitch the case to a jury to avoid the impression that the government was “ganging up” on a little guy.<sup>208</sup>

Empirical studies of legal actors’ attitudes toward jurors have tended to focus on the strategic dimensions of lawyers’ thought processes.<sup>209</sup> In the context of prosecutorial strategy, this orientation is not an altogether surprising one because the conflation of chronology and causality can be built into criminal law itself.<sup>210</sup> Rather than focus only on legal outcomes, however, anthropologists of law are increasingly attentive to aspects of legal practice that transcend instrumental considerations.<sup>211</sup> In the context

<sup>204</sup> See, e.g., Interview with BL, AUSA (2013).

<sup>205</sup> See, e.g., Interview with BY, AUSA (2013).

<sup>206</sup> See, e.g., Interview with BS, AUSA (2013).

<sup>207</sup> See, e.g., Interview with AS, AUSA (2013).

<sup>208</sup> See, e.g., Interview with DH, AUSA (2017).

<sup>209</sup> See Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 298–302 (2005) (discussing a case study of a Midwest county that invited litigators to share general reflections about their approaches to voir dire).

<sup>210</sup> See, e.g., RICHARD ASHBY WILSON, INCITEMENT ON TRIAL: PROSECUTING INTERNATIONAL SPEECH CRIMES 126–32 (2017) (describing this analytic tendency in the context of prosecuting speech crimes in international criminal courts).

<sup>211</sup> See generally 1 THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE (Elizabeth Mertz, Stewart Macaulay & Thomas W. Mitchell eds., 2016).

examined here, it is clear that prosecutors' inordinate attention to jurors is not entirely attributable to ends-focused concerns such as (in the criminal context, for instance) obtaining convictions. As we have seen, prosecutors integrated talk of jurors into routine discussions—with one another and with me—as they assessed and debated particular decisions.

2. *Hypothetical Jurors Enhance the Democratic Character of Prosecutorial Decision-Making*

Hypothetical jurors also critically intervened in the U.S. Attorney's Office to facilitate more egalitarian and collaborative discussions with trial partners, supervisors, and colleagues from other federal law enforcement agencies. Rather than explicitly critique colleagues' opinions, lawyers frequently invoked the contrary perspectives of hypothetical jurors. Divisive suggestions, in other words, were imputed to future lay decision-makers. Invocations of imagined juror reactions thus served as legal fictions that afforded prosecutors flexibility to reframe peers' approaches to cases in light of their various potential interpretations by outsiders.<sup>212</sup>

Prosecutors' ability to invoke jurors during preparation meetings, of course, depended on the occurrence of such meetings in the first place. The office's particular organizational structure thus influenced the potential and quality of interactions between line attorneys and their supervisors. This included the office's division into units with multiple levels of oversight—including unit heads, chiefs and deputy chiefs, lawyers who worked directly with the U.S. Attorney and, in some cases, attorneys in the appeals unit who were assigned to work with trial teams. In the office that was the focus of this study, prosecutors often raised concerns about future jurors' views during preliminary meetings and conversations with law enforcement agents. These discussions, as described herein, focused on the intelligibility of evidence and perceived credibility and character of witnesses, defendants, and victims.

In these contexts, AUSAs grounded the contrary opinions they shared with supervisors and peers in the imagined perspectives of lay onlookers. This technique allowed conflicting views to be presented in impersonal terms while keeping lay intuitions about justice at the center of case discussions. The diversely constituted and unpredictable interpretations of future jurors thus raised the stakes of disregarding colleagues' divergent views even when

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<sup>212</sup> See ELINOR OCHS & LISA CAPPS, *LIVING NARRATIVE: CREATING LIVES IN EVERYDAY STORYTELLING* 163 (2001); Frank Gaik, *Radio Talk-Show Therapy and the Pragmatics of Possible Words*, in *RETHINKING CONTEXT: LANGUAGE AS AN INTERACTIVE PHENOMENON* 271, 285, 287 (Alessandro Duranti & Charles Goodwin eds., 1992).

they were not shared.<sup>213</sup> In an office setting subject to continual personnel rearrangement facilitated by the presidential appointment of new U.S. Attorneys, such a technique of neutralizing hierarchical distinctions was essential.

Though they offered a resource for prosecutors in conversation, concerns about hypothetical jurors' perspectives did not necessarily win the day. In some cases, prosecutors' assessments of the jury appeal of their cases failed to persuade supervisors to change their minds. One prosecutor, for example, recalled being approached by an agent with a fraudulent billing case involving a physician and her son. The prosecutor's inclination at the time was to look for evidence of a larger scheme. When the agent brought her the case, she recalled, her instinct was to collect evidence that larger amounts of money had moved in and out of the clinic. If the doctor chose not to plead guilty, she would face the scrutiny of a similarly skeptical federal jury.<sup>214</sup> After the defendant was sentenced to probation, the judge criticized the case, noting that neither defendant had a criminal record. The AUSA felt vindicated that the judge's instincts about the case mirrored those she had imputed to potential jurors—despite a supervisor's previous dismissal of her concerns. In subsequent cases, the prosecutor said this experience taught her to insist that supervisors take her commonsense critiques of cases more seriously.<sup>215</sup>

### 3. *Hypothetical Jurors Are an Ethical Resource for Prosecutors*

In *Berger v. United States*, Justice George Sutherland famously described the prosecutor's role as seeing that "justice shall be done."<sup>216</sup> Legal scholars and practitioners have since puzzled over the meaning of justice in this context, noting its ambiguity.<sup>217</sup> In practice, however, prosecutors

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<sup>213</sup> See, e.g., Interview with DA, AUSA (2013) (noting that jurors inject an "inherent degree of unpredictability" into case outcomes and that no prosecution is so "rock solid" that prosecutors can rule out the possibility that a jury will acquit a defendant).

<sup>214</sup> See, e.g., Interview with AO, AUSA (2013).

<sup>215</sup> *Id.*

<sup>216</sup> 295 U.S. 78, 88 (1934) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2016) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

<sup>217</sup> See, e.g., Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 622 (1999) (considering alternate potential interpretations of prosecutors' ambiguous directive to seek justice: "It might be taken to imply a posture of detachment characteristic of that assumed by judges, and quite apart from that ordinarily assumed by advocates, particularly in the trial context. It might imply an obligation of fairness in a procedural sense. Or, it might imply a substantive obligation of fairness—for example, an affirmative duty to ensure that innocent people are not convicted." (internal citations

continually formulated understandings of what justice entailed in particular cases. And they did so with reference to hypothetical jurors' perspectives, which served as a proxy for commonsense views that might not otherwise find explicit expression in their work.

Imagined jurors were conducive to this exercise for several reasons. First, multiple and shifting identities and opinions could be imputed to them. That is, the varied and unpredictable responses of the laypeople prosecutors imagined authorized them to bring diversely constituted lay expertise into their case preparation.<sup>218</sup> Second, hypothetical jurors' embodiment of distinct personas and perspectives, and their broad evaluative potential, gave them moral malleability for attorneys who invoked them. Depending on the particular perspective a prosecutor sought to advance, distinct juror characteristics and intuitions could be selectively emphasized.

Hypothetical jurors thus offered prosecutors a resource with which to consider disparate meanings of justice in the context of different cases. Though the prosecutors who were the subjects of this study viewed their central professional obligation as seeking justice, lawyers articulated subjective intuitions about the fairness of their cases that varied from one case and colleague to the next. To this end, invocations of hypothetical jurors' perspectives, and formulations of jury appeal in particular, often brought the subject of justice into case assessments explicitly. One prosecutor noted, for example, that inquiries into jury appeal were aimed at determining whether cases were "fundamentally fair."<sup>219</sup> In this prosecutor's view, fairness took shape with reference to hypothetical jurors who he imagined would differentiate between behavior that warranted prosecution and that which did not.<sup>220</sup>

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omitted)); Luban, *supra* note 88, at 17 (noting the "minimalist" approach taken by formal ethical rules with respect to prosecutors' professional obligation to "seek justice not victory"); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) ("The do justice standard, however, establishes no identifiable norm. Its vagueness leaves prosecutors with only their individual sense of morality to determine just conduct." (internal quotation marks and citation omitted)); Cyrus Vance, *The Conscience and Culture of a Prosecutor*, N.Y.C. B. ASS'N (June 20, 2012), <https://www.manhattanda.org/the-conscience-and-culture-of-a-prosecutor-new-york-city-bar-association> [<https://perma.cc/D8CW-9CC9>] (arguing that prosecutorial discretion is delimited by "values of conscience and culture" rather than by laws or ethics rules).

<sup>218</sup> A fitting description of the creative process in this context can be found in C. Wright Mills's description of creativity as a form of "playful[]" thinking, open to "re-arranging," "re-sort[ing]" and access to a "variety of viewpoints," which helped lawyers estrange themselves from their work to see the details of their cases anew. C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 211–14 (2d. ed. 2000) (noting that creativity has an "unexpected" quality about it, prompted by its combination of multiple ideas and opinions). Prosecutors' invocations of hypothetical jurors similarly aid them in estranging themselves from cases they know intimately to examine their work anew.

<sup>219</sup> See, e.g., Interview with DA, AUSA (2013).

<sup>220</sup> See, e.g., Interview with DH, AUSA (2013).

Another prosecutor drew a connection between the uncertainty and unpredictability of his colleagues' and jurors' decision-making processes. Despite the fact that AUSAs shared professional training as lawyers and carried out similar work, he pointed out, it was entirely possible to get twelve different opinions on how to approach case preparation or characterize evidence in opening statements.<sup>221</sup> Another colleague explained that everyone saw cases differently—often wrangling internally with doubt about what jurors would make of their judgment calls in particular cases.<sup>222</sup> Anticipating jurors' reactions to evidence and witnesses, however, was an inherently speculative endeavor. The variability of jurors' interpretations thus prompted prosecutors to take a reflexive and flexible approach to evaluating or cutting particular pieces of evidence from their cases.<sup>223</sup>

An analog to prosecutors' conceptual work can be found in studies of category creation in other social settings. Though his substantive and geographic foci differ, Professor Ira Bashkow's research on the Orokaiva in Papua New Guinea revealed a similar technique of invoking hypothetical constructs of strangers to render judgment. For the Orokaiva, conceptions of foreigners were tied to ideas about abstracted qualities, activities, and objects understood as "detachable from persons."<sup>224</sup> Likewise, prosecutors conceived of justice with reference to characteristics they imputed to the places of affiliation, institutions, and occupations of imagined citizens. Though jurors—like foreigners for the Orokaiva—rarely appeared in person, they remained an abundant and generative foil for their creators, contributing to formulations of the identities of those who invoked them.<sup>225</sup>

Two cases illustrated hypothetical jurors' relevance as prosecutors negotiated their professional roles and competing visions of justice. The first involved the prosecution of a federally employed supervisor who allegedly violated the Whistleblower Protection Act by disabling a hotline which contained an anonymous report that criticized him. Noting jurors' potential concerns, one prosecutor chose to frame the supervisor's behavior as not only violating his obligations as an employee but also violating the freedom of those seeking to utilize a protected reporting process. Interjecting with the

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<sup>221</sup> *Id.*

<sup>222</sup> *See, e.g.*, Interview with BG, AUSA (2014).

<sup>223</sup> *Id.* In this context, prosecutors commented on the importance of strategic thinking about evidence that should *not* be presented at trial.

<sup>224</sup> IRA BASHKOW, *THE MEANING OF WHITEMEN: RACE AND MODERNITY IN THE OROKAIVA CULTURAL WORLD* 146, 249 (2006).

<sup>225</sup> *See id.* at 20 (“[E]ven as whites’ physical presence among Orokaiva has decreased, the importance of whitemen and taupa kastom in the local culture has continued undiminished, as an elaborate complex of ideas about whitemen and their customs, institutions, and things has developed in the vernacular culture.”).

contrary perspective of a detached observer, a colleague noted that the word “freedom” might sound out of place and urged the use of different language. Given popular attention to the perils of anonymous bullying, a juror might find the notion of “freely” reporting abuse less compelling than an argument for the protection of public welfare compromised by a supervisor’s alleged actions.<sup>226</sup>

In a different case, a prosecutor critiqued a defendant for taking bribes in dive bars and coffee shops, where much of the surveillance evidence against him had been gathered. Here, again, a skeptical colleague intervened, highlighting the subliminally adverse impact that criticizing the defendant’s location could have on jurors. If white-collar criminals routinely planned criminal activity on golf courses without complaint, he argued, how would it look to criticize a defendant’s use of more modest and widely accessible locales? This colleague’s decision to frame his intervention in this meeting from a collective vantage point reflected an effort to present his views as encompassing those of listeners beyond his colleagues. In both cases, characterizations of cases were revised with an eye toward incorporating the concerns and intuitions of a plurality of imagined others. Though jurors were not privy to the interactions that purported to consider their perspectives, they nonetheless had an outsized influence on prosecutors’ work.<sup>227</sup>

As these examples demonstrate, reference to hypothetical jurors enhanced the procedural justice of prosecutors’ collaborative work—ensuring that each argument and counterargument was aired and considered on equal terms. This is not, of course, to suggest, that jurors functioned as an ethical *constraint* or that they necessarily facilitated just outcomes. To be sure, the idiosyncrasies of lawyers’ views, even projected onto jurors, could vary as widely as those of empaneled deliberating jurors. The next Section examines some of the justice considerations and concerns that accompany jurors’ inconsistent and uneven interventions as a narrative and strategic tool for legal practitioners.

### *B. Hypothetical Jurors and Justice Considerations*

To the extent that common sense and local expertise are invoked to justify lay decision-makers’ participation in the U.S. legal system,<sup>228</sup> the

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<sup>226</sup> See, e.g., Interview with AA, AUSA (2013).

<sup>227</sup> Cf. DAVIS, *supra* note 74, at 5; SOUTHWORTH & FISK, *supra* note 87, at 336 (noting prosecutors’ relative lack of accountability due to their “amorphous” clients); McCoy, *supra* note 53, at 688.

<sup>228</sup> For recent examples of this type of invocation, see Justice Anthony Kennedy’s majority opinion and Justice Samuel Alito’s dissent in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861, 874–75 (2017).

influence of jurors exceeds their physical presence in courtrooms.<sup>229</sup> Acknowledgment of this empirical reality affirms the practical value of a robust jury system to lawyers' work. Though hypothetical jurors are in no way equivalent to actual individuals summoned to court to participate in trials, their presence has a democratizing effect on prosecutors' intraoffice decision-making processes. This is because they facilitate genuine engagement with alternative formulations of justice. When prosecutors imagine and give voice to so-called lay perspectives, they bring "ordinary moral and commonsense reasoning" into the exercise of prosecutorial discretion.<sup>230</sup> Though prosecutors seldom have the opportunity to elicit feedback from jurors in person,<sup>231</sup> they can nonetheless draw on the effects of such interactions as an ethical resource—including, as Professor Robert Burns has characterized it—by considering the "human dimension of legal questions that can be lost in piles of briefs and records."<sup>232</sup>

Prosecutors' views, however, cannot—and ought not—be substituted for those of jurors. And there are certainly openings for prosecutors to effectively amend democratically passed laws by declining to prosecute their violation. Acknowledging this pernicious possibility, however, some prosecutors were quick to point out that even the *presence* of jurors during voir dire supplied them with limited or imperfect information, at best.<sup>233</sup> In spite of their rarity, jurors nonetheless enlarged the range of arguments and considerations available during prosecutors' deliberation, prompting them to revisit or challenge arguments and evidence that might otherwise go unquestioned.

In the civil context, legal scholars have noted the extent to which knowledge of jury awards in past trials inform attorneys' assessments of likely damage awards during settlement negotiations.<sup>234</sup> John Gunther argues, for example, that

juries have a function even when they aren't functioning. That is, decisions are regularly made about the course a case will take based on the participants'

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<sup>229</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) (inviting further empirical attention to how formal legal proceedings influence lawyers' strategy and behavior).

<sup>230</sup> BURNS, *supra* note 6, at 126.

<sup>231</sup> *Cf.* Participation in a meeting with CZ during which a prosecutor said he learned jurors' first-hand impressions from a post-trial meeting that was permitted in another jurisdiction where he worked as an Assistant District Attorney. *See* Interview with CZ, AUSA (2013).

<sup>232</sup> BURNS, *supra* note 6, at 121.

<sup>233</sup> *See* Offit, *supra* note 100, at 19; Offit, *supra* note 131, at 172 (noting that federal jury selection was a "low information" process due to judges' wide discretion to limit the quantity and substance of the questions they posed to prospective jurors).

<sup>234</sup> *See, e.g.*, JONAKAIT, *supra* note 193, at 11.

beliefs of what would *likely* happen if the case were tried by a jury. It is probably no exaggeration to say that, directly or indirectly, the large majority of civil cases are settled without trial for this reason. Similarly, in criminal cases, defense lawyers particularly agonize over whether theirs is a “good” or “poor” jury case.<sup>235</sup>

This effect may nonetheless be tempered by litigants who increasingly rely on past settlements as “precedent” for settlement decisions.<sup>236</sup> Others point out that opportunities to informally and advantageously settle disputes may be limited by the absence of access to public adjudication.<sup>237</sup>

As the examples discussed in this Article suggest, however, hypothetical jurors’ influence on case outcomes requires further empirical study. In assessing whether justice interests are served by the consideration of lay perspectives, several factors deserve emphasis. First, it is possible that the selective invocation of hypothetical jurors among different prosecutors and units resulted in unlike approaches to like cases. Exacerbating the potential for the inconsistent enforcement of federal law, prosecutors with less experience with jury trials could find lay decision-makers less relevant to their case preparation. In the declined case involving fake drug prescriptions, for example, a prosecutor in a different U.S. Attorney’s office might have chosen to prosecute the case due to the clear violation of federal law, availability of evidence, and preparedness of other law enforcement agents to move forward with the case. Likewise, lawyers could differ in their prosecutions of drug cases that involved “reverse” sting operations from one jurisdiction, narcotics unit, and part of the country to the next.

Cases referred to as “home invasion reversals” presented a different ethical dilemma. To what extent could the selective prosecution of defendants who seemed superficially more threatening (or *less* sympathetic) lead to the disproportionate prosecution of those with criminal records? Or to the targeting of those already known to the law enforcement agents who investigated them? Legal scholars and practitioners in the United States have long advanced arguments about the potential for jury verdicts to be “unpredictable and arbitrary, susceptible to being moved by factors which

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<sup>235</sup> JOHN GUINTEHER, *THE JURY IN AMERICA*, at xv (1988).

<sup>236</sup> J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1727 (2012) (“Contrary to the conventional account of settlements, characterized as unknown and unknowable, empirical evidence reveals that prior settlement outcomes, which internalize the various distortions mentioned above, now serve as an increasingly important determinant of future settlements. As the shadow of the law is fading, a new shadow is emerging: the shadow of settlement.”).

<sup>237</sup> See Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC’Y REV. 11, 46 (1984) (“[I]nformal community justice is unlikely to serve many disputants unless it is intimately connected to some formal legal agency.”).

do not have to do with the evidence.”<sup>238</sup> Debates about jurors’ right to be informed about their power to disregard—or “nullify”—the law point to a similar source of ambivalence about discretionary judgment with limited oversight.<sup>239</sup> Greater awareness of how consideration of jury appeal can effectively amend the enforcement of federal laws thus also demands further study. On one hand, such considerations have the potential to counter the overcriminalization of cases that fail to comport with commonsense ideas about justice. On the other, prosecutors can freely authorize their own idiosyncratic views by putting them in the mouths of hypothetical others. Because cases are ultimately settled by groups rather than individuals, collective deliberation (whether in a jury room or prosecutor’s office) emerges as a vital context for sharing, challenging, or reconciling discordant opinions.

Alternative ethical frameworks for bringing extralegal considerations to criminal prosecutions warrant empirical attention, too. This includes the implications of preparing cases in the shadow of idiosyncratic federal judges or presidentially appointed U.S. Attorneys whose views may be well-known to AUSAs and yet be perceived as unjust in the context of particular cases. As a rhetorical device through which commonsense justice claims can be aired and contested, reference to hypothetical jurors may also stand as an alternative to other metrics for exercising discretion—including AUSAs’ perceptions, for example, of a defendant’s risk aversion or poor quality of legal representation.

#### V. RECOMMENDATIONS TO FACILITATE THE CONSIDERATION OF JURORS

The reduced presence of juries has not entirely robbed them of their ideational effects, including their role as an ethical resource for prosecutors during case preparation. This is because prosecutors often impute lay conceptions of fairness and local knowledge to lay decision-makers in the course of routine case preparation. In some cases, this knowledge originated from encounters with jurors during voir dire, questionnaire responses, or colleagues’ impressions of jurors that were empaneled in past trials. In other cases, prosecutors attributed their own local knowledge to “proxy” jurors that included nonlawyer friends, family, and office staff. Though jurors did not participate in such discussions firsthand, this Article challenges the notion that prosecutors’ work is completely attenuated from consideration of

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<sup>238</sup> See, e.g., PAULA DiPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 218 (1984).

<sup>239</sup> JOHN W. CLARK III, THE AMERICAN JURY: ISSUES AND COMMENTARY 157–58 (2010); NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 236–40 (2007).

outside, lay observers.<sup>240</sup> Time and again this public takes the form of an imagined jury.

Despite the inherent difficulty of applying findings from one case study to distinct office settings, this research highlights the potential of particular office practices to facilitate consideration of hypothetical jurors' views. First, convening regular meetings with trial teams, supervisors, colleagues, and staff can simulate the range of responses jurors can bring to a case. In the context of this study, such meetings took the form of status updates with law enforcement agents who were assembling evidence and, later, focused on mooted trial teams' opening statements and summations.

Second, to the extent that prosecutions do result in jury trials, U.S. Attorney's Office leadership should regularly circulate trial calendars and encourage AUSAs to observe portions of colleagues' trials as a precondition for trying their own cases. At the conclusion of trials, attorneys who served on or assisted trial teams should be encouraged to discuss their experience in the form of internal Continuing Legal Education programming that assumes a conversational format. Prosecutors should also be encouraged to devote time early in their case preparation to drafting—or locating—plain-language jury instructions, case-specific voir dire questions, questionnaires, and case statements. These practices further reinforce the practice of putting potential jurors' perspectives front and center in AUSAs' routine work.

Prosecutors' integration of lay perspectives into case discussions also has the distinct and underappreciated benefit of making their own decision-making practices more democratic. As this research reveals, the potential presence of jurors underscored the importance of considering multiple perspectives by eliciting colleagues' divergent opinions. Furthermore, jurors' views were invoked as part of a constructive and nonconfrontational technique of shaping colleagues' behavior. Jurors thus contributed an ethical dimension to prosecutors' talk by offering a vantage point that was distinct from the lawyers and supervisors involved in particular cases which allowed for external standards of judgment and critique. As part of this practice, trial teams verbalized impressions of evidence and witnesses with reference to jurors' third-person perspectives.

Beyond the contributions of hypothetical jurors discussed in this Article, social scientists have highlighted a number of the jury system's virtues. These include evidence that jury service in criminal cases facilitates broader civic engagement, including a willingness to participate as voters in

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<sup>240</sup> See SOUTHWORTH & FISK, *supra* note 87, at 336 (“The absence of a traditional client enables prosecutors to take a broad view of what justice requires in a particular case, but it also means that no one outside the bureaucracy of the federal or state Department of Justice or law enforcement community effectively constrains how prosecutors exercise their power.”).

electoral politics.<sup>241</sup> Another study found, with some qualification, that citizens who deliberate as part of twelve-person, unanimous civil trials are more likely to vote after their service.<sup>242</sup> Focusing on civil trials in particular, empirical studies have drawn attention to the favorable impressions of the fairness of the legal system generated by jury participation.<sup>243</sup> Others argue that the jury has a legitimating function as a democratic institution that allows ordinary people to render legal judgment,<sup>244</sup> contribute to a fact-finding body,<sup>245</sup> and reap the benefits of an educational resource.<sup>246</sup>

Prosecutors nonetheless face barriers to empaneling a diverse group of prospective jurors. Though research suggests that most attrition from jury service occurs during the preliminary “summoning” and “summons response” phases,<sup>247</sup> the greatest source of juror attrition observed in this study related to the hardship a trial might pose to a prospective juror. This finding is corroborated by jury participation research carried out in

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<sup>241</sup> See JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 32 (2010) (describing the authors’ approach to testing whether jury participation led to greater civic engagement in a Thurston County, Washington case study); John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 351, 359 (2008) (noting evidence of a “pervasive and enduring effect of criminal jury deliberation on electoral engagement”).

<sup>242</sup> Traci Feller, John Gastil & Valerie Hans, *The Civic Impact of Civil Jury Service*, VOIR DIRE, Summer 2016, at 24, 26 (noting that this result was particularly true of non-automotive tort cases that involve “at least one organization, as opposed to exclusively private individuals”); see also Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 712–15 (2014) (providing an additional discussion of how findings are extended to the civil context).

<sup>243</sup> Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 285 (Robert E. Litan ed., 1993).

<sup>244</sup> VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 248 (1986) (citing ALEXIS DE TOCQUEVILLE & JOHN CANFIELD SPENCER, *AMERICAN INSTITUTIONS AND THEIR INFLUENCE* (1854)); see also ALBERT W. DZUR, *DEMOCRATIC PROFESSIONALISM: CITIZEN PARTICIPATION AND THE RECONSTRUCTION OF PROFESSIONAL ETHICS, IDENTITY, AND PRACTICE* 111 (2008) (“Far from merely constraining the power of the judge, the jury system legitimates the power of the judge.”). For a discussion of the seventeenth-century origin of this principle, see SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 31 (1990) (“The argument that the common individual is capable of knowing and understanding the law, and having understood is the best judge of its application to individual cases, is an inherently democratic claim of epistemology.”).

<sup>245</sup> See, e.g., Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 387–90 (1954).

<sup>246</sup> See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334–37 (Schoken ed., 1st ed. 1961) (1835)).

<sup>247</sup> As Professor Mary Rose and her co-authors outline in their study of lifetime jury participation in Texas, jurors must be summoned for jury service, recognize and respond to this summons, and complete a period of in-court questioning in order to be assigned to sit as jurors in particular cases. See Mary R. Rose et al., *Selected to Serve: An Analysis of Lifetime Jury Participation*, 9 J. EMPIRICAL LEGAL STUD. 33, 35 (2012).

California, noting that citizens' likelihood of being summoned and responding to summonses is strongly influenced by their income and education.<sup>248</sup> These findings have led researchers and those involved in jury reform initiatives to address practical and material obstacles to jury participation, including compensation that can alleviate financial hardship imposed by jury service<sup>249</sup> and the expansion of jury source lists, which often rely on voter registration and licensed driver records.<sup>250</sup> A significant contribution of these studies is the part they play in unsettling the misconception that citizens routinely ignore summonses due to their indifference or hostility toward jury service.<sup>251</sup> In fact it has long been known that the individuals who are least likely to participate as jurors are those who face economic barriers including the need to care for a child or other dependent, or the risk of loss of income.<sup>252</sup> Though it is beyond the scope of this Article to propose jury reforms addressing this systemic problem, ongoing empirical research is shedding light on obstacles that prevent prosecutors from encountering juries as diversely and unpredictably constituted as those they imagine.

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<sup>248</sup> See *id.* at 45–52; see also HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 64–65 (1993) (noting that factors that are likely to lead to prospective jurors' excusal include "(1) economic hardship; (2) lack of child care; (3) age; (4) the distance traveled and transportation; and (5) illness").

<sup>249</sup> See GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 13 (2007) ("[S]tates have begun to recognize the relationship between the amount of juror fees, the proportion of citizens who are excused for financial hardship, and minority representation in the jury pool. As a result, a number of states have increased juror fees . . ."); Paula Hannaford-Agor, *The Laborer is Worthy of His Hire and Jurors Are Worthy of Their Juror Fees*, 21 COURT MANAGER 38, 38 (2006) (noting that states are substantially increasing juror fees in order to alleviate the financial hardship of jury service, making it possible for many citizens to serve, and to better reflect in monetary terms the value of jury service to the justice system).

<sup>250</sup> G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT 4 (1996).

<sup>251</sup> See, e.g., ABRAMSON, *supra* note 85, at 248 ("Among those who do appear and are sent into a courtroom for voir dire, the art of getting excused is highly developed. Individuals accuse themselves of prejudice, students say they cannot afford to miss classes, and self-employed persons state they cannot afford to miss work."); ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS 117–20 (1998) (presenting a multi-sited study including surveys of administrators in 100 state and federal courts and 400 summoned jurors); GUNTHER, *supra* note 235, at 288–89, 353–54 (noting, based on a survey of 352 individuals who served as state and federal jurors in civil cases in the Philadelphia area, that a majority understood their cases, formed opinions based on the evidence in their respective trials, and left with a positive impression of the jury system).

<sup>252</sup> See BOATRIGHT, *supra* note 251, at 73; see also JANICE T. MUNSTERMAN ET AL., NAT'L CTR. FOR STATE COURTS, THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 40 (1991), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/juries/id/105> [<https://perma.cc/WY9P-FM9P>].

## CONCLUSION

In writing on the Sixth Amendment, legal scholars have emphasized the jury's role in helping lawyers "fulfill their duties responsibly."<sup>253</sup> This widely acknowledged ethical intervention becomes concrete when one looks at how lawyers invoke jurors in practice. Though absent from empirical research to date, federal prosecutors' references to abstracted jurors play a vital role in their everyday work. This research demonstrates that prosecutors' conceptions of jurors' judgment affects their own.<sup>254</sup> This is because the specter of jurors' participation in criminal cases brought commonsense ideas about justice to prosecutors' discussions—making jury concerns salient from the moment a case landed on an AUSA's desk.<sup>255</sup>

Such attentiveness to jurors' potential perceptions is brought into relief first by prosecutors' invocations of "jury appeal" as a basis for articulating concerns about their cases. Second, as investigations are underway, hypothetical jurors can offer a detached point of reference during routine interactions with colleagues, witnesses, victims, and defendants. Because any criminal case can lead to a trial, many prosecutors recognize the strategic value of considering jurors' perspectives early and often. And when assessments of evidence are at odds with those of supervisors, hypothetical jurors facilitate critiques in impersonal and constructive terms. Beyond instrumental considerations related to efficaciously presenting evidence in a case, hypothetical jurors are also a point of departure for prosecutors' formulations of justice. This often takes the form of prosecutors imputing ideas about fair prosecutions to lay decision-makers whom they imagine they might encounter.

Legal scholars who draw attention to the declining number of trials in the United States often assert the value of lay participation in symbolic terms. If the trend away from juries can be reversed, some argue, a reinvigorated jury can bring greater legitimacy and accountability to the legal system by serving as an external check on professional lawyers.<sup>256</sup> Ethnographic research in prosecutors' offices is uniquely positioned to sharpen the stakes of this claim. The jury system ought to be valued for its far-reaching practical and ethical effects on legal practice, even as it is presently constituted. That

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<sup>253</sup> *Sixth Amendment at Trial*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 671, 671–72 (2012).

<sup>254</sup> Andrew E. Taslitz, *The People's Peremptory Challenge and Batson: Aiding the People's Voice and Vision Through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1678 (2012) ("The jury acts as the People's eyes by monitoring the state and its agents. That monitoring reveals abuses of power, discourages those abuses, and humbles our leaders and their agents.").

<sup>255</sup> See, e.g., Interview with DH, AUSA (2013).

<sup>256</sup> See, e.g., ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION 139–42 (2013) (discussing the jury's role in acting as a force for accountability which serves as the community's consciousness and as an ultimate check on government power).

is, we should care about jurors because they concretely and powerfully matter to the lawyers tasked with enforcing the law fairly. Though the obsolescence of the jury trial is difficult to imagine, keeping jurors imaginable should be enough of an impetus to heed scholars' warnings.

