

**WOODBURY COUNTY BOARD OF SUPERVISORS AGENDA ITEM(S) REQUEST FORM**

Date: 07/31/2024

Weekly Agenda Date: 08/06/2024

**ELECTED OFFICIAL / DEPARTMENT HEAD / CITIZEN:** Chairman Matthew Ung

**WORDING FOR AGENDA ITEM:**

Approval to draft a Memorandum of Understanding for the AFSCME Assistant County Attorney collective bargaining agreement to address understaffing

**ACTION REQUIRED:**

Approve Ordinance

Approve Resolution

Approve Motion

Public Hearing

Other: Informational

Attachments

**EXECUTIVE SUMMARY:**

Woodbury County currently has 8 open Assistant County Attorney positions. This lack of staffing is a nationwide problem which also leads to greater competition for recruitment and retention. Woodbury County needs to be creative with their compensation package, including wages and benefits.

Fully staffed, the office would have 18 attorneys (which includes the county attorney).

An academic article explaining the scope and consequences of this national issue is explained for the public in the attachment. This article was originally shared by County Attorney James Loomis to the Board of Supervisors in December 2023, and it would be good for anyone in the public curious of this issue to read.

**BACKGROUND:**

After a roundtable meeting with AFSCME, attorneys from the department, and Human Resources, the following changes to the current contract through an MOU have been suggested:

1. Remove steps 1 and 2 from the wage matrix, making our current step 3 the starting point for compensation. This would also give the County Attorney discretion to start a new attorney at step 10 instead of the current step 8.
2. Changing the intervals in steps from 1 year to 6 months to increase compensation more quickly.
3. Provide each attorney with 5 "Attorney Days". These days will be used as personal days or forfeited at the end of the fiscal year.
4. Each 6 months (based on hire anniversary date) the attorneys will have the option of "cashing in" any vacation that has accrued but are unable to use. The payout amount will be any time accrued over the maximum allowable amount.
5. Allow up to one day per week of remote work at the County Attorney's discretion.
6. Extend the \$3,000 sign on bonus until June 30, 2025.

It is further recommended that #4 and #5 "sunset" if/when the office reaches a staffing level of 17 total attorneys (of 18 budgeted).

**FINANCIAL IMPACT:**

The financial impact are as follows:

1. The difference between the current 1st step of the contract and 3rd step of the contract is \$7,785.00. The financial impact of removing the bottom 2 steps for 8 new attorneys would be \$62,280.00 (wages only), which will be covered by the current staffing budget.
2. The cost of changing the amount of time in between steps for (3) current employees is \$11,970.00 (wages only). The County Attorney's current budget has the funds to cover this cost and any other step increase before next fiscal year. Going forward this will be figured into the budget for BOS approval.
3. The Attorney Days would be at no additional cost since their positions are not backfilled when someone is absent, this time is already budgeted.
4. Cashing in vacation will be covered by the current staffing budget.
5. There will be no additional cost to allowing the remote work since attorneys are all supplied a laptop with a secure connection (utilized during Covid closures).
6. The bonus extension will be covered by the current staffing budget.

**IF THERE IS A CONTRACT INVOLVED IN THE AGENDA ITEM, HAS THE CONTRACT BEEN SUBMITTED AT LEAST ONE WEEK PRIOR AND ANSWERED WITH A REVIEW BY THE COUNTY ATTORNEY'S OFFICE?**

Yes  No

**RECOMMENDATION:**

Pass the motion

**ACTION REQUIRED / PROPOSED MOTION:**

Motion to direct the Human Resources Director to draft a Memorandum of Understanding for the AFSCME Assistant County Attorney collective bargaining agreement to address understaffing



WILLIAM & MARY  
LAW SCHOOL

**THE PROSECUTOR VACANCY  
CRISIS**

**Adam M. Gershowitz**

**William & Mary Law School**

William & Mary Law School Research Paper No. 09-480  
(FORTHCOMING)

This paper can be downloaded without charge from  
the Social Science Research Network Electronic Paper Collection:

<http://ssrn.com/abstract=4666047>

## The Prosecutor Vacancy Crisis

Adam M. Gershowitz\*

*There is a prosecutor vacancy crisis in the United States. Prosecutors are quitting in droves and there are few applicants to replace them. In Houston and Los Angeles, more than 15% of prosecutor positions are open. In Detroit, the vacancy rate exceeds 20%. In Alameda, 25% of prosecutor positions are empty. And in Miami, a staggering 33% of prosecutor positions are unfilled. The situation is equally dire in many large and small counties across the nation.*

*Drawing on data and interviews from more than two-dozen district attorney's offices, this article documents how low salaries, massive caseloads, the lack of remote work options, and crushing discovery burdens have caused an exodus from prosecutors' offices. Worse yet, many young lawyers no longer perceive prosecutor jobs as admirable public service. Following the murder of George Floyd, law students are more likely to believe that public defenders, rather than prosecutors, are on the side of justice.*

*Prosecutor vacancies are dangerous to public safety and, counter-intuitively, to criminal defendants as well. Vacancies lead to junior prosecutors having massive caseloads that they cannot handle. In turn, busy prosecutors fail to dismiss weak cases, leaving innocent defendants to languish in jail. Vacancies also result in junior prosecutors being promoted to senior positions before they are ready. And vacancies cause Brady violations because busy offices fail to provide adequate training, and individual prosecutors lack the time review their casefiles and recognize Brady material.*

Many prosecutors' offices across the United States are in a state of crisis. Prosecutors are quitting in droves and there are few applicants to replace them.<sup>1</sup> In Houston<sup>2</sup> and Los Angeles,<sup>3</sup> more than 15% of prosecutor positions are open. In Detroit, the vacancy rate exceeds 20%.<sup>4</sup> In Alameda, 25% of prosecutor positions are empty.<sup>5</sup> And in Miami, a staggering 33% of prosecutor positions are unfilled.<sup>6</sup> The

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\* James D. & Pamela J. Penny Research Professor and Hugh & Nolie Haynes Professor of Law, William & Mary Law School.

<sup>1</sup> See *infra* Part III.

<sup>2</sup> See Email and accompanying chart from Elizabeth Stevens, Human Resources Director, Harris County District Attorney's Office, to Adam Gershowitz, Nov. 13, 2023.

<sup>3</sup> See Letter from Kathryn Albracht, Los Angeles County District Attorney's Office, to Adam Gershowitz, Nov. 30, 2023.

<sup>4</sup> See Kara Berg, *Michigan Prosecutors Face Staffing Crisis With Repercussions for Justice System*, THE DETROIT NEWS, Oct. 13, 2023.

<sup>5</sup> See Telephone Interview with Desmond Jeffries, Alameda County District Attorney's Office, Nov. 15, 2023.

<sup>6</sup> See Interview with Stephen Talpins, Chief Deputy Assistant State's Attorney, Miami-Dade County, Sept. 22, 2023.

vacancy problem is not just in large cities. In some smaller counties, more than half of the lawyers in the office have resigned.<sup>7</sup>

Prosecutor vacancies cause a downward spiral. The remaining prosecutors must pick up the cases of those who quit, resulting in astronomical caseloads. Prosecutors can try to mitigate the problem by dropping low-level drug cases and other quality-of-life offenses. But prosecutors' offices cannot ignore most crimes. Murders, robberies, and other violent crime must be prosecuted,<sup>8</sup> regardless of whether the district attorney's office is fully staffed or 30% vacant.

With massive caseloads, prosecutors are forced to work nights and weekends to try to keep up. But this "overtime" typically does not translate into additional pay because prosecutors are salaried employees. Increased workloads for the same low pay hurts morale.<sup>9</sup> In turn, more prosecutors quit their jobs and matters become even worse for those who stay. Entry-level lawyers look at this situation and decide to begin their careers elsewhere. The downward spiral feeds on itself and vacancies grow.

The prosecutor vacancy crisis is a very new problem.<sup>10</sup> Just a few years ago, entry-level jobs in prosecution were considered desirable. While the salary for prosecutors has always been low, the tradeoff -- exceptional training and courtroom experience<sup>11</sup> -- has been worth it for many entry-level lawyers. Within a few years, many prosecutors have more trial experience than they would get in a lifetime at a civil law firm. Additionally, the frequent plea bargaining in criminal courthouses teaches prosecutors negotiation skills.<sup>12</sup> Entry-level prosecutors also get to know the judges, senior prosecutors and defense attorneys who make the courthouse run. With all of that valuable experience, prosecutors have long had two attractive options after a few years in the trenches: they can stay with the office and quickly be promoted to important positions, or they can take their trial skills and newfound reputation and transition into a successful criminal defense practice.

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<sup>7</sup> See *infra* notes Part III.D.

<sup>8</sup> See Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203 (2020); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005).

<sup>9</sup> See Mark Hayward, *Hillsborough County Loses Two of Its Special Victims Unit Prosecutors*, THE NEW HAMPSHIRE UNION LEADER, Oct. 19, 2022 (noting that caseloads and low pay caused prosecutors to quit and noting that "[a]s workload increases, you expect to be paid more.").

<sup>10</sup> A search of the Westlaw news database from 2017 to 2020 for "prosecutor /10 shortage or vacancy" turns up almost no relevant documents. The same search for the years 2020 to 2023 turns up many dire stories.

<sup>11</sup> Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1685 (2018) ("[P]rosecutors think of themselves as trial lawyers because they are in court regularly for adversarial proceedings, and gaining courtroom experience was a common motivation voiced by our interviewees who had joined their offices straight from law school."). Professors Wright and Levine did note however that most of the prosecutors they interviewed had "only a handful of trials each year." *Id.*

<sup>12</sup> Professors Jenny Roberts and Ron Wright have documented that entry-level public defenders receive little-to-no plea bargaining and negotiating training. See Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445 (2016). There is no reason to think matters are different for entry-level prosecutors.

The benefits of working in prosecution have not changed in the last few years. Indeed, with short-staffing, prosecutors are now getting even more trial experience and being promoted even more quickly than before. With these high upsides, one would expect hungry, junior lawyers to jump at the chance to join the prosecutor's office. But exactly the opposite has happened.

Prosecutors' offices are receiving a fraction of the applications that they have in the past.<sup>13</sup> Rather than waiting for hundreds of applications to roll in, prosecutors' offices now have to get on the road and recruit applicants. Some offices are even spending time recruiting college students in the hopes of creating a pipeline of future lawyers.<sup>14</sup>

To combat the vacancies, district attorneys' offices have pushed their appropriating bodies for salary increases. In Houston, the elected district attorney recently managed to raise starting salaries by roughly 33%.<sup>15</sup> In Detroit, the prosecutor's union recently procured a 25% raise.<sup>16</sup> In Miami, the elected State's Attorney also successfully lobbied for a large salary increase for prosecutors and staff.<sup>17</sup> Yet, even with big raises, there are still large vacancies in all of those offices and many more. Prosecutor positions, it seems, are no longer desirable.

The reasons for large prosecutor vacancies vary from office to office, but there are some recurring themes. Most significantly, prosecutor salaries across the country remain comparatively low. With rapid inflation, law school loans, and a huge jump in housing prices, a salary of \$70,000 or \$75,000 does not go very far, especially in expensive cities.<sup>18</sup>

Low salaries would be tolerable for many applicants if the job came with reasonable hours and a good quality of life. But in many prosecutors' offices, the workload has skyrocketed. Some prosecutors' offices had huge caseloads before the Covid pandemic.<sup>19</sup> And lockdowns that shuttered courthouses exacerbated the caseload problem by creating years of backlogged cases that now render dockets even bigger than before. And each time a prosecutor quits, the caseloads of the remaining prosecutors grow larger.

Discovery obligations have also exploded for prosecutors in recent years. New technology (including police body cameras; dashboard cameras; Ring doorbell footage; and, of course, cell phones) have increased the amount of discovery prosecutors must sift through. In response to *Brady* violations and wrongful convictions, multiple

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<sup>13</sup> See *infra* Part II.

<sup>14</sup> See Interview with Gray Collins, Elected Commonwealth's Attorney, Colonial Heights, Virginia, Nov. 29, 2023.

<sup>15</sup> See Interview with Kim Ogg, Elected District Attorney, Harris County, Texas, Nov. 10, 2023.

<sup>16</sup> See Email from Maria Miller, Wayne County Prosecutor's Office, to Adam Gershowitz, Oct. 23, 2023.

<sup>17</sup> See Talpins Interview, *supra* note 6.

<sup>18</sup> Some prosecutors' offices are still paying entry-level salaries below \$70,000, while a few offices have managed to increase salaries to over \$80,000 and in rare instances to over \$100,000. But as Part IV.A below describes, many offices are paying salaries between \$70,000 and \$80,000.

<sup>19</sup> See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011).

states have also recently expanded their discovery laws to impose earlier and broader disclosure obligations on prosecutors.<sup>20</sup> While greater discovery is overdue for criminal defendants in some states, it does not change the fact that it has made prosecutors' jobs much more difficult. One prosecutor explained that "you've got to be a document pusher to be a prosecutor," and it is incredibly time-consuming.<sup>21</sup>

The pandemic also changed work expectations in ways that disadvantage prosecutors' offices. Lawyers in many fields can now work remotely, and law school graduates appear to crave that flexibility.<sup>22</sup> But prosecutors have to be in court, not working from the comfort of their home. Almost no district attorney's office is in a position to offer flexible remote work arrangements, even when the office is fully staffed. And remote work is utterly impossible when 15%, 20% or even 30% of the prosecutor positions in the office are already vacant.

At the same time that prosecutor positions have become less attractive, the pool of available lawyers has shrunk. The number of law school graduates has declined dramatically from a decade ago.<sup>23</sup> On top of that, bar passage rates fell noticeably during the pandemic.<sup>24</sup> Law school graduates who fail the bar might be able to keep working in civil law firms,<sup>25</sup> but they cannot continue to work in a prosecutor's office where they need a bar license to try cases, sign pleadings, make plea offers, and do myriad other tasks.

Not only is the pool of lawyers smaller, but many law students are less willing to go into prosecution than just a few years ago. Following the murder of George Floyd in 2020, an increasing number of law students have become unreceptive to law enforcement jobs and believe the only way to "do justice" in the criminal system is to work in a public defender's office.<sup>26</sup>

Vacancy problems have also been amplified in cities with newly elected progressive prosecutors. Progressive prosecutors come with a vision for change. And many existing prosecutors in the office (particularly some senior prosecutors on the management team) actively disagree with the new prosecutor's vision. The progressive prosecutor thus has to clean house and terminate some lawyers – sometimes dozens of prosecutors.<sup>27</sup> Other line prosecutors quit because they find

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<sup>20</sup> See, e.g., Riley E. Clifton, *A Material Change to Brady: Rethinking Brady v. Maryland, Materiality, and Criminal Discovery*, 110 J. CRIM. L. & CRIMINOLOGY 307, 342 (2020) ("The 2013 Morton Act substantially amended the first section of Article 39.14 and added twelve additional sections.").

<sup>21</sup> Interview with Wesley Wittig, Second Assistant District Attorney, Fort Bend County District Attorney's Office, Nov. 14, 2023.

<sup>22</sup> See Colleen R. Smith, *How Fully Remote Work Has Enabled Me To Thrive in the Face of Adversity*, ABA J., Nov. 27, 2023.

<sup>23</sup> See Statista, available at <https://www.statista.com/statistics/428985/number-of-law-graduates-us/>

<sup>24</sup> See Karen Sloan, *U.S. Bar Exam Pass Rate Drops For First-Time Takers*, REUTERS, Feb. 28, 2023.

<sup>25</sup> See Casey Sawyer, *Big Law Associates Who Fail the Bar, What Happens to Them?* BLOOMBERG, July 20, 2016.

<sup>26</sup> See *infra* Part IV.F.

<sup>27</sup> See, e.g., Jason Tashea, *3 Days Into New Job, DA Krasner Fires 31 Staff Members*, ABA J., Jan. 5, 2018 (explaining that the newly elected progressive prosecutor fired 10% of the office's prosecutors to make "clear his intention to take the office in a different direction").

themselves in disagreement with the progressive prosecutor's new policies.<sup>28</sup> The result is dozens upon dozens of vacancies. And progressive prosecutors have to find replacements willing to tolerate low salaries, high caseloads, and massive discovery obligations. Positions thus remain empty.

The factors described above have created a perfect storm that has made it extremely difficult to staff prosecutor positions in many offices. As one senior prosecutor in Miami explained, "it will take us years to recover from this situation."<sup>29</sup>

The prosecutor vacancy crisis is not simply a problem for the lawyers who work in district attorneys' offices. It is a serious problem for public safety. Faced with a huge workload, prosecutors can make mistakes on their cases that result in guilty defendants going free. In short-staffed offices, junior prosecutors are promoted to handle serious cases before they are ready.<sup>30</sup> The absence of experienced senior lawyers makes it nearly impossible to train entry-level lawyers who are joining the office. And prosecutor vacancies mean that specialized units – whether it be the family violence unit, the sexual assault division, or the anti-gang task force – are not filled because prosecutors are needed elsewhere to cover the most basic felony cases.<sup>31</sup>

Just as importantly (and perhaps counter-intuitively) prosecutor vacancies are terrible news for criminal defendants. Over-burdened prosecutors lack the time to promptly review their cases and figure out which defendants are actually innocent.<sup>32</sup> Defendants thus languish in jail (and possibly lose their jobs and their ability to pay rent) while they wait for prosecutors to focus on their cases.<sup>33</sup> Busy prosecutors do not have enough time to investigate their cases and learn which defendants are less culpable than the police reports suggest.<sup>34</sup> Overburdened prosecutors thus fail to give out more lenient plea bargain offers in some cases. And short staffing means that prosecutors do not have the time to determine which defendants are good candidates for drug court. Worse yet, prosecutors who are flying by the seat of their pants unintentionally commit *Brady* violations because they lack the time to read the casefile closely or to communicate with police officers who are in possession of exculpatory evidence.<sup>35</sup>

To explain the dire state of prosecutorial staffing, this article proceeds in five parts. Part I explains how I gathered data from more than 25 large and small prosecutors' offices across the country and how I interviewed many elected and senior prosecutors to understand what is happening in their offices. Part II describes how numerous prosecutors have identified a dramatic nationwide drop in applications. Part III then shows the bleak numbers of prosecutor vacancies. Part III describes the

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<sup>28</sup> See, e.g., Jonah Owen Lamb, *Veteran Alameda County Prosecutors Depart as New DA Pushes Progressive Overhaul*, SAN. FRAN. STANDARD, Mar. 28, 2023.

<sup>29</sup> Talpins Interview, *supra* note 6.

<sup>30</sup> See *infra* note 339 and accompanying text.

<sup>31</sup> See *infra* Part V.D.

<sup>32</sup> See Gershowitz & Killinger, *supra* note 19, at 285-88.

<sup>33</sup> See *id.*

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

<sup>35</sup> See *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1985 (2010).



situation in more than 20 offices that are suffering from huge vacancies. Part IV then explains the numerous (and often intersecting) reasons for prosecutor vacancies, including low salaries, massive caseloads, growing discovery obligations, reduced pools of law school graduates and bar passers to draw from, increased demand for remote work that prosecutors' offices cannot accommodate, reduced interest in law enforcement jobs following the murder of George Floyd, resignations and terminations due to policy disagreements with progressive prosecutors, and garden variety mismanagement by some district attorneys. Part V then details the harms caused by prosecutor vacancies, including improper handling of serious cases, promotion of inexperienced lawyers, delays in dismissing weak cases, and *Brady* violations. While the news is mostly bad, not all prosecutors' offices are in crisis.<sup>36</sup> Finally, Part VI explains why some counties are not suffering from prosecutor shortages and shows how those offices can serve as a model for reducing the vacancy crisis across the country.

## I. Methodology for Understanding the Prosecutor Vacancy Problem

To understand the challenges prosecutors' offices face in hiring, I wrote to prosecutors' offices in more than 50 counties to request information about their allotted prosecutor positions and how many are vacant. I sought data from and interviews with district attorneys' offices in the 25 largest counties in the nation. Because medium-sized and small counties sometimes face different problems than large offices, I also contacted 25 small and medium-sized counties to request vacancy rates and to request interviews. When an office did not respond, I also sent multiple reminders.

Some district attorneys' offices declined to provide the information on the grounds that it amounted to personnel data. Of the 50 offices I contacted, more than 20 provided information. Some of those offices were extremely interested in shedding light on the under-staffing problem and provided lengthy interviews and detailed information. Other offices provided only basic information.

To provide a fuller picture, I canvassed recent news articles about prosecutor vacancies.<sup>37</sup> When a news story provided specific data about the number of prosecutor vacancies, I reached out to that district attorney's office to request the most current data. If the office did not reply to multiple requests for information, I relied on the vacancy data from the recent news article.

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<sup>36</sup> As Professors Ron Wright and Kay Levine have explained, "place matters in prosecution research." Ronald F. Wright, Kay L. Levine, *Place Matters in Prosecution Research*, 14 OHIO ST. J. CRIM. L. 675, 677 (2017).

<sup>37</sup> Of course, it is unlikely that newspapers or television stations run stories about offices that are fully or nearly fully staffed. As such, it is certainly the case that my list of counties without staffing problems is incomplete. There are surely many additional counties without major staffing problems. This, however, does not undermine the premise of the article, which is to demonstrate (1) that many district attorney's offices are suffering from staffing problems; and (2) to identify reasons why some offices are having staffing challenges while others are not.

Because the district attorneys' offices responded to my information requests over a period of months (sometimes after multiple reminders) the responses do not reflect a snapshot of staffing on the same day. In other words, some offices provided their vacancy rates in September 2023, while others provided data from October or subsequent months. Similarly, by supplementing my data requests with news articles that were written in 2022 and 2023, the news stories do not capture an identical moment in time.

Because hiring in district attorneys' offices occurs throughout the year, reporting a vacancy at the time data is available is necessarily imprecise. An office with a 20% vacancy rate on one date might have a different vacancy rate a month later. For instance, a senior prosecutor in the Hidalgo County District Attorney's Office explained that the office had a 27% vacancy rate on November 14<sup>th</sup>, but that its vacancy rate had actually been above 30% in September. The reason was that bar results for recent law school graduates – some of whom the office hired – came out in October.<sup>38</sup> On the flip side, in some counties the vacancy rate almost surely rose from December to January when newly elected district attorneys were sworn in and when they removed prosecutors who did not share their policy views.

Accordingly, it is important to acknowledge that the numbers reported in this article would be slightly different had my information requests gone out in a different month. To deal with this reality, I have reported the most recent data available in all instances. Reporting the most recent data does not always result in reporting the highest prosecutor vacancy rate for that county over the course of the year.

Before proceeding to analyze the offices that are under-staffed and the reasons for those vacancies, I begin where the prosecutors I interviewed began: a drastic decline in applications for prosecutor positions.

## **II. Applications for Prosecutor Positions Are Down Dramatically**

The first place to start in analyzing prosecutor vacancies is the number of applications to fill those vacancies. As explained in this Part, applications for prosecutor positions across the nation are down dramatically. In offices large and small, district attorneys are receiving far fewer applications than in the recent past. As a result, some prosecutors' offices have been forced, often for the first time, to proactively recruit applicants.

In Miami-Dade County, applications for prosecutor positions have fallen off a cliff. The Chief Deputy Assistant State's Attorney explained that when he was hired as an entry-level prosecutor in 1991 there were 2,000 applicants for a class of 23 lawyers.<sup>39</sup> The office had "could take pretty much whoever it wanted" because it was a "coveted job."<sup>40</sup>

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<sup>38</sup> See Telephone Interview with Alex Benavides, First Assistant District Attorney, Hidalgo County District Attorney's Office, Nov. 14, 2023.

<sup>39</sup> See Talpins Interview, *supra* note 6.

<sup>40</sup> *Id.*

The number of applicants to the Miami-Dade office has “plunged.”<sup>41</sup> Prior to Covid, the number of applicants had declined to roughly 500 per year.<sup>42</sup> By 2023, the number of applicants had fallen to approximately 300 per year.<sup>43</sup>

In the 17<sup>th</sup> District of Colorado (an eighty-lawyer office that serves two counties north of Denver), the district attorney posted 10 new job openings in August 2021.<sup>44</sup> The District Attorney hoped that access to the outdoors and what he described as a commitment to criminal justice reform would help fill the 10 new job openings.<sup>45</sup> Despite the desirable location “he never received more than one or two applications for any of the positions” and they all remained unfilled as of March 2022.<sup>46</sup>

The First Assistant District Attorney for Montgomery County, Texas (just north of Houston) offered a similar explanation. In 2016, he would post job openings with the Texas District and County Attorneys Association and receive about 200 applications.<sup>47</sup> In 2023, that same job posting would result in between 10 and 20 applications.<sup>48</sup>

Small counties have also seen dramatic application drops and suffered long-term vacancies as a result.<sup>49</sup> The elected prosecutor in Halifax, Virginia has led a six person office for a decade.<sup>50</sup> When she started in the position in 2014, she would receive over 100 applications, with 30 strong prospects.<sup>51</sup> Over time, the quantity and quality of the applicants declined. When two prosecutors coincidentally left at the same time in 2020, she received only a handful of applicants to replace them. The positions sat mostly empty for over a year.<sup>52</sup>

A decade ago, the Kalamazoo County District Attorney’s Office in Michigan would receive 50 applications within 10 days of posting a prosecutor position.<sup>53</sup> Today, it “gets 10 resumes in 10 months.”<sup>54</sup> Worse yet, the office is caught in a cycle of continuous openings. The office will lose two attorneys, hire one person to replace them and then lose another two.<sup>55</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> *See* Disha Raychaudhuri & Karen Sloane, *Prosecutors Wanted: District Attorneys Struggle to Recruit and Retain Lawyers*, REUTERS, Apr. 13, 2022.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See* Interview with Mike Holley, First Assistant District Attorney, Montgomery County District Attorney’s Office, Nov. 10, 2023.

<sup>48</sup> *See id.*

<sup>49</sup> *See* Telephone Interview with Tracy Martin, Elected Commonwealth’s Attorney for Halifax County, Dec. 6, 2023.

<sup>50</sup> *See id.*

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> *See* Berg, *Michigan Prosecutors Face Staffing Crisis*, *supra* note 4.

<sup>54</sup> *Id.*

<sup>55</sup> *See id.*

In Pueblo, Colorado, the district attorney's office had 7 of 23 prosecutor positions unfilled in late 2021. The elected district attorney further explained that "I currently have no applicants for any of the jobs and haven't for the better part of a year."<sup>56</sup>

Prosecutors in New York state have had the same experience. In Erie County, New York, the district attorney said "he used to have a stack of 50 or so resumes from people looking to become assistant DAs. . ." but those days are gone.<sup>57</sup>

Matters are worse in some small offices. In Texas, prosecutor openings for some small counties have been posted for over a year without receiving a single resume.<sup>58</sup> In Dodge County, Wisconsin the entire office of five prosecutors quit their positions, leaving the office "pleading for applicants."<sup>59</sup> In another Wisconsin county (La Crosse) the office received no applications for a recent job posting in 2023.<sup>60</sup>

Even highly prestigious offices with few or no vacancies have cited a drop in applications. For instance, the Kings County District Attorney's Office in Brooklyn, New York noted that "the total number of applications has been trending downward for the past few years."<sup>61</sup> Nor are offices in highly desirable cities immune from the decline. In San Diego, California applications "fell 28% between 2019 and 2021."<sup>62</sup>

To combat the application decline, some prosecutors have had to be even more aggressive by taking recruiting trips far from their own offices.<sup>63</sup> For instance, the Chief Deputy Assistant of Miami-Dade made recruiting trips to law schools in the metro Washington, D.C. area (including Maryland and Virginia), New York, and Puerto Rico.<sup>64</sup> In nearby Broward County, Florida, the district attorney's office made a recruitment video "that [they] have shared on [their] website, social media, and that [their] recruiters play on a loop at [their] recruiting table at job fairs and other events at law schools."<sup>65</sup>

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<sup>56</sup> Michael Karlik, *Pueblo County DA Blames 'Poisonous Attitude Toward Law Enforcement' for Staffing Shortage*, COLORADO POLITICS, Nov. 23, 2021.

<sup>57</sup> *Id.*

<sup>58</sup> See Holley Interview, *supra* note 47.

<sup>59</sup> Sarah Lehr, *From 'Serious' to 'Dire:' DAs Offices Across Wisconsin and the Country Are Struggling To Hire Prosecutors*, WIS. PUB RADIO, Feb. 8, 2023.

<sup>60</sup> See Evan Casey, *Low Pay Causes Shortage of Public Defenders, Prosecutors*, WIS. PUB. RADIO, May 2, 2023.

<sup>61</sup> Email from Oren Yaniv, Director of Communications, Brooklyn District Attorney's Office, to Adam Gershowitz, Sept. 15, 2023.

<sup>62</sup> See Raychaudhuri & Sloan, *supra* note 44.

<sup>63</sup> The National District Attorney's Association now produces a 19-page recruitment fair guide that walks prosecutors through the nuts and bolts of recruiting on law school campuses. It advises "providing light refreshments or lunch," setting up booths, creating promotional flyers, partnering with student groups, and even offers guidance on how a recruiting booth should look. See NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, *COURTING LAW STUDENTS: A RECRUITMENT FAIR GUIDE FOR PROSECUTORS' OFFICES* 6, 9, 13 (2023).

<sup>64</sup> See Talpins Interview, *supra* note 6.

<sup>65</sup> See Email from Paula McMahon, Public Information Officer, Broward County State's Attorney's Office, to Adam Gershowitz, Nov. 27, 2023.

The District Attorney in Erie County, New York explained that “[i]n my 5 1/2 years here, I’ve never had to advertise for an opening. Until now.”<sup>66</sup> In 2022, he “put up ads in the bar association journal, on the county website and the University at Buffalo career services office.”<sup>67</sup> In nearby Niagara County, the district attorney had to make “the unusual request of asking to set up a recruitment table at Niagara County’s next job fair.”<sup>68</sup>

The First Assistant District Attorney of Montgomery County, Texas explained that we “have to be more aggressive about pursuing good candidates.”<sup>69</sup> Even if we don’t have an opening, the Montgomery prosecutor will bring in prospective candidates to show them around the office and courthouse.<sup>70</sup> He seeks out speaking opportunities at conferences (such as the state prosecutor’s association) and at law schools.<sup>71</sup> The idea is to do “reputation building” so that law students and lateral candidates will have heard good things about the office.<sup>72</sup> Following that same playbook, the elected commonwealth’s attorney in a small Virginia office explained that he speaks at the same law school multiple times a year so that students get to know you and learn the good things your office is doing.<sup>73</sup>

### III. Some Prosecutors’ Offices Are Suffering from Huge Vacancies

Given how demanding and important a line prosecutor’s job is, any vacancy is significant. This Part focuses however on the offices that are dealing with substantial and in some cases massive vacancies.

#### A. Vacancies by the Numbers

Across the United States, prosecutors’ offices are dealing with huge vacancies. Large offices, mid-sized offices, and small offices are all struggling with prosecutor shortages. In some large offices, dozens of prosecutor positions are vacant. In smaller offices, vacancy rates exceed 50%. Table 1 sets forth the high vacancy rates for some large and small prosecutors’ offices.

**Table 1: Prosecutors’ Offices With Large Vacancies**

County	Prosecutor Positions Allocated	Prosecutor Positions Filled	Prosecutor Positions Vacant	Percentage of Prosecutor Positions Vacant

<sup>66</sup> Sandra Tan, *Criminal Justice Agencies Grapple With Recruitment Challenges*, BUFFALO NEWS, Aug. 1, 2022.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Holley Interview, *supra* note 47.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Collins Interview, *supra* note 14.

Alameda, CA <sup>74</sup>	185	139	46	25%
Anchorage, AK <sup>75</sup>	38	29	9	24%
Athens, GA <sup>76</sup>	17	3	14	82%
Bexar, TX <sup>77</sup>	237	218	19	8%
Broward, FL <sup>78</sup>	189	149	40	21%
Cook (Chicago), IL <sup>79</sup>	770	627	143	18%
Dougherty, GA <sup>80</sup>	16	11	5	31%
Greg, TX <sup>81</sup>	17	6	11	65%
Harris (Houston), TX <sup>82</sup>	441	373	68	15%
Hidalgo, TX <sup>83</sup>	98	72	26	27%
Los Angeles, CA <sup>84</sup>	966	812	154	16%
Maricopa (Phoenix), AZ <sup>85</sup>	366	319	47	13%
Miami-Dade, FL <sup>86</sup>	349.5	230	119.5	33%
Nueces (Corpus Christi), TX <sup>87</sup>	44	33	11	25%
Pueblo, CO <sup>88</sup>	27	17	10	37%

<sup>74</sup> See Jeffries Interview, *supra* note 5.

<sup>75</sup> See *Alaska's Prosecutors Need Our Help*, STATES NEWS SERVICE, Apr. 27, 2022.

<sup>76</sup> See Joe Johnson, *Judge Rebukes Athens DA Blaming Him For Prosecutor Resignation*, CLASSIC CITY NEWS, Sept. 26, 2023.

<sup>77</sup> See Email from Bexar County District Attorney's Office Open Records Division to Adam Gershowitz, Nov. 28, 2023.

<sup>78</sup> See McMahon Email, *supra* note 65.

<sup>79</sup> The Cook County numbers are approximate. The State's Attorney's Office failed to respond to numerous requests for information. But one recent news report details that the office "had 143 vacancies. That's about 18% of all assistant state's attorney positions that the office is budgeted for." Megan Hickey, *Cook County State's Attorney Claims Resignations Not To Blame for Case Backlog*, CBS NEWS CHICAGO, Apr. 5, 2023. Another news report indicates that the office had about 770 prosecutors prior to the pandemic. See Megan Crepeau, *Her Office Hit By the Pandemic and Morale Issues, Cook County State's Attorney Kim Foxx Struggles to Keep Up With Prosecutor Exit*, CHI. TRIB., July 25, 2022. Assuming 770 allocated positions and 143 vacancies, the office would have 627 prosecutors, which amounts to a vacancy rate of 18.6%.

<sup>80</sup> See Alan Mauldin, *Dougherty DA's Office Struggling Backlog, Shortage of Felony Prosecutors in Taking Felony Cases to Trial*, THE ALBANY HERALD, Sept. 22, 2022.

<sup>81</sup> See Ashlyn Anderson, *Greg County Experiencing Criminal Prosecutor Shortage*, KETK.COM, Apr. 29, 2023.

<sup>82</sup> See Stevens Email, *supra* note 2.

<sup>83</sup> See Benavides Interview *supra* note 38.

<sup>84</sup> See Albracht Letter *supra* note 3.

<sup>85</sup> See Email from Debbie Mackenzie, Custodian of Records, Maricopa County Attorney's Office, to Adam Gershowitz, Sept. 18, 2023. The Maricopa office noted that "some of these positions are part-time at .5 FTE (20 hours per week) or .75 (30 hours per week)." *Id.*

<sup>86</sup> See Talpins Interview, *supra* note 6.

<sup>87</sup> See Telephone Interview with James Granberry, District Attorney, Nueces County District Attorney's Office, Nov. 20, 2023.

<sup>88</sup> See James Bartolo, *Pueblo DA's Office Hiring Law Students as Prosecutors in Response to Staff Shortages*, PUEBLO CHIEFTAN, Mar. 26, 2023.

St. Louis, MO <sup>89</sup>	58	23	35	60%
Salt Lake, UT <sup>90</sup>	133	118-122	21-25	16-19%
Wayne (Detroit), MI <sup>91</sup>	163	127	36	22%
Yakima, WA <sup>92</sup>	37	31	6	16%

## B. Vacancies in Large Prosecutors' Offices

As the data in Table 1 indicates, some large prosecutors' offices are suffering from huge vacancies. Maricopa County (home to Phoenix) has 47 open prosecutor positions – 13% of its office.<sup>93</sup>

In Harris County -- which includes the fourth largest city in the United States (Houston), there were 68 vacancies as of November 2023 – 15% of the office.<sup>94</sup> In Los Angeles, 154 of the 966 prosecutor positions – 16%-- were unfilled.<sup>95</sup> A similar percentage of positions were open in Salt Lake City, Utah. The Salt Lake District Attorney's Office has 133 prosecutor positions.<sup>96</sup> But in early 2022, between 21 and 25 positions were vacant at any given time.<sup>97</sup> That amounts to 17% of prosecutor positions going unfilled.

Matters are equally dire in Wayne County (home to Detroit), which had 22% of its prosecutor positions vacant as of late October 2023.<sup>98</sup> The 22% vacancy rate in Wayne County was actually a considerable improvement over earlier in the year (likely because bar results comes out in October enabling the office to hire recent graduates). Looking back to January 2023, there were 47 vacancies in Wayne County, which amounted to 29% of prosecutor positions being vacant.<sup>99</sup>

Florida's two largest counties also have enormous vacancy rates. In Broward County, Florida (home to Fort Lauderdale) the prosecutor vacancy rate is 21%.<sup>100</sup> And in the even larger Miami-Dade County – Florida's largest metropolitan area -- roughly one-third of the 349.5 prosecutor positions were unfilled as of late 2023.<sup>101</sup>

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<sup>89</sup> See Jim Salter, *St. Louis Judges Deeply Concerned by Prosecutor Shortage*, INDEPENDENT ONLINE, May 1, 2023 (reporting that “about 23 prosecutors are left to handle thousands of cases”); Katie Kull & Erin Heffernan, *St. Louis Prosecutor's Staff Down By Nearly Half As Caseloads Jump: Seriously Underwater*, ST. LOUIS POST-DISPATCH, Mar. 6, 2023 (reporting 58 total positions).

<sup>90</sup> See Raychaudhuri & Sloane, *supra* note 44.

<sup>91</sup> See Miller Email *supra* note 16.

<sup>92</sup> See Email from Joseph Brusic, Elected District Attorney, Yakima County Prosecuting Attorney, to Adam Gershowitz, Nov. 20, 2023.

<sup>93</sup> See Mackenzie Email, *supra* note 85.

<sup>94</sup> See Stevens Email, *supra* note 2.

<sup>95</sup> See Albract Letter, *supra* note 3.

<sup>96</sup> See Raychaudhuri & Sloane, *supra* note 44.

<sup>97</sup> See *id.*

<sup>98</sup> See Miller Email, *supra* note 16.

<sup>99</sup> See Berg, *Michigan Prosecutors Face Staffing Crisis*, *supra* note 4.

<sup>100</sup> See McMahon Email, *supra* note 65.

<sup>101</sup> See Talpins Interview, *supra* note 6.

Philadelphia did not respond to repeated requests for information, but there is ample news coverage documenting significant vacancies and turnover. According to the *Legal Intelligencer*, between April 1 and December 16 of 2022, the office lost 46 prosecutors.<sup>102</sup> That was in addition to 115 lawyers who left between January 2021 and March 2022.<sup>103</sup> As of December 2022, the office was down to 282 prosecutors. Matters improved in early 2023 with the office reporting 311 prosecutors on staff.<sup>104</sup> That number still lagged the October 2021 headcount of 328 prosecutors though.<sup>105</sup>

Cook County in Chicago has also suffered from major vacancy problems over the last few years. Despite repeated requests for information, Cook County never provided information on the number of allocated positions and the number of vacancies.<sup>106</sup> But news reports from April 2023 indicated that the office had 143 vacant prosecutor positions, which amounted to an 18% vacancy rate.<sup>107</sup> That percentage lines up identically with news reports indicating that the office had 770 prosecutors before the pandemic.<sup>108</sup> And the 18% vacancy rate is also consistent with the office's own website which describes it as having "600+ attorneys,"<sup>109</sup> not 770 attorneys. Moreover, numerous news reports detailing "significant attrition"<sup>110</sup> and prosecutors "leaving in droves."<sup>111</sup>

### C. Vacancies in Medium-Sized Offices

The vacancy problem is not limited to large offices. Medium-sized prosecutors' offices are also suffering from hiring emergencies. For instance, in St. Louis, Missouri, the number of prosecutors dropped from 58 in 2016 to 23 in 2023.<sup>112</sup> The vacancy problem caused such a backlog that in the summer of 2023 the elected county prosecutor brought in "[a]t least eight federal prosecutors [from the U.S. Attorney's Office] . . . to help clear dozens of the city's pending homicide cases."<sup>113</sup>

In Hidalgo County, Texas, 26 of 98 positions – or 27% -- were vacant as of November 2023.<sup>114</sup> The First Assistant District Attorney in Hidalgo noted however

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<sup>102</sup> See Aleeza Furman, *Philadelphia Prosecutors Struggle to Manage Caseloads as DA's Office Slows Turnover*, THE LEGAL INTELLIGENCER, Feb. 13, 2023.

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See Aleeza Furman, *Phila DA's Office Lost Over 130 Staff in 2021, Records Show*, THE LEGAL INTELLIGENCER, Dec. 7, 2021.

<sup>106</sup> Requests for information to the general email address, the media department, and the human resources department all went un-returned.

<sup>107</sup> See Hickey, *supra* note 79.

<sup>108</sup> See Crepeau, *supra* note 79.

<sup>109</sup> See COOK COUNTY STATE'S ATTORNEY'S OFFICE, ABOUT THE COOK COUNTY STATE'S ATTORNEY'S OFFICE.

<sup>110</sup> Crepeau, *supra* note 79.

<sup>111</sup> Hickey, *supra* note 79.

<sup>112</sup> See Kull & Heffernan, *supra* note 89.

<sup>113</sup> See Katie Kull, *US Attorney Talks About Helping St. Louis Circuit Attorney's Office, Violent Crime*, ST. LOUIS POST-DISPATCH, July 7, 2023.

<sup>114</sup> See Benavides Interview, *supra* note 38.



that the vacancy rate had recently been higher. After bar exam results were released in October, the office was able to hire some recent law school graduates. A few months earlier, roughly 30 of the 91 prosecutor positions -- about one-third of the Hidalgo County District Attorney's Office -- were vacant.<sup>115</sup>

About 150 miles north of Hidalgo in Corpus Christi, Texas, the Nueces County District Attorney's Office has also suffered terrible vacancies. In 2022, a senior prosecutor recounted how 13 prosecutors had recently left, including a prosecutor who left for another county where she would be paid \$35,000 more.<sup>116</sup> To deal with the low salaries and stop the departures, the previous district attorney proposed a deal to the county commissioners. In exchange for giving back five prosecutor positions, the county would allow the district attorney's office to use the savings from those positions to increase salaries as a way to retain current prosecutors.<sup>117</sup> The district attorney left the positions vacant, but the commissioners never authorized the salary increase.<sup>118</sup> When a new district attorney was appointed by the governor in late 2023 he began trying to reclaim the five positions.<sup>119</sup> But as of November 2023 those five positions, as well as six others, remained empty, leaving the office with a 25% vacancy rate.<sup>120</sup> The district attorney explained that "we're holding the misdemeanor courts together with spit and glue."<sup>121</sup>

In Chatham County, Georgia the number of prosecutor vacancies is up and so are caseloads. In 2020, the office had 26 prosecutors devoted to felony cases. By mid-2023, there were only 12 felony prosecutors.<sup>122</sup> Those prosecutors were each "shouldering about 369 active cases" and they were also responsible for 367 pending cases that had yet to be presented to the grand jury."<sup>123</sup>

On the other side of the country, Yakima, Washington is experiencing similar problems. As of November 2023, the office was allocated 37 prosecutor positions and had 6 open positions -- a vacancy rate of 16%.<sup>124</sup> For fiscal year 2024, the county commissioners reduced the prosecutor's budget by \$175,000, which will force the district attorney to reduce the number of prosecutor positions from 37 to 35.<sup>125</sup>

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<sup>115</sup> *See id.*

<sup>116</sup> *See* Chase Rogers, *Nueces County DA is Down More Than a Dozen Prosecutors*, CORPUS CHRISTI CALLER TIMES, June 23, 2022. In addition to the 13 departures, the senior prosecutor warned that another 3 prosecutors were on the cusp of leaving in the near future. *See id.*

<sup>117</sup> *See* Granberry Interview, *supra* note 87.

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See Chatham County District Attorney Shortage Puts Defendants, Victims, Prosecutors in Jeopardy*, SAVANNAH MORNING NEWS, May 16, 2023.

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

<sup>124</sup> *See* Brusie Email *supra* note 92.

<sup>125</sup> *See id.*

In Indiana in 2023, there were open prosecutor positions in 50 of the state's 92 counties.<sup>126</sup> In Tippecanoe County (population 187,000) there were seven open prosecutor positions.<sup>127</sup>

#### D. Vacancies in Small Offices

District attorneys' offices in some small counties are also in disastrous shape. Consider Greg County, an east Texas county with a population of over 100,000 people. To be fully staffed, the Greg County District Attorney's Office is supposed to have 17 prosecutors.<sup>128</sup> But as of April 2023 it had only six.<sup>129</sup>

In Dodge County, Wisconsin (population 89,000), the elected district attorney turned in his notice because all four of his assistant prosecutors were leaving the office.<sup>130</sup> The elected prosecutor explained that "I realized that that was going to cause me to probably commit multiple acts of malpractice just because I wouldn't have the time to properly address my cases."<sup>131</sup> The problem was not limited to Dodge County. According to a news report, "[c]lose to 12% of Wisconsin's assistant DA jobs are vacant and turnover is high [statewide]."<sup>132</sup>

In Michigan, the Attorney General had to take over running the prosecutor's office in Houghton County after the lead prosecutor – and only current prosecutor in the office -- quit in September 2023. The lead prosecutor had posted two prosecutor jobs in September 2022 and November 2022.<sup>133</sup> However as of a year later "he was unable to hire any assistant prosecutors to help him run the office."<sup>134</sup> Other counties in Michigan were also suffering from vacancies. A 2022 study of 28 counties by the Prosecuting Attorney's Association found that all those counties were understaffed.<sup>135</sup>

In Halifax, Virginia, the six-person Commonwealth's Attorney's Office went through a period of more than a year in which two of the six positions were vacant.<sup>136</sup> During that time-period, the elected prosecutor recruited aggressively by visiting law schools, posting the jobs with the statewide prosecutor's association, and reaching out to lawyers around the state.<sup>137</sup> But all of those efforts resulted in only five applications in a multi-year period.<sup>138</sup>

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<sup>126</sup> See Maria Flora, *Statewide Attorney Shortage Puts Prosecutors in a Bind*, THE LEBANON REPORTER, Apr. 14, 2023.

<sup>127</sup> See *id.*

<sup>128</sup> See Anderson, *supra* note 81.

<sup>129</sup> See *id.*

<sup>130</sup> See Sarah Lehr, *As Wisconsin Struggles to Hire Prosecutors, One DA Resigned Because of the Workload*, NPR, Feb. 4, 2023.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Kara Berg, *Prosecutor's Resignation Leaves U.P. County With No Attorneys; AG to Take Over*, DETROIT NEWS, Oct. 1, 2023.

<sup>134</sup> See Berg, *Michigan Prosecutors Face Staffing Crisis*, *supra* note 4

<sup>135</sup> See *id.*

<sup>136</sup> See Martin Interview, *supra* note 49.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

## IV. The Reasons for Prosecutor Vacancies

In analyzing why there are huge prosecutor vacancies across the country it is important to recognize that each prosecutor's office has unique features. In particular, the historical culture of an office contributes to its work environment. Moreover, the values, policy choices, management style, and personality of the elected district attorney heavily impacts how the office functions. No two offices are the same and therefore it is challenging to paint with a broad brush and reach conclusions across multiple offices. Nevertheless, based on interviews and public comments from prosecutors, there are some very clear reasons why some district attorneys are having difficulty staffing their offices.

### A. Low Salaries Are a Huge Hiring Challenge

Numerous district attorneys' offices pointed to low salaries as a key reason for difficulty in hiring. Prosecutors' offices lose lawyers to the private sector (which pays markedly better), and they also lose entry-level attorneys to other district attorneys' offices with higher salaries.

#### 1. Low Prosecutor Salaries Are Not Competitive With Other Attorney Positions

While some large offices have recently managed to raise salaries, they still lag well behind the private sector. And the raises are diminished by inflation. Accordingly, on a comparative basis, prosecutor salaries remain low, particularly for recent graduates with large student loans.

In Harris County (home to Houston, Texas), the starting salary for prosecutors was only \$66,000 as of 2021.<sup>139</sup> The elected district attorney pushed for additional resources and in 2022<sup>140</sup> was able to raise salaries to \$88,000.<sup>141</sup> While Houston has a far lower cost of living than comparable large cities, it nevertheless is still an expensive place to live if someone wants to buy a home and have a reasonable commute.<sup>142</sup>

In Miami-Dade County the situation is even more dire. Until a few years ago, starting salaries for entry-level prosecutors were below \$50,000.<sup>143</sup> Recently, the office has offered a substantial percentage raise to \$68,000.<sup>144</sup> But Miami remains

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<sup>139</sup> See Ogg Interview, *supra* note 15.

<sup>140</sup> See Dug Begley & Leah Brennan, *Extra \$7.2 Million Is OK'd for DA's Office; Funds Settling Department Dispute Aimed at Filling Positions, Boosting Prosecutor Pay*, HOUS. CHRON. Apr. 9, 2022.

<sup>141</sup> See Ogg Interview, *supra* note 15.

<sup>142</sup> See Erica Grieder, *Houston's Cost of Living Is Lower Than the National Average –and that of Most Big Cities*, HOUS. CHRON. Mar. 24, 2023; Yichen Su, *Gentrification Transforming Neighborhoods in Big Texas Cities*, SOUTHWEST ECONOMY, FOURTH QUARTER 2019.

<sup>143</sup> See Talpins Interview, *supra* note 6.

<sup>144</sup> See *id.*

one of the most expensive cities in the United States. To subsist on \$68,000, a prosecutor must endure a lengthy commute or live in an undesirable location. At the same time, attorneys in private practice are being paid far better. As the Chief Assistant District Attorney said in an interview, “we are being slaughtered by the private firms, businesses, and other government agencies (especially federal agencies) that pay much higher salaries than we do.”<sup>145</sup>

The elected prosecutor in a small Virginia county agreed that low salaries make it extremely difficult to compete for attorneys. She explained that “there is not a prosecutor’s office that can compete with the private sector on salaries. You can make so much more working for a big corporation or hanging your own shingle.”<sup>146</sup> In Virginia (which sets a statewide base salary for prosecutors), the entry-level salary has been only about \$65,000.<sup>147</sup> In response to the dramatic downturn in applications for prosecutor jobs, Virginia raised the entry-level salary to about \$71,000 in December 2023.<sup>148</sup> But prosecutors say that salary is still too low to attract many lawyers.<sup>149</sup> As a result, elected prosecutors must advocate with their counties for additional “locality pay” to supplement the base salary and attract candidates.<sup>150</sup> Some counties have far more robust additional funds than others.<sup>151</sup>

Low pay for prosecutors is one of the main reasons for prosecutor vacancies in Wisconsin. Until mid-2023, prosecutors across the state were paid \$56,659 per year.<sup>152</sup> As noted above in Part II, all four assistant prosecutors in Dodge County, Wisconsin quit, which in turn led to the elected district attorney also turning in his notice.<sup>153</sup> News reports indicated that vacancies were a statewide problem with nearly 12% of Wisconsin assistant prosecutor positions vacant.<sup>154</sup> In a bit of positive news, these news reports led the legislature in July 2023 to increase starting salaries to roughly \$75,000 per year.<sup>155</sup>

## **2. Offices With Low Salaries Lose Lawyers to Nearby Offices With Higher Salaries**

Some prosecutors’ offices pay better than others. And when the better paying offices are within the same state or worse yet, right down the road, lawyers choose the higher-paying positions.

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<sup>145</sup> *Id.*

<sup>146</sup> Martin Interview, *supra* note 49.

<sup>147</sup> *See id.*

<sup>148</sup> *See id.*

<sup>149</sup> *See id.*

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

<sup>151</sup> *See id.*

<sup>152</sup> See Jason Calvi, *Wisconsin Prosecutors, Public Defenders Pay Getting a Boost*, FOX6NOW.COM, July 6, 2023.

<sup>153</sup> See Lehr, *As Wisconsin Struggles to Hire*, *supra* note 130.

<sup>154</sup> *See id.*

<sup>155</sup> See Calvi, *supra* note 152.

In Wayne County (home to Detroit) the prosecutor's office is significantly understaffed with 22% of the prosecutor positions vacant.<sup>156</sup> The office pointed to low salaries as a major reason for vacancies, noting that “[o]ur pay rate was behind other larger prosecutors’ offices in Michigan. . . [which] made it difficult to attract people to the office, and made people who wanted to remain leave because other offices had better salaries and benefits.”<sup>157</sup> In September 2023, the County and the prosecutor’s union agreed to a much more favorable contract terms, including a 25% wage increase (from \$60,000 to \$75,000) for entry-level hires, retention bonuses of up to \$15,000, a reduction of employee health care contributions, and free parking.<sup>158</sup> The elected prosecutor remarked that the salary increases and other benefits “will help us bring down our huge backlogs and has already attracted interest in lawyers coming and returning to our office.”<sup>159</sup>

In Hidalgo County, Texas, the First Assistant District Attorney pointed to low salary as the primary reason for losing prosecutors.<sup>160</sup> The entry-level starting salary in Hidalgo is around only \$69,000.<sup>161</sup> Hidalgo is the seventh largest district attorney’s office in Texas and has a large volume of cases.<sup>162</sup> It has to compete for lawyers with other Texas counties, most of which pay more. For instance, in the Webb County District Attorney’s Office, which has a smaller caseload due to the size of the jurisdiction, the starting salary exceeds \$75,000.<sup>163</sup> The First Assistant District Attorney bluntly stated that “we can’t recruit and retain well with our current salaries.”<sup>164</sup> Indeed, the Hidalgo First Assistant thought that the reason why attorneys are leaving the office has more to do with salary than anything else. He explained that “I think if we could better compensate them, they would be okay with the volume [of work]. I don’t think volume alone is the reason people leave. It’s more the pay.”<sup>165</sup>

Across the state in Nueces County, Texas, the District Attorney said prosecutor vacancies are primarily due to low salaries.<sup>166</sup> The entry-level salary of \$67,454 is lower than the compensation in larger Texas counties.<sup>167</sup> The District Attorney explained that “We’re running a farm team for the bigger offices. We hire them and train them and then they go somewhere else to get paid better.”<sup>168</sup> The lead prosecutor further noted that the county commissioners do not want to increase

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<sup>156</sup> See Miller Email, *supra* note 16.

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

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

<sup>160</sup> See Benavides Interview, *supra* note 38.

<sup>161</sup> See *id.*

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Granberry Interview, *supra* note 87.

<sup>167</sup> See *id.*

<sup>168</sup> *Id.*

salaries because the junior prosecutors are going to go to Houston, Dallas, and San Antonio anyway so the commissioners think “why spend the money.”<sup>169</sup>

In Colonial Heights Virginia the elected commonwealth’s attorney said – with pride – that he loses young prosecutors to higher-paying offices.<sup>170</sup> He explained that Virginia prosecutors start at a base pay of \$73,000, but that wealthier jurisdictions are free to supplement that base pay.<sup>171</sup> Because Colonial Heights is a small jurisdiction (with six total prosecutors), it lacks the funds to supplement the base salary with local money.<sup>172</sup> But nearby, and larger, Chesterfield, Virginia provides a \$15,000 to \$20,000 salary supplement to its prosecutors.<sup>173</sup> The Colonial Heights Commonwealth’s Attorney explained that “I can’t compete with Chesterfield. I hire young talent and they go to Chesterfield after two or three years.”<sup>174</sup> Indeed, when I interviewed the Colonial Heights Commonwealth’s Attorney in November 2023, he explained – once again, with pride -- that his deputy had just won the election to become the commonwealth’s attorney in Chesterfield and she had immediately hired half of the Colonial Heights office.<sup>175</sup>

A similar problem exists on the eastern side of Virginia. The Norfolk Commonwealth’s Attorney’s Office pays a starting salary of \$73,000.<sup>176</sup> But nearby Virginia Beach pays \$82,000 and some other offices in the area pay even more.<sup>177</sup> The Norfolk Commonwealth’s Attorney explained November 2023 that he had just lost six of his prosecutors to the Suffolk office, which is only twenty miles away.<sup>178</sup> He explained that those prosecutors got \$20,000 to \$30,000 salary increases by taking jobs in the Suffolk Commonwealth Attorney’s Office.<sup>179</sup>

In Oklahoma, “the most common starting salary [in 2022] for an assistant district attorney in Oklahoma [was] \$45,000 a year.”<sup>180</sup> One district attorney wrote an editorial encouraging a pay increase because “prosecutors are leaving District Attorneys’ offices in increasing numbers for the simple reason we cannot pay a competitive salary.”<sup>181</sup> The district attorney further noted that Oklahoma offices could not compete with neighboring states like Arkansas and New Mexico that pay far more.<sup>182</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> *See* Collins Interview, *supra* note 14.

<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See id.*

<sup>176</sup> *See* Telephone Interview with Ramin Fatehi, Elected Commonwealth’s Attorney in Norfolk, Virginia, Nov. 29, 2023.

<sup>177</sup> *See id.*

<sup>178</sup> *See id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See* Matt Ballard, Opinion, *Oklahoma Will Lose Its Prosecutors If We Don’t Fund Them*, OKLAHOMAN, Apr. 3, 2022.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

Lane County, Oregon provides an example of how low salaries can drive out junior prosecutors and how a pay raise can bring them back. Nearly a dozen prosecutors left the Lane County District Attorney's Office between November 2021 and January 2023, "with many leaving for better-paying jobs."<sup>183</sup> A news story reported that one attorney left for the Oregon Department of Justice, which pays better, and that other prosecutors had left for nearby county prosecutors positions which paid almost 14% higher salaries.<sup>184</sup> The elected prosecutor pushed for higher salaries, even boldly telling the media that the office might have to stop charging some non-violent felonies and misdemeanors if it could not hire and retain lawyers.<sup>185</sup> Even though the county's contract with the prosecutor's office was not up until mid-2024, the Board of Commissioners authorized a raise and improved retirement benefits in March 2023.<sup>186</sup> And by late 2023, the Lane County office was fully staffed.<sup>187</sup>

Salary raises do not always solve the problem though. In Yakima, Washington the starting salary for an entry-level prosecutor was \$63,000.<sup>188</sup> In late 2022, the elected prosecutor substantially raised the starting salary substantially to \$80,100.<sup>189</sup> But as of late 2023 the office still had 16% of prosecutor positions vacant.<sup>190</sup> The elected prosecutor said that salaries are still too low to fully compete in the market.<sup>191</sup> He explained that some junior lawyers will simply go to another county where they can make more money or have a lighter caseload.<sup>192</sup>

### **3. Offices in Expensive Cities and No Cost-of-Living Adjustments Have Vacancy Problems**

A related problem to low salaries is the lack of cost-of-living adjustments for expensive cities. Even when salaries within a state are equal, some offices still lose the war for talent because the same salary is worth more in a cheaper city. Florida provides an instructive example.

Entry-level prosecutors in Florida are paid roughly the same amount regardless of whether they are working in Miami or a rural town.<sup>193</sup> Yet, Miami is one of the most expensive cities in the United States.<sup>194</sup> Rent and other expenses are

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<sup>183</sup> Makenzie Elliott, *Attorneys' Group Blames Lane County as DA Struggles to Hire, Retain Prosecutors*, REGISTER GUARD, Jan. 14, 2023.

<sup>184</sup> *See id.*

<sup>185</sup> *See id.*

<sup>186</sup> *See* Email from Patricia Perlow, Elected District Attorney, Lane County District Attorney's Office, to Adam Gershowitz, Nov. 20, 2023.

<sup>187</sup> *See id.*

<sup>188</sup> *See* Brusica Email, *supra* note 92.

<sup>189</sup> *See id.*

<sup>190</sup> *See id.*

<sup>191</sup> *See id.*

<sup>192</sup> *See id.*

<sup>193</sup> *See* Talpins Interview, *supra* note 6.

<sup>194</sup> *See* U.S. NEWS & WORLD REPORT, *Most Expensive Places to Live in the U.S. 2023-24*, available at <https://realestate.usnews.com/places/rankings/most-expensive-places-to-live> (listing Miami as the fourth most expensive city).

thus much higher than they would be in, for instance, Jacksonville, Florida. A cost-of-living calculator indicates that a prosecutor making \$70,000 a year in Jacksonville, Florida would have to make \$90,000 a year to have a comparable standard of living in Miami.<sup>195</sup>

The Miami-Dade State's Attorney's Office recently raised the starting salary to \$68,000 a year.<sup>196</sup> Yet, according to a senior prosecutor in the Miami-Dade office, even that salary increase does not make it feasible for many starting lawyers – particularly those with student loans – to live in Miami. Some applicants “accept the job, then see the cost of the housing market, and then withdraw from the position.”<sup>197</sup>

The lack of a considerable cost-of-living adjustment for expensive cities is thus one of the drivers of vacancies in the Miami-Dade office. As noted above, one-third of prosecutor positions are vacant in the Miami-Dade office. By contrast, the prosecutor's office in Palm Beach County – which has more affordable housing -- is fully staffed with 120 of 120 prosecutor positions full.<sup>198</sup>

In short, both large and small district attorneys' offices lose prosecutors to other offices. In some instances, prosecutors flow from small counties to big cities that pay more, leaving smaller offices in a constant state of vacancy and re-hiring. But in other states where salaries are equal across localities, it is the larger offices that suffer the vacancy problems because entry-level lawyers accept positions in cheaper locations where their salary goes further.

#### **4. Offices With Higher Salaries Are Better Staffed**

Not all prosecutors' offices suffer from low salaries. But those offices seem to be the exception that proves the rule because the higher-salaried offices tend to be fully staffed.

In the Santa Clara County District Attorney's Office, the salary for entry-level prosecutors in Santa Clara is between roughly \$129,000 and \$135,000 per year which is markedly higher than most prosecutors' offices.<sup>199</sup> The explanation for the higher salaries is multi-faceted. First, the Santa Clara County Charter provides that “[r]ates of pay shall be fixed by the Board of Supervisors which are commensurate with those prevailing throughout the county for comparable work.”<sup>200</sup> This means that salaries are set with the private sector in mind. And government workers in the county – not just prosecutors, but also public defenders – are represented by the Government Attorneys Association, which effectively negotiates salaries and other employment

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<sup>195</sup> See CNN, *How Far Will My Salary Go In Another City*, available at <https://money.cnn.com/calculator/pf/cost-of-living/index.html>

<sup>196</sup> See Talpins Interview, *supra* note 6.

<sup>197</sup> *Id.*

<sup>198</sup> See Email from Marc Freeman, Public Information Office, Palm Beach County State's Attorney's Office, to Adam Gershowitz, Sept. 18, 2023.

<sup>199</sup> See Email from James Gibbons-Shapiro, Santa Clara District Attorney's Office, to Adam Gershowitz, Nov. 28, 2023.

<sup>200</sup> SANTA CLARA COUNTY CHARTER, Section 709.



matters on behalf of prosecutors.<sup>201</sup> Not surprisingly, the Santa Clara office is nearly fully staffed.

Similarly, the starting salary for entry-level prosecutors in the San Francisco District Attorney's Office is \$114,816.<sup>202</sup> [Waiting for response on San Francisco vacancy rate. . . ]

## 5. The High Prestige Exception to the Low Salary Problem

While low salaries is a compelling explanation for prosecutor vacancies, it does not explain the staffing situation in all offices however. Some district attorneys' offices have low salaries but are nevertheless fully staffed.

The Manhattan District Attorney's Office pays entry-level prosecutors only \$74,553 per year, yet it has few vacancies.<sup>203</sup> And New York City is one of the most expensive places in the nation to live. Moreover, the Manhattan office often hires cream of the crop lawyers who could walk across the street to jobs at law firms paying well over \$200,000 a year. Those same entry-level prosecutors could also land positions at district attorneys' offices around the country that pay more and are located in cheaper cities. As the District Attorney's Office said in testimony to the City Council Public Safety Committee, "[the] low starting salary combined with the burdens of tremendous law school debt and the cost of living in New York City makes it extremely challenging for our offices to recruit recent law school graduates in the competitive legal labor market."<sup>204</sup>

How then is the Manhattan District Attorney's Office nearly fully staffed? One explanation is the geographic draw of living in New York City. Another, perhaps even more likely explanation is that the Manhattan office is widely considered to be the most prestigious state prosecutor's office in the nation.<sup>205</sup> Junior prosecutors are seemingly willing to be paid less and live in tighter quarters to work in a high-profile office.

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<sup>201</sup> See MEMORANDUM OF AGREEMENT BETWEEN COUNTY OF SANTA CLARA AND SANTA CLARA COUNTY GOVERNMENT ATTORNEYS' ASSOCIATION (2016) (40-page document detailing agreement on salary, insurance benefits, leaves, labor practices, disciplinary policy, grievance policy, and many other topics).

<sup>202</sup> See SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE, JOIN OUR TEAM, available at <https://www.sfdistrictattorney.org/about-us/join-our-team/attorneys/>. The San Francisco office previously suffered from vacancies during the Chesa Boudin administration. See *infra* notes 291-92 and accompanying text. As explained in Part IV.H, progressive prosecutors often fire some (sometimes many) senior prosecutors who they believe do not agree with their vision. And some line prosecutors quit because of policy disagreements. At present however the San Francisco District Attorney's Office . . . .

<sup>203</sup> See Email from Emily Tuttle, Deputy Communications Director, Manhattan District Attorney's Office, to Adam Gershowitz, Nov. 13, 2023.

<sup>204</sup> See WRITTEN TESTIMONY: CITY COUNCIL PUBLIC SAFETY COMMITTEE, FY23 BUDGET & OVERSIGHT HEARINGS, Mar. 18, 2022, available at <https://manhattanda.org/written-testimony-city-council-public-safety-committee-fy23-budget-oversight-hearings/>

<sup>205</sup> See e.g., Joshua Chaffin, *Alvin Bragg, the District Attorney Behind the Case Against Trump*, FIN. TIMES, Mar. 31, 2023 (describing Manhattan as "arguably the nation's premier law enforcement office).

The same explanation appears to hold across town for the also prestigious Brooklyn District Attorney's Office. In spite of a low starting salary of \$78,000 per year, the office is fully staffed.<sup>206</sup>

The Manhattan and Brooklyn offices (and perhaps a handful of other high-profile offices) are the exception that proves the rule though. For most offices, the inability to pay a competitive salary is a major obstacle to hiring all of the prosecutors they need.

## **B. Huge Workloads Burn Out Prosecutors and Lead Them To Quit**

In addition to salary, a major reason for prosecutor burnout and attrition is the workload. Caseloads in many district attorneys' offices have been heavy for decades.<sup>207</sup> But a confluence of events have made caseloads far worse in some offices over the last few years.

First, and most obviously, courtrooms, like everything else across the country, shut down during the Covid pandemic. Pending cases slowed down or even came to a halt.<sup>208</sup> But crime did not stop during the pandemic. New defendants came in the door and their cases were piled on top of old cases.<sup>209</sup> Backlogs grew, and years later prosecutors are still trying to dig their way out from under them.

As caseloads grew, so did frustration with the job. As a result, many prosecutors quit. Of course, when a prosecutor quits, their cases do not simply disappear. Instead, they are transferred to the remaining prosecutors in the office. Those prosecutors then each have higher caseloads than they did the day before. With each new departure, the situation grows worse.

For instance, in St. Louis, nearly half of the prosecutor position were vacant as of early 2023. The result was massive caseloads.<sup>210</sup> Prosecutors were forced to "often drop and refile charges because they aren't ready for trial — a maneuver they used at least a dozen times in murder cases last year."<sup>211</sup> An experienced prosecutor described the caseload as "untenable" and "like an avalanche" and caused him to leave the office.<sup>212</sup> The high caseloads in turn caused more prosecutors to quit.

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<sup>206</sup> See Email from Orin Yaniv, Director of Communications, Brooklyn District Attorney's Office, to Adam Gershowitz, Nov. 14, 2023.

<sup>207</sup> See Gershowitz & Killinger, *supra* note 19.

<sup>208</sup> Susie Neilson & Joshua Sharpe, *D.A.'s Alternative Focus for Lower-Level Crimes*, SAN. FRAN. CHRON., May 15, 2022 ("Cases are moving through the court at an incredibly slow pace . . . because the courts were shut down, and then were only partially open.").

<sup>209</sup> Worse yet, backlogged cases can be more time-consuming than new cases. In older cases, defendants are often out on bond and not in a hurry to resolve their cases. Moreover, finding witnesses from older cases can be more challenging. See Email from Mike Holley, First Assistant District Attorney, Montgomery County District Attorney's Office, to Adam Gershowitz Dec. 1, 2023.

<sup>210</sup> See Kull & Heffernan, *supra* note 89.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

In Baltimore, prosecutors and former prosecutors in the Marilyn Mosby administration reported that “grueling hours, large caseloads and depleted morale have driven [prosecutors] out.”<sup>213</sup>

In Yakima, Washington, felony prosecutors carry upwards of 120 cases at any given time.<sup>214</sup> The elected prosecutor pointed to caseloads as a key problem, noting that “our caseloads are too high so some of the attorneys go to other counties.”<sup>215</sup> The “work/life balance” is a key issue for younger prosecutors and Yakima loses some of them because of high caseloads.<sup>216</sup>

In Cook County (Chicago), prosecutors said that caseloads had become so high that “[y]ou now have first-chair ASAs [Assistant State’s Attorney’s] who have no time to prepare for murders because they have so many that need to be set (for trial) because they’ve been pending forever. . . . Even if you’re an experienced ASA, you’re going to get burned out if you just do trial after trial after trial.”<sup>217</sup> Several longtime prosecutors who would only speak on the condition of anonymity described the understaffing problem with words such as “hemorrhaging,” “unheard of” and “dumpster fire.” Due in large part to high caseloads, Cook County prosecutors “are attending what seems like an endless string of going-away parties.”

In Kalamazoo County, Michigan, “the number of pending felony cases has nearly doubled, going from 650 in 2017 to 1,150 in 2023.”<sup>218</sup> The elected district attorney in that county has said that as a result “[w]e have huge caseloads with attorneys trying to manage too many cases . . . . That leads to stress and burnout. That combined with the low salaries that we pay leads people to leave. And we can’t attract new people because of low starting salaries.”<sup>219</sup>

It is not just line prosecutors who highlight excessive caseloads. Kim Ogg, the elected district attorney in Harris County (Houston) recognizes the recruiting and retention problem that huge caseloads poses:

The number one cause of our retention problems is that we do not have enough lawyers or support staff. That in turn leads to high caseloads. Caseloads have been a significant part of the problem in retaining young prosecutors. Our retention of lawyers with fewer than five years of experience is directly impacted by the unreasonable caseloads that they have. And it has an even greater negative impact on those young lawyers with children. It is very difficult to maintain a caseload of 900 cases and have young children at home. We lose good lawyers who we should not lose.<sup>220</sup>

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<sup>213</sup> Lee O. Sanderlin & Alex Mann, *'A Threat to Public Safety': Staffing Shortage and Low Morale Plague Baltimore State's Attorney Marilyn Mosby's Office*, *BALT. SUN*, June 6, 2022.

<sup>214</sup> See Brusie Email, *supra* note 92.

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

<sup>216</sup> *Id.*

<sup>217</sup> Crepeau, *supra* note 79.

<sup>218</sup> Berg, *Michigan Prosecutors Face Staffing Crisis*, *supra* note 4.

<sup>219</sup> *Id.*

<sup>220</sup> See Ogg Interview, *supra* note 15.

Worse yet, attrition resulting from huge caseloads occurs at the same time as “normal” departures. Senior prosecutors retire. Prosecutors who had always been planning to open a criminal defense firm eventually do so. Young lawyers get married and move to new cities. In short, regular attrition continues alongside caseload-based attrition. The ultimate result is massive departures from some offices.

And while caseload-based attrition and normal departures are happening, the district attorneys must look for replacements. But law school graduates and lateral attorneys are sophisticated and well networked. Those prospective hires recognize that the office’s workload is unreasonable, and so they decline to accept positions when offered or decline to even apply for positions in the first place.

### **C. Increasing Discovery Obligations From Body Cameras and New Statutory Obligations Have Exhausted Prosecutors**

In addition to low salaries and large caseloads, multiple prosecutors’ offices identified growing discovery obligations as a reason why prosecutors are burned out and leaving their positions. The situation varies from office-to-office, but there were two main themes: (1) new statutory obligations to turn over evidence at an earlier stage are burdensome for prosecutors; and (2) recording technology such as dashcams is creating more and more material for prosecutors to review and disclose.

In 2022, the *New York Times* reported massive departures from the Manhattan, Brooklyn, Bronx, and Queens district attorneys’ offices.<sup>221</sup> In addition to pandemic burnout and low salaries, the report explained that two new discovery statutes were contributing to departures.

The *Times* explained that “[t]he first law requires prosecutors to obtain and hand over hundreds of documents on many cases, a demanding task that can impede interviewing witnesses and otherwise preparing for court.”<sup>222</sup> The first statute added to the amount of information that must be disclosed prior to trial – “including all electronically created or stored information relevant to a case.”<sup>223</sup>

The second discovery statute then “ties the handover of that material to the speedy trial clock, creating deadline pressure for prosecutors to collect all the material once charges are filed.”<sup>224</sup> That statute requires prosecutors to obtain “reams of paperwork” from the New York City Police Department, causing “immense pressure” on prosecutors who worry that “their cases are going to get dismissed or that [the elected District Attorney is] going to fire them.”<sup>225</sup> A former New York prosecutor explained that the discovery statutes were “difficult to comply with because there was so much we were expected to produce.”<sup>226</sup>

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<sup>221</sup> See Jonah E. Bromwich, *Why Hundreds of New York City Prosecutors Are Leaving Their Jobs*, N.Y. TIMES, Apr. 4, 2022.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

The discovery burden is not just limited to New York. In Texas, the Michael Morton Act, which imposed greater discovery burdens following an exoneration, has also been time-consuming for prosecutors.<sup>227</sup> A senior prosecutor in a mid-sized Texas county did not criticize the new discovery obligations – calling them “understandable” – but said they are “burdensome and time-consuming.”<sup>228</sup> He went on to explain that “you’ve got to be a document pusher to be a prosecutor in Texas.”<sup>229</sup>

The recent increase in the discovery burden for prosecutors goes beyond just statutory obligations. An increasingly technological world has actually created more time-consuming discovery obligations for prosecutors across the country. Three recurring examples are body camera recordings, police dash-cam footage, and Ring doorbell footage.

As a senior Texas prosecutor explained, “there is much more video now than there used to be. That is good, but the prosecutor has to watch it.”<sup>230</sup> In a recent murder trial, that prosecutor had to review 45 hours of video.<sup>231</sup>

The elected Manhattan District Attorney offered a similar explanation, noting that “before 2020, his office used about 32 terabytes of data storage. Today, it uses 320 terabytes, a 900 percent increase over two years.”<sup>232</sup> In testimony to the City Council Public Safety Committee, the District Attorney’s Office explained that “[m]uch of this growth is tied to the video and digital evidence that is now part of every investigation. For example, our Body Worn Camera Unit has linked and stored more than 339,000 videos associated with investigations and cases between January 2020 and March 4, 2022.”<sup>233</sup>

Recording technology has also created huge discovery obligations in run-of-the-mill drunk driving cases (one of the most common criminal prosecutions) and other straightforward prosecutions. As Virginia prosecutors explained, “[t]ypically, multiple officers respond to a crime scene with body cameras rolling, leaving it to the prosecutor to sift through what can be several hours of footage when criminal charges are filed.”<sup>234</sup> The Commonwealth’s Attorney for Arlington County, Virginia

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<sup>227</sup> One time-consuming portion of the Act involves redaction of non-discoverable parts of a document. Pursuant to the Michael Morton Act, “[i]f only a portion of the applicable document, item, or information is subject to discovery under this article, the state is not required to produce or permit the inspection of the remaining portion that is not subject to discovery and may withhold or redact that portion.” Tex. Code Crim Pro § 39.14(c). The items to be redacted include “address, telephone number, driver’s license number, social security number, date of birth, and any bank account or other identifying numbers contained in the document or witness statement.” Tex. Code Crim Pro § 39.14(f).

<sup>228</sup> Wittig Interview, *supra* note 21.

<sup>229</sup> *Id.*

<sup>230</sup> Holley Interview, *supra* note 47.

<sup>231</sup> *See id.*

<sup>232</sup> *Id.*

<sup>233</sup> TESTIMONY, *supra* note 204.

<sup>234</sup> *See* Antonio Olivo, *Criminal Justice Changes in Virginia Prompt Debate Over How Prosecutors Are Funded By the State*, WASH. POST, July 6, 2021.

explained that “[i]t’s a crushing, crushing burden. . . You’d think that a 30-minute stop for a DUI would be 30 minutes of in-car camera video, but it’s not.”<sup>235</sup>

And then of course there are cell phones, which carry a huge amount of evidence for prosecutors to sift through. Prosecutors must ordinarily take the time to procure a warrant to search a cell phone,<sup>236</sup> and they often need a subpoena to gather data held by third-party applications such as Snapchat.<sup>237</sup> Once they have access to the phone and its applications, prosecutors must sift through gigabytes of data.<sup>238</sup>

The combination of new statutory discovery obligations and increased camera footage has contributed to prosecutor departures. As the Manhattan District Attorney’s Office explained, “we must both reproduce and keep tremendously more paper on every case than had been required in the past.”<sup>239</sup> “Faced with these unprecedented evidentiary demands, we’ve experienced record attrition, as our ADAs burned out and sought less demanding jobs for more money.”<sup>240</sup>

#### **D. Covid Increased Demand for Remote Work, Which Is Nearly Impossible For Prosecutors’ Offices**

The Covid pandemic brought changes to the labor market. Workers across all industries began to re-examine their priorities and how hard they are willing to work.<sup>241</sup> Workers also realized that they preferred the opportunity to work remotely for part of the time. The legal market was no exception. Just as some restaurant workers discovered that they do not want (or need) to work grueling hours in person for low pay, some prosecutors reached the same conclusion.

According to a senior prosecutor in Montgomery County, Texas “the hours people are willing to put in got re-set by the pandemic. The work mindset has changed. Keeping prosecutors became more difficult after the pandemic.”<sup>242</sup>

The demand for more reasonable hours was particularly true among junior lawyers. One prosecutor explained that scaled down remote work during the

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<sup>235</sup> *Id.* Virginia prosecutors also pointed to the change in Virginia’s jury sentencing law as an added burden on prosecutors. Until 2020, a defendant who elected by tried by a jury in Virginia would be sentenced by that jury. Because of the perception among defendants that they could end up with a longer sentence from the jury, they were incentivized to plead guilty. The Virginia legislature amended the jury sentencing statute in 2021 to allow defendants to opt for a jury trial only at the guilt stage of the trial and to have a judge conduct sentencing. *See Rachel Weiner & Laura Vozzella, Revolutionary ‘Criminal Sentencing’ Change Passes in Virginia*, WASH. POST, Oct. 20, 2020. As a result of the statutory change, prosecutors contend that more defendants opted for jury trials rather than pleading guilty. With more trials but the same number of prosecutors, the work burden on prosecutors increased. *See Martin Interview, supra* note 49.

<sup>236</sup> *See Riley v. California*, 573 U.S. 373 (2014).

<sup>237</sup> *See Holley Email, supra* note 47.

<sup>238</sup> *See id.*

<sup>239</sup> TESTIMONY, *supra* note 204.

<sup>240</sup> *Id.*

<sup>241</sup> *See R. Jason Faberman, Andreas I. Mueller, & Aysegul Sahin, Has the Willingness to Work Fallen During the Pandemic*, National Bureau of Economic Research Working Paper, Feb. 2022, available at [https://www.nber.org/system/files/working\\_papers/w29784/w29784.pdf](https://www.nber.org/system/files/working_papers/w29784/w29784.pdf)

<sup>242</sup> Holley Interview, *supra* note 47.

pandemic may have contributed to junior prosecutors leaving the field even sooner than they normally would: “Some younger attorneys never really got the courtroom experience and the experience of preparing a jury trial and handling it from beginning to end. The newer attorneys never really had the in-person trial experience. Covid caused people to get a little too relaxed” and it is difficult to re-adjust from that.<sup>243</sup>

The pandemic did not just re-set expectations about the raw number of hours lawyers are willing to work. It also clarified that lawyers prefer to work from home. In civil practice, remote work is possible and attorneys began to demand it.<sup>244</sup> The market responded and many law firms – even those that pay astronomically high salaries – allowed their lawyers to work from home, at least part of the week, in order to remain competitive.<sup>245</sup>

Prosecutors, too, would prefer to work from home. One senior prosecutor explained that “when we interview candidates we get questions about remote positions” and the answer is always “no.”<sup>246</sup> Remote work typically does not exist in prosecutors’ offices because line prosecutors are usually assigned to a particular courtroom, and that court is often in session every day. Prosecutors cannot work remotely when defendants, defense attorneys, judges, and the rest of the court staff are working in person.

The lack of remote work options has led to prosecutors’ offices losing prosecutors to civil law firms. The district attorney for a small office with a 31% vacancy rate noted that “as far as other practices of law, the ability to practice civil law, you can do far more things remotely than you can as a prosecutor or even a public defender. In the civil practice you can do a lot more remotely, at home.”<sup>247</sup> A spokesperson for the Brooklyn District Attorney’s Office echoed this in noting that there is “very limited access to remote or hybrid work for government workers in New York City, a perk that is provided in many other legal firms.”<sup>248</sup>

That is not to say that remote work for prosecutors’ offices is impossible. In one large district attorney’s office, prosecutors are in fact permitted to work from home up to two times per week.<sup>249</sup> To foster remote work, a prosecutor’s office needs to think creatively about how to cover all the court proceedings, and it must have a well-staffed office with enough lawyers. This combination is exceedingly rare, which is why remote work in prosecution is rare.

## **E. Decreased Pool of Prospective Prosecutors: Fewer Law School Graduates and Lower Bar Pass Rates**

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<sup>243</sup> See Benavides Interview, *supra* note 38.

<sup>244</sup> See Smith, *supra* note 22.

<sup>245</sup> See Sara Merken, *Another U.S. Law Firm Shrinks Office Space as Hybrid Work Becomes the Norm*, REUTERS, Nov. 22, 2022.

<sup>246</sup> Benavides Interview, *supra* note 38.

<sup>247</sup> Mauldin, *supra* note 80.

<sup>248</sup> See Yaniv, *supra* note 61.

<sup>249</sup> See Interview with anonymous senior prosecutor, Oct. 2, 2023.

Most prosecutors hired at district attorneys' offices around the country are entry-level lawyers who have just graduated from law school. The reason is that more senior lawyers would typically need to take a large pay cut to go to work at the prosecutor's office. As such, any decrease in the pool of entry-level lawyers makes it harder for prosecutors' offices to fully staff their offices.

At first glance, it would seem like there should be a larger pool of new lawyers for district attorneys' offices to choose from. However, in recent years, two phenomena have combined to reduce the size of the entry-level pool: fewer law school graduates and decreased bar passage rates.

First, the number of law school graduates has hovered between 34,000 and 35,000 from 2017 to 2022.<sup>250</sup> In earlier years, the number of graduates was markedly higher – roughly 37,000 in 2016, 40,000 in 2015, 44,000 in 2014, and more than 46,000 in 2013.<sup>251</sup> There was hope that the number of graduates would increase because law school enrollment surged by 12% in 2021.<sup>252</sup> However in 2022, enrollment declined by 11%, thus returning to about 34,000 to 35,000 graduates per year.<sup>253</sup> As such, prosecutors must continue to draw from a smaller pool of graduates than pre-2017. As one prosecutor explained, if we had 80,000 more law school graduates over the last 10 years, we'd have plenty of lawyers applying for prosecutor jobs."<sup>254</sup>

Second, the percentage of graduates passing the bar has also declined. In 2020, the national bar exam pass rate for first-time bar takers was 84%.<sup>255</sup> Perhaps due to the problems with online learning during the Covid pandemic,<sup>256</sup> the pass rate declined over the next few years. By 2022, the first-time pass rate nationally was down to 78%.<sup>257</sup>

Civil law firms can continue to employ recent law school graduates who fail the bar exam. Those graduates can work under the supervision of a senior lawyer and have that attorney sign all pleadings or contracts. Indeed, civil law firms who have already invested in recruiting lawyers and paying them as summer associates may see little downside to continuing to employ recent graduates for another six months until they take the bar exam a second time.<sup>258</sup>

Prosecutors' offices face a different calculus however. District attorneys' offices need to be able to place a prosecutor in court and have that lawyer handle tasks. The prosecutor needs to be able to sign pleadings, make plea offers, argue motions, and handle trials. District attorneys' offices do not have the resources to assign a

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<sup>250</sup> See Statista, available at <https://www.statista.com/statistics/428985/number-of-law-graduates-us/>

<sup>251</sup> See *id.*

<sup>252</sup> See Karen Sloan, *Law School See Double-Digit Decline in New Students After Surge*, REUTERS, Dec. 19, 2022.

<sup>253</sup> See *id.*

<sup>254</sup> Fatehi Interview, *supra* note 176.

<sup>255</sup> See Karen Sloan, *U.S. Bar Exam Pass Rate Drops For First-Time Takers*, REUTERS, Feb. 28, 2023.

<sup>256</sup> See Stephanie Francis Ward, *Pass Rates for First-Time Takers Decrease; Are Online Classes the Cause*, ABA JOURNAL, Nov. 17, 2022.

<sup>257</sup> See Sloan, *supra* note 252.

<sup>258</sup> See Sawyer, *supra* note 25.



senior prosecutor to sign off on every single thing an unlicensed lawyer does. Thus, prosecutors' offices cannot carry someone who has recently failed the bar and they have to let them go.

The bar failure problem hit particularly hard in some under-staffed prosecutors' offices. Harris County (home to Houston) provides a good example. For decades, the Harris County District Attorney's office paid unlicensed law school graduates as "pre-commits" on an hourly basis until they passed the bar exam.<sup>259</sup> The pay was paltry. Some recent law school graduates would work for these low wages between the time they graduated law school and the time when they officially became licensed because they were very enthusiastic about working in the prosecutor's office. But many graduates could not afford to live on this low pay, or they were simply unwilling to do so.<sup>260</sup>

The most recent District Attorney, Kim Ogg, poured resources into a new policy that paid unlicensed graduates as full-time employees – post-bar fellows -- who earned 95% of the salary of licensed entry-level hires.<sup>261</sup> Under this approach, recent law school graduates began their careers at the District Attorney's Office immediately after graduating from law school, rather than looking elsewhere and landing a different job before their bar results were posted.<sup>262</sup> The office was excited about this new initiative. Unfortunately, as in other parts of the country, there was a high failure rate for the Texas Bar Exam during the Covid pandemic.<sup>263</sup> According to the District Attorney, many of the fellows "didn't pass the bar and we lost a significant percentage of post-bar fellows to bar exam failure."<sup>264</sup> The entry-level lawyers that the District Attorney's Office was counting on to fill vacant positions never materialized.

#### **F. Hostility to Law Enforcement Jobs Among Some Law Students and Professors**

The murder of George Floyd in the summer of 2020 created "an astonishing [negative] shift in public opinion" toward law enforcement.<sup>265</sup> The impact of the murder and the ensuing protests is often discussed in terms of the public's reaction to policing. However, some prosecutors have also noticed that law students and entry-level lawyers have begun to have negative attitudes toward prosecution work as well.

According to a senior prosecutor in Texas, after the summer where George Floyd was murdered "younger students increasingly seem to have the mindset that to

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<sup>259</sup> See Ogg Interview, *supra* note 15.

<sup>260</sup> See *id.*

<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

<sup>263</sup> See Karen Sloan, *Big Drop in Bar Exam Rates for New York, Florida, Texas, and Elsewhere*, REUTERS, Apr. 21, 2023.

<sup>264</sup> Ogg Interview, *supra* note 15.

<sup>265</sup> David A. Graham, *George Floyd's Murder Changed Americans' Views on Policing*, THE ATLANTIC, May 25, 2021.

work for justice that they have to do it as a defense attorney. Students increasingly seem to believe that the system is too flawed to work as a prosecutor.”<sup>266</sup> Indeed, current prosecutors sometimes are asked by their friends and family “How can you be a prosecutor?”<sup>267</sup> There is a “stigma of being in prosecution.”<sup>268</sup>

According to an experienced prosecutor in Wisconsin “There's been so much bad publicity, around policing and the whole criminal justice system, that it doesn't appear that there are as many students even ... taking the criminal law courses and doing internships in criminal law as there used to be.”<sup>269</sup>

An experienced prosecutor in Virginia agreed, noting that negative sentiment toward police and prosecutors pre-dated the George Floyd murder. She explained that it “happened slowly over a period of time.”<sup>270</sup> The discourse reputed among law students and law faculty went from “prosecutors are the ones who pursue justice, to prosecutors becoming the problem. Maybe there is a sense among students that you have to be mean to be a prosecutor. And the students want to be the good guy.”<sup>271</sup> Students who at one point might have sought careers in prosecution in the pursuit of justice might now see “The Innocence Project as the only pursuer of justice.”<sup>272</sup>

The elected progressive prosecutor in Norfolk, Virginia also pointed toward negative publicity about prosecutors but said that some of it was understandable. He explained that the public has become more distrustful of law enforcement because of exonerations and documented cases of police brutality.<sup>273</sup> He further stated that prosecutors have been resistant to the public and the media reviewing their work and that the public has noticed.<sup>274</sup> Though pointing to a different cause of public distrust, he said the result is the same: law students seem more interested in becoming public defenders than prosecutors.<sup>275</sup>

Other prosecutors focused less on public opinion or the the George Floyd murder and instead on the negative picture that some law schools and law professors paint of prosecutors. A senior prosecutor in Miami-Dade County noted that some, though not all, “law schools seem to discourage people from becoming prosecutors. There are negative societal attitudes toward prosecutors.”<sup>276</sup> The elected district attorney in Pueblo Colorado similarly remarked that “[t]here is a resistance for young attorneys and law school graduates to go into prosecution, that had not previously existed.”<sup>277</sup>

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<sup>266</sup> Holley Interview, *supra* note 47.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> See Lehr, *From 'Serious' to 'Dire,' supra* note 59.

<sup>270</sup> Martin Interview, *supra* note 49.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> See Fatehi Interview, *supra* note 176.

<sup>274</sup> See *id.*

<sup>275</sup> See *id.*

<sup>276</sup> Talpins Interview, *supra* note 6.

<sup>277</sup> Karlik, *supra* note 55.

In the Lane County District Attorney's Office, which hosted a major law school's prosecution clinic, the office had to cancel the clinic in Fall 2023 for "lack of interest."<sup>278</sup> The District Attorney said the reason was that "[l]aw schools do not promote prosecution as a career."<sup>279</sup>

Of course, the legal academy's criticism of prosecutors is not new. Some scholars openly criticize careers in prosecution.<sup>280</sup> It has been over twenty years since Professor Abbe Smith penned her provocative article "*Can You Be a Good Person and a Good Prosecutor?*," a question she answered in the negative<sup>281</sup> Less striking than Professor Smith's criticism of prosecutors were the opening words of her article:

Somehow, it is understood that prosecutors have the high ground. Most people simply assume that prosecutors are the good guys, wear the white hats, and are on the "right" side. Most law students contemplating a career in criminal law seem to think this. It could be that most practicing lawyers think this, as well. Prosecutors represent the people, the state, the government. This is very noble, important, and heady stuff. Prosecutors seek truth, justice, and the American way. They are the ones who stand up for the victims and would-be victims, the bullied and battered and burgled. They protect *all of us*.<sup>282</sup>

It is unclear if Professor Smith was correct in 2001 that "most" law students believed prosecutors are the good guys. Even if so, law student belief in the purity of prosecution, and their interest in those careers, seems to have declined, perhaps dramatically in recent years.

### G. Disruption of Internship Pipelines Due to Covid

While some law professors do signal negative attitudes about prosecution work, law schools are still a huge pipeline to prosecutor offices. Many prosecutors' offices rely heavily on internship programs to find and vet their future employees. During Covid however, many internships moved online and some district attorneys' offices had difficulty maintaining their internship programs.

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<sup>278</sup> Email from Patricia Perlow, Lane County District Attorney, to Adam Gershowitz, Nov. 27, 2023.

<sup>279</sup> *Id.*

<sup>280</sup> See, e.g., Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. Rev. 164, 211 (2022) ("Prosecutors cannot execute justice within the current framework because justice cannot be done via the criminal legal system--the racism, narrative of individual blame rather than attention to structural root causes, and reactive rather than preventive stance--are all built into it. . . [T]he only way for prosecutors to contribute to a transformed system is to cede both their influence as political elites and professional experts and their material resources.").

<sup>281</sup> Abbe Smith, *Can You Be a Good Person and a Good Prosecutor*, 14 GEO. J. LEGAL ETHICS 355 (2001).

<sup>282</sup> *Id.* at 355-56.

A senior prosecutor in Miami-Dade County explained that their office “had a robust legal internship program” and that “we relied heavily on interns to find full-time lawyers.”<sup>283</sup> But Covid “crashed the internship program.”<sup>284</sup> The harm went beyond the online years though. The Miami prosecutor explained that when our internship program crashed, “word of mouth from law students took a hit.”<sup>285</sup> He elaborated that “1Ls and 2Ls listen to older students who had good experiences. When they didn’t intern because of Covid we lost our best ambassadors.”<sup>286</sup>

Recognizing the importance of the law school pipeline, at least one district attorney’s office is doubling down on experiential recruiting. In Harris County, the district attorney worked with one of the Houston law schools to establish a prosecution clinic.<sup>287</sup> The district attorney noted that while many law schools have innocence clinics, comparatively few have prosecution clinics, thus failing to maximize recruiting prospects.<sup>288</sup>

#### **H. Policy Differences (and Resignations) Related to Progressive Prosecutors**

In some prosecutors’ offices, vacancies can be directly traced to the election of progressive prosecutors. Not surprisingly, newly elected progressive prosecutors have fired or asked for the resignation of some prosecutors (often at the management level) in order to install lawyers who share their policy vision for the office.<sup>289</sup> In addition, some line prosecutors quit because they disagree with the policies implemented by the new progressive prosecutor.<sup>290</sup>

For instance, “at least 51 lawyers at the San Francisco District Attorney’s Office . . . either left or [were] fired” between Chesa Boudin taking office in January 2020 and October 2021.<sup>291</sup> A San Francisco judge claimed the office “is beset by the ‘chaos’ of constant staff turnover and management reorganizations.”<sup>292</sup>

In St. Louis, there were massive departures following the election of progressive prosecutor Kim Gardener in 2017.<sup>293</sup> Those who quit said that they had “their hands tied in trying to prosecute and punish criminals. Not surprisingly, many left for

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<sup>283</sup> Talpins Interview, *supra* note 6.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> See Ogg Interview, *supra* note 15.

<sup>288</sup> See *id.*

<sup>289</sup> See, e.g., *Lawyers, Top Brass Among Cuts as Krasner Trims More Than 30 Jobs From DA’s Office*, THE LEGAL INTELLIGENCER, Jan. 5, 2018.

<sup>290</sup> For a more critical take on the motivations of the resignations, see Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny*, 60 AM. CRIM. L. REV. 1403 (2023).

<sup>291</sup> See Bigad Shaban, Robert Campos, Jeremy Carroll & Mark Villareal, *Two SF Prosecutors Quit, Join Effort to Recall DA Chesa Boudin*, NBCBAYAREA.com, Oct. 31, 2021.

<sup>292</sup> Jaxon Van Derbeken, *SF Judge to DA Boudin: ‘Take Care of Business,’* NBCBAYAREA.COM, Sept. 29, 2021.

<sup>293</sup> See Joel Currier, *470 Years of Experience Gone; Kimberly Gardner Has Lost More Lawyers Than She Had When She Took Office*, ST. LOUIS POST-DISPATCH, Sept. 20, 2019.

private practice, academia, or retirement.”<sup>294</sup> According to Gardner, “most of those leaving were loyal to her predecessor and resistant to Gardner's reforms. . . Most of those people who left, I'm not missing them.”<sup>295</sup> Regardless of whether one believes that Gardener pushed out too many prosecutors or that those who left had sour grapes about not getting their way, there is no question the number of departures were huge. Between January 2017 and September 2019 more than 65 prosecutors quit or were fired.<sup>296</sup> That amounted to more prosecutors resigning or being fired than were in the office when Gardner took over.<sup>297</sup>

More recently, there were many attorney departures following the election of Pamela Price as the Alameda County District Attorney in California. In her first month in office, Price “put a half-dozen of the office's most experienced prosecutors on leave.”<sup>298</sup> The following month, news reports indicated that, “six experienced trial prosecutors had left or given notice . . . and that more departures are coming.”<sup>299</sup> One departing prosecutor explained that she was quitting because of an “office policy shift toward minimal consequences for most crimes to a lack of concern for crime victims and their families.”<sup>300</sup> Once again, it is difficult to know whether blame should be laid at the feet of the new prosecutor or the departing employees. But either way, the result was fewer prosecutors on staff.

Chicago experienced a similar turn of events. Senior prosecutors in the Cook County State’s Attorney’s Office resigned in protest because they believed District Attorney Kim Foxx was too defense-oriented and did not pay enough attention to crime victims.<sup>301</sup> One prosecutor wrote a lengthy departure email where he explained that his policy disagreements with the State’s Attorney were the reason for his departure:

Bond reform designed to make sure no one stays in jail while their cases are pending with no safety net to handle more criminals on the streets, shorter parole periods, lower sentences for repeat offenders, the malicious and unnecessary prosecution of law enforcement officers, the overuse of diversion programs, intentionally not pursuing prosecutions for crimes lawfully on the books after being passed by our legislature and signed by a governor, all of the so-called reforms have had a direct negative impact, with consequences that will last for a generation.<sup>302</sup>

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<sup>294</sup> See Thomas Hogan, *The Prosecutor Exodus*, CITY JOURNAL, July 9, 2021.

<sup>295</sup> Currier, *supra* note 293.

<sup>296</sup> See *id.*

<sup>297</sup> See Hogan, *supra* note 294.

<sup>298</sup> Emilie Raguso, *Pamela Price’s First Month as DA Sees Big Moves, Leaves Many Questions*, BERKELEY SCANNER, BERKELEY SCANNER, Feb. 7, 2023.

<sup>299</sup> Emilie Raguso, *A Prosecutor Said She Can’t Fulfill Her Ethical Duties Under DA Pamela Price*, BERKELEY SCANNER, Mar. 22, 2023.

<sup>300</sup> *Id.*

<sup>301</sup> See Craig Wall, *Resigning Prosecutor Says He Has “Zero Confidence” in Cook County State’s Attorney Kim Foxx*, ABC7CHICAGO.COM, Aug. 3, 2022.

<sup>302</sup> Florian Sohnke, *Departing Cook County Prosecutor Upbraids Kim Foxx in Searing Exit Letter*, CHICAGO CONTRARIAN, May 6, 2023.

In the cases above, the terminations and noisy resignations attracted news coverage. There are likely many other unreported cases in which prosecutors were let go or quit because of disagreements with the policy preferences of newly elected district attorneys.

## I. Management Problems

A final reason for huge prosecutor vacancies is garden-variety mismanagement. This category breaks down into two sub-categories. First, a prosecutor who poorly manages a fully-staffed office can drive out their lawyers. Second, a newly elected prosecutor who believes he must replace a large number of the existing prosecutors with “his own” people may be left with huge vacancies if he over-estimates how difficult it will be to replace the lawyers he fires.

### 1. Poor Management Leads to Quitting

When a new district attorney is elected – particularly when they come from outside the office – there is often a clash with the line prosecutors who were already working there. The clash can be particularly great when the newly elected district attorney has no prior prosecution experience. Line prosecutors complain that the new district attorney “doesn’t know what they are doing” or that (s)he is mismanaging the office. When these types of allegations are leveled, it is hard for outside observers to know whether they are true. Nevertheless, it is clear that mismanagement – whether real or only perceived – causes prosecutors to leave when a new district attorney is elected.

For example, in 2020, voters in Athens, Georgia elected a new district attorney, Deborah Gonzalez, who had previously been an entertainment lawyer.<sup>303</sup> Shortly thereafter, prosecutors began to quit.<sup>304</sup> By 2023, 14 of the 17 prosecutor positions were vacant.<sup>305</sup> District Attorney Gonzalez blamed the departures on low salaries and hostility from local judges.<sup>306</sup> But news reports indicated that prosecutors left for neighboring counties that actually paid less.<sup>307</sup> Some prosecutors said they left because they “were unhappy with the way Gonzalez ran her office. . . [citing] Gonzalez's inexperience with criminal law as a significant reason.”<sup>308</sup> Other news reports quoted former prosecutors as saying that the office was “toxic.”<sup>309</sup>

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<sup>303</sup> See Johnson, *supra* note 76.

<sup>304</sup> See *id.*

<sup>305</sup> See *id.*

<sup>306</sup> See *id.*

<sup>307</sup> See *id.*

<sup>308</sup> *Id.*

<sup>309</sup> Rebecca Lindstrom, Nick Wooten, & Meredith Sheldon, “*It’s in Crisis*” *Embattled Athens DA Faces Staffing Woes, Lawsuit*, 11ALIVE.COM, Mar. 30, 2023.

In San Francisco, the public and some line prosecutors had strong reactions to progressive prosecutor Chesa Boudin (who was subsequently recalled).<sup>310</sup> Some prosecutors quit because they disagreed with his new policies. But others blamed his management style. A self-described progressive line prosecutor “who has long sought alternatives to incarceration” quit because she believed Boudin was prioritizing ideology and politics over the day-to-day handling of cases, which “yielded an unorganized office, plummeting morale and bad outcomes for victims and their families.”<sup>311</sup>

## 2. Over-Estimating How Easy It Is To Replace Prosecutors

As described in Part V.I above, it is common for newly elected district attorneys to fire senior prosecutors at the start of their term and to install their own team. It is also common for newly elected prosecutors to terminate line prosecutors who they view as too aggressive or who vocally do not share the policy views of the new administration. Sometimes, however, the new district attorney fires more prosecutors than they can replace and the office is left with persistent and huge vacancies.

Yvonne Rosales, who was elected El Paso District Attorney in late 2020, made the mistake of firing more people than she could replace. In December 2020, a month after her election, Rosales announced that “25% of the current District Attorney's Office staff will not return when she takes over in January.”<sup>312</sup> District Attorney Rosales explained that:

Every newly elected official has the opportunity to hire their own staff . . . People that they feel comfortable with, that they feel would be loyal and trustworthy and help execute the plans of the newly elected official. So, I have that opportunity. . . What I have done is nothing different than any other elected official, including the newly elected officials that were part of this election locally. Nothing different than our new president [Biden] is undergoing.<sup>313</sup>

Replacing 25% of the staff would be a huge undertaking. But the terminations were not evenly distributed. Rosales terminated a far higher percentage of prosecutors than support staff. News reports indicated that the office had about 90 prosecutors and that she notified about 40 of them that they had been terminated.<sup>314</sup> That amounted to roughly 44% of the prosecutors in the office.

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<sup>310</sup> See Thomas Fuller, *Voters in San Francisco Topple City's Progressive District Attorney, Chesa Boudin*, N.Y. TIMES, June 8, 2022.

<sup>311</sup> Heather Knight, *Why a Progressive Prosecutor Just Left D.A. Chesa Boudin's Office and Joined the Recall Effort*, SAN. FRAN. CHRON., Oct. 24, 2021.

<sup>312</sup> Aaron Martinez, *El Paso District Attorney's Office to Lose 25% of Staff as Yvonne Rosales Takes Post*, EL PASO TIMES, Dec. 7, 2020.

<sup>313</sup> *Id.*

<sup>314</sup> See *id.*

Rosales took office in January 2021. And she did not last long in the position. Critics accused Rosales of mismanaging her office, including the high-profile case where a mass shooter killed 23 people at a Wal-Mart in El Paso.<sup>315</sup> By August 2022, a local lawyer had filed a petition to remove her for “official misconduct and continued incompetence.”<sup>316</sup> In November 2022, Rosales resigned to avoid the removal proceeding. At that point, roughly two years after firing 44% of the office prosecutors, there was still a huge prosecutor vacancy. Roughly 30 of the 90 prosecutor positions were vacant.<sup>317</sup> Without enough prosecutors on staff, the case backlog had ballooned to over 17,000 cases.<sup>318</sup> And in the final months of Rosales tenure, the El Paso Public Defender’s Office was able to get hundreds of cases dismissed not because of the merits but because of inaction by the district attorney’s office.<sup>319</sup>

## V. Harms Caused By Prosecutor Vacancies

Prosecutor vacancies cause a litany of problems. Most obviously, each time a prosecutor quits, the workload for the remaining prosecutors increases and makes their lives harder. The harms go beyond the work-life balance of individual employees though. Prosecutor vacancies pose a serious danger to public safety. Prosecutors who are over-burdened by excessive caseloads make mistakes in serious felony cases. Vacancies can also lead to the premature promotion of junior prosecutors who are not yet ready to handle more complicated cases and considerable responsibility. And prosecutor vacancies lead to specialized divisions going un-staffed. Finally, and counter-intuitively, prosecutor vacancies cause hidden and serious harms to criminal defendants. This Part explains that prosecutor vacancies are not simply a matter of making a few assistant prosecutors work harder. Instead, under-staffing leads to dire consequences.

### A. Practical and Legitimacy Problems for the District Attorney’s Office

Prosecutor vacancies are harmful to the district attorney’s office itself. When a prosecutor departs their position, their existing cases must be re-distributed to other prosecutors in the office. When the vacancy rate is small it is typically not burdensome for remaining prosecutors to absorb cases. But as the vacancy rate grows and the number of re-assigned cases grows, the burden on the remaining prosecutors becomes unsustainable. Prosecutors will be forced to work nights and weekends to try to keep up. As salaried employees, they will not be paid overtime in most cities. More work for the same pay harms morale.

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<sup>315</sup> See Jolie McCollough, *Chaos Surrounding Rookie El Paso DA Yvonne Rosales Fuels Concern About Wal Mart Massacre Prosecution*, TEX. TRIB. Oct. 10, 2022.

<sup>316</sup> Aaron Martinez, *District Attorney Bill Hicks Making Progress on Wal Mart Case, But Case Backlog Lingers*, EL PASO TIMES, July 23, 2023.

<sup>317</sup> See *id.*

<sup>318</sup> See *id.*

<sup>319</sup> See *id.*



Lawyers who are firmly committed to their jobs or who have no other employment prospects will stay at the district attorney's office. But not all lawyers will stay. Prosecutors who are repeatedly asked to absorb the cases of departing prosecutors will, at some point, themselves leave the office. And with each additional departure, a downward spiral will occur that harms the legitimacy of the entire office.

Critics of the criminal legal system will not shed a tear over the mass departures. They have long advocated for "starving the beast" and would see a dramatic drop in prosecutors as a feature not a bug.<sup>320</sup> Critics believe that fewer prosecutors will result in fewer criminal charges and fewer convictions. As explained in Part IV.B below, this may be correct. If an office becomes too under-staffed, it will eventually have no choice but to dismiss (and stop charging) some low-level drug crimes and quality of life offenses.

As a political matter however, non-prosecution can only go so far before it affects the legitimacy of the office. Most of the work of a prosecutor's office cannot be ignored.<sup>321</sup> The public will not tolerate ignoring murders, robberies, or other violent crime. Indeed, the recall of progressive prosecutor Chesa Boudin in San Francisco indicates that the public will not even tolerate decreased prosecution of property crimes. During the pandemic, a narrative took hold that the San Francisco District Attorney's Office was ignoring property crime and signaling to thieves that there were no consequences for theft.<sup>322</sup> Although it is disputed whether Boudin's office did in fact decrease prosecution of property crimes,<sup>323</sup> the public perceived Boudin to have done so. And over 55% of the electorate in a liberal city voted to remove him from office.<sup>324</sup>

In short, the public expects the district attorney's office to prosecute not just violent crime but also property crimes. To prosecute the minimum threshold of criminal activity, the office needs enough prosecutors to do the basic work of the office. If the office becomes too under-staffed, the legitimacy of the office and the district attorney will suffer. Vacancies that in turn feed additional vacancies is therefore a serious problem for the political legitimacy of the district attorney's office.

## **B. Declining to Charge Legitimate Crimes and Improperly Handling Serious Cases**

As described in Part IV.A above, when vacancies become large enough, it becomes impossible for prosecutors to continue to charge the same number of cases and properly handle them. A human being can only work so many hours in a day. Although district attorneys rarely acknowledge that staffing problems lead to case reductions and errors, a few chief prosecutors have been bold enough to say it.

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<sup>320</sup> See Godsoe, *supra* note 280 (advocating for a reduction in resources).

<sup>321</sup> See Richman & Stuntz, *supra* note 8, at 600.

<sup>322</sup> See Michael Barba, *Data Shows Chesa Boudin Prosecutes Fewer Shoplifters Than Predecessor*, S.F. EXAMINER, July 9, 2021.

<sup>323</sup> See Eric Ting, *New Data Explore Chesa Boudin's Handling of San Francisco Retail Theft Cases*, S.F. GATE, Mar. 17, 2022.

<sup>324</sup> See *San Francisco District Attorney Chesa Boudin Recalled*, 136 HARV. L. REV. 1740, 1742 (2023).

In Lane County, Oregon the district attorney’s office of 29 prosecutors was hemorrhaging lawyers in late 2022 and early 2023. As a result, the elected district attorney told the media that unless she was able to fill the vacancies her office would stop filing charges for nonviolent felonies and low-level misdemeanors, as well as dismiss some cases.”<sup>325</sup>

A district attorney in Idaho similarly highlighted the connection between prosecutor vacancies and the number of criminal charges. The Bonneville County District Attorney in Idaho “asked local law enforcement, in June, to limit arrests as multiple attorneys in her office have entered their resignations.”<sup>326</sup> The prosecutor later clarified that the request was just to clear arrests with the district attorney’s office in advance and that “[r]est assured, those who commit crimes in Bonneville County will be prosecuted.” Nevertheless, the message was clear: at some point prosecutor vacancies impact the ability of the office to bring charges that it would otherwise bring.

And prosecutor vacancies can surely contribute to district attorneys’ offices plea bargaining cases that they otherwise would have brought to trial. As a New York district attorney explained: “We don’t get to choose the crimes that come in,’ said [Anthony] Jordan, who is the district attorney in Washington County, New York. ‘But if you don’t have enough people to prosecute them then you have to let certain ones go.’”<sup>327</sup>

Of course, it is difficult to say what the right number of criminal charges is, and I do not purport do so in this article. There are a lot of criminal statutes on the books and there are a lot of people who violate those statutes. Prosecutors have always lacked the resources to charge every possible criminal violation that police bring to them.<sup>328</sup> Nor should they want to bring every charge. Police sometimes bring weak cases and prosecutors have equitable discretion to decline or later dismiss some charges.<sup>329</sup> Prosecutors, defense attorneys, scholars and activists have long disagreed over the “right” number of cases to charge. This article is not the place to resolve the optimal number or types of criminal charges that prosecutors should bring. Instead, whether good or bad, I want to highlight that prosecutor vacancies lead to involuntary changes in charging.

Prosecutor vacancies not only lead to changes in the number of charges brought, they also lead to prosecutors mishandling serious cases. A prosecutor with a massive

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<sup>325</sup> Elliott, *supra* note 183.

<sup>326</sup> Jonathan Hogan, *As Attorneys Quit, Bonneville Prosecutor Asks Police To Make Fewer Arrests*, POST-REGISTER, Aug. 10, 2023.

<sup>327</sup> Raychaudhuri & Sloane, *supra* note 44.

<sup>328</sup> Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 84 (2011) (“Prosecutors lack sufficient resources to bring all charges supported by probable cause in all cases.”); Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 732 (2008) (“[There are far too many criminal laws and far too many offenders for society’s limited police, prosecutorial, judicial, and penological resources.”]).

<sup>329</sup> See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1700 (2010).

caseload will be inadequately prepared for some of them and make mistakes. Those mistakes can lead to guilty defendants going free.

In the last half of 2022, judges in El Paso, Texas dismissed nearly 1,000 cases<sup>330</sup> because the district attorney's office failed to procure an indictment within 180 days of detention as required by section 32.01 of the Texas Code of Criminal Procedure.<sup>331</sup> The point of that statute is to avoid cases languishing and to ensure that defendants know the charges against them so that they can prepare their defense. The defendants in these roughly 1,000 cases were left dangling for more than six months because prosecutors lacked the time to present the cases to a grand jury and seek an indictment.

Some of the dismissed cases were quite serious. In the first batch of 100 cases that were dismissed on 32.01 grounds “[a]bout one in four of the dismissed charges were against people accused of assault family violence.”<sup>332</sup> When the cases were dismissed “any protective conditions imposed on someone as part of their bond were [also] removed” which potentially endangered domestic violence victims.<sup>333</sup> Moreover, when family violence situations are not addressed they unfortunately sometimes escalate in severity.<sup>334</sup>

The El Paso District Attorney's Office failed to handle the cases appropriately because it lacked adequate staffing. Indeed, “the District Attorney's Office did not initially send a prosecutor to be present at the hearing” where the judge was deciding whether to dismiss the first 100 cases.<sup>335</sup> Instead, the office sent a paralegal to court for this important hearing.<sup>336</sup> And even then, the paralegal was late to the hearing!<sup>337</sup> The paralegal explained that “[t]he prosecutors are slammed right now, that's why they sent me up.”<sup>338</sup>

The El Paso example is extreme, but that is why it resulted in news coverage. Every day, overburdened prosecutors across the country are almost certainly making mistakes in serious cases because their offices are under-staffed and they have too many cases. Yet, for most of those cases there will never be news stories. Some of those mistakes would occur in a fully staffed office – people are human after all. But many mistakes are the result of excessive caseloads caused by prosecutor attrition and case reassignments.

### **C. Promotion of Inexperienced Prosecutors Before They Are Ready**

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<sup>330</sup> See Aaron J. Montes, *DA's Office Requests Funds for Attorney Positions as Rosales Steps Down, Governor Names Replacement*, KTEP.COM., Dec. 14, 2022.

<sup>331</sup> See Tex. Code Crim Pro. 32.01.

<sup>332</sup> Victoria Rossi, *Criminal Charges Dismissed Against 100 People for Lack of Prosecution by District Attorney*, EL PASO TIMES, Aug. 16, 2022.

<sup>333</sup> *Id.*

<sup>334</sup> See *United States v. Castleman*, 572 U.S. 157, 160 (2014) (“Domestic violence often escalates in severity over time.”).

<sup>335</sup> Rossi, *supra* note 332.

<sup>336</sup> See *id.*

<sup>337</sup> See *id.*

<sup>338</sup> *Id.*

In under-staffed offices, prosecutors are promoted very quickly.<sup>339</sup> An attorney who might have spent a year in a misdemeanor position, may find themselves promoted to felony courtroom in only a few months. And a prosecutor who might have been the #2 prosecutor in a courtroom for a few years might be promoted to the chief prosecutor position much faster.

Rapid advancement is exciting for junior prosecutors who get to move up the ranks quickly, but it is also dangerous for the public and for criminal defendants. Prosecutors with limited experience don't know what they don't know. They have seen fewer cases, appeared in front of fewer judges, and likely know less about the penal law, the Code of Criminal Procedure, and the Supreme Court's caselaw.

Not only do junior prosecutors have less developed legal skills, they also have had less opportunity to develop inter-personal skills and life knowledge; they are less mature. Junior prosecutors are more likely to have an overly simplistic, aggressive, good versus evil view of the criminal justice system.<sup>340</sup> Junior prosecutors on balance are also more likely to be overly punitive.<sup>341</sup> Based on interviews with hundreds of prosecutors, Professors Ron Wright and Kay Levine dubbed this "young prosecutor's syndrome."<sup>342</sup>

If junior prosecutors with less skill and knowledge are promoted too quickly to handle more serious felony cases, they are more likely to lose those cases. In St. Louis, 65 prosecutors quit or were fired and a combined 470 years of experience walked out the door during Kim Gardener's first 2 ½ years as district attorney.<sup>343</sup> One defense attorney pointed out that an office with mostly junior lawyers is likely to lose major cases: "Quite honestly, the office is made up of rookies and that's why I think the win rate is so bad."<sup>344</sup>

In Philadelphia, the turnover was also massive. More than 250 lawyers left the office during Larry Krasner's first term as district attorney.<sup>345</sup> The result was a much more junior office. Following the wave of departures in Philadelphia, the median attorney tenure declined from 5.7 years to 3.3 years.<sup>346</sup> A former homicide prosecutor remarked that "The DA's Office is completely ill-equipped to prosecute serious cases outside a handful of prosecutors. They don't have the experience."<sup>347</sup>

Of course, one must always wonder about the impartiality of former employees particularly if they have policy disagreements with a new progressive prosecutor. But

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<sup>339</sup> See, e.g., *Connick v. Thompson*, 563 U.S. 51, 96 (2011) (discussing the New Orleans District Attorney's Office and noting that "[h]uge turnover' allowed attorneys with little experience to advance quickly to supervisory positions").

<sup>340</sup> Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutor's Syndrome*, 56 ARIZ. L. REV. 1065, 1081-82 (2014).

<sup>341</sup> See *id.* at 1082.

<sup>342</sup> *Id.* at 1081.

<sup>343</sup> *100% Turnover in St. Louis Prosecutor's Office in 2 ½ Years*, NEWS TRIBUNE, Sept. 21, 2019.

<sup>344</sup> *Id.*

<sup>345</sup> See Samantha Melamed, Chris Palmer, & Dylan Purcell, *More Than 70 Lawyers Hired by DA Larry Krasner Have Left, Some Say Office Is in Disarray*, PHILA. INQ., Dec. 22, 2021.

<sup>346</sup> See *id.*

<sup>347</sup> *Id.*

in the Philadelphia example the claims of former prosecutors were supported by both statistical evidence and also comments from current employees. As of the end of 2021, two-thirds of the lawyers in the major crimes unit and two-thirds of the lawyers in the sexual assault unit in the Philadelphia office had graduated from law school in the past five years.<sup>348</sup> One-third of lawyers in the Homicide and Non-Fatal Shootings Unit were equally junior.<sup>349</sup> Some current junior prosecutors anonymously commented that “they felt ill-prepared for their jobs in high-profile units.”<sup>350</sup>

In addition to problems handling their own cases, lawyers who are promoted too quickly will not be in a position to train the junior prosecutors coming in behind them. As one former prosecutor said of Kim Gardener’s office in St. Louis, “you don’t have the people that are entrenched that can teach the people fresh out of law school.”<sup>351</sup> Lawyers in Chicago leveled similar comments after huge departures from the Cook County State’s Attorney’s Office: “The departures of veteran prosecutors and midlevel management has led to concerns about brain drain. When older attorneys leave, newer attorneys don’t get the benefit of their on-the-job guidance.”<sup>352</sup>

The examples above, unfortunately, come from offices where progressive prosecutors were elected and where they fired many line prosecutors. The problem is almost certainly not unique to progressive prosecutors though. Instead, when new progressive prosecutors come into office and replace a large number of lawyers, those attorneys are more likely to go to the media and generate news stories.<sup>353</sup> It is certainly the case that other offices with “traditional” prosecutors have replaced senior lawyers with junior lawyers and rapidly promoted those with limited experience.

#### **D. Specialized Units Cannot Be Staffed**

Prosecutor vacancies also cause problems for staffing specialized units in district attorneys’ offices. Prosecutors’ offices are complicated organizational entities. A district attorney’s office does not simply have widgets who are all doing the identical job. In smaller offices, cases are, at a minimum, divided between misdemeanor and felony divisions. In larger offices there are numerous specialized departments, including *inter alia*, animal cruelty, appellate, automobile theft, consumer fraud, cybercrime, environmental justice, elder abuse, family violence, health care fraud, human trafficking, juvenile, narcotics, organized crime, public integrity, sex crimes, white collar, and writs.<sup>354</sup>

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<sup>348</sup> *See id.*

<sup>349</sup> *See id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> Crepeau, *supra* note 79.

<sup>353</sup> *See* Godsoe & Romero, *supra* note 290.

<sup>354</sup> These divisions are drawn from the Los Angeles County District Attorney’s Office. *See* LOS ANGELES COUNTY DISTRICT ATTORNEY’S OFFICE FUNCTIONAL ORGANIZATIONAL CHART, available at <https://da.lacounty.gov/sites/default/files/pdf/LADA-Org-Chart-110623.pdf>

Specialized units require specialized training. They also require having enough bodies on hand, which is not always the case when the prosecutor's office is understaffed.

According to a senior prosecutor in Miami, where one-third of prosecutor positions are vacant, the staffing crisis makes it difficult to keep "specialized units staffed because we don't have enough lawyers and we need them to be in regular courts."<sup>355</sup> Indeed, the problem is so serious in Miami-Dade County that the office is leaving grant-funded positions empty. As he explained, "[w]e have grant funds for gun violence positions where prosecutors embed with the police to work with them to build better cases. One of those three grant funded positions is not filled because we cannot spare the bodies to put prosecutors there. We need bodies in front of podiums."<sup>356</sup>

News reports in late 2022 indicated a similar problem in Cook County, Illinois. In one of the main Chicago courthouses, there were supposed to be "two Assistant State's Attorney's for each of the 10 courtrooms, but recently at times there have been only three Assistant State's Attorneys to cover six or even seven of the courtrooms."<sup>357</sup> The lack of prosecutors to cover the main courtrooms in turn prevented the office from fully staffing specialized units. According to prosecutors, there were vacancies in "Felony Review, Special Prosecutions, Civil, Sex Crimes, Juvenile, Domestic Violence and Traffic courts as well."<sup>358</sup>

## **E. Excessive Prosecutor Workloads Harm Defendants**

Last, but certainly not least, prosecutor vacancies have terrible consequences for criminal defendants. Before exploring the myriad way that an under-staffed prosecutor's office harms criminal defendants it is important to set the stage and understand that prosecutor vacancies do not benefit defendants by leading district attorneys' offices to simply drop cases.

### **1. Vacancies Do Not Lead Prosecutors to Stop Charging**

At the outset, it is important to consider the argument made in some quarters that reducing the number of prosecutors will be a net benefit to potential defendants (and to the problem of mass imprisonment) because fewer prosecutors would mean fewer cases. There is a glimmer of truth to the "starve the beast" theory. As described above in Part V.B, prosecutor shortages do lead to prosecutors dismissing or declining to charge some low-level misdemeanor cases. But those are charges at the margins.<sup>359</sup> Prosecutor shortages do not lead to the gutting of misdemeanor divisions and the

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<sup>355</sup> Talpins Interview, *supra* note 6.

<sup>356</sup> *Id.*

<sup>357</sup> *Kim Foxx Faces Withering Criticism Amid High Staff Turnover at State's Attorney's Office*, NBC CHICAGO, Oct. 12, 2022.

<sup>358</sup> *Id.*

<sup>359</sup> *But see* Josh Bowers, *Physician Heal Thyself: Discretion and the Problem of Excessive Prosecutor Caseloads*, 106 NW. U.L. REV. COLLOQUY 143 (2011) (focusing on public order offenses as a way to reduce prosecutor caseloads).

cessation of misdemeanor charges. And dismissing some marginal misdemeanor charges does not lead to a wholesale reassignment of misdemeanor prosecutors to the felony division.

There has never been a reported instance where a district attorney has gutted its misdemeanor division to transfer their prosecutors to the felony division. Both traditional prosecutors (even those with huge staffing shortages) and progressive prosecutors have kept their misdemeanor divisions intact. The reason is that misdemeanor prosecutors are busy with a host of “politically mandatory”<sup>360</sup> cases that cannot be dismissed altogether. Prosecutors’ offices cannot simply ignore drunk driving, burglary, and assault cases, even if they are denominated as misdemeanors.<sup>361</sup> At best, terribly high caseloads will enable busy misdemeanor prosecutors to dismiss minor drug possession charges or low-level quality of life charges in order to free them up to work on more serious misdemeanors.

The reality, quite simply, is that prosecutor vacancies exacerbate the problem of high caseloads. As explained below, those vacancies and excessive caseloads make matters worse, not better, for criminal defendants.

## **2. Excessive Caseloads Prevent Prosecutors from Quickly Dismissing Weak Cases**

Excessive caseloads prevent overburdened prosecutors from quickly dismissing weak cases. Police sometimes arrest the wrong person. Or they arrest people for crimes that cannot be proven. Both the district attorney’s office and the defendant should want those cases dismissed as quickly as possible. The prosecutor’s office should want them off the docket so that prosecutor’s time can be re-directed to other cases rather than having needless additional hearings or time-consuming conversations with defense attorneys about cases that will ultimately be dismissed.

The defendant – who may well be in jail pending trial – wants the case dismissed so that he can see his family, get back to work, earn money to pay his rent and avoid eviction, not lose his spot in a drug treatment program, and for a hundred other reasons.

Why won’t the prosecutor quickly dismiss weak cases then? Because the prosecutor does not know which case is weak until they study it.<sup>362</sup> Many guilty defendants claim to be innocent, so prosecutors cannot simply take their word for it. If the defense attorney provides exculpatory information, the prosecutor has to follow up on it. The prosecutor has to carefully read the file, talk with witnesses, do legal research, and possibly consult with more experienced prosecutors about whether the case is viable or not.

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<sup>360</sup> See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 205 (2019).

<sup>361</sup> Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors’ Scarce Resources*, 106 NW. U.L. REV. COLLOQUY 138, 140 (2011) (“[P]rosecutors cannot simply stop prosecuting all misdemeanors; these charges help to keep our neighborhoods safe, orderly, and clean.”).

<sup>362</sup> See Gershowitz & Killinger, *supra* note 19, at 285-86.

A prosecutor who is buried under a mountain of open cases will not have time for all of the steps necessary to properly handle a case. The prosecutor will triage and instead devote most of their attention to the case that has a hearing or a trial right around the corner. Other cases – like the weak case we have been talking about – will go on the backburner. And the innocent defendant (or the defendant who might be guilty but the evidence is flimsy) will languish in jail for days or weeks longer before their case is eventually dismissed. Worse yet, if the defendant is detained for a low-level charge, he might plead guilty just to get out of jail and go home.<sup>363</sup> In that way, excessive caseloads that cause backlogs lead to wrongful convictions.

### **3. Huge Caseloads Prevent Prosecutors From Recognizing Who Should Be Sent to Drug Court**

Many jurisdictions have drug courts, veteran's courts, mental health courts, or other specialty courts designed to rehabilitate non-violent offenders suffering from substance abuse or other problems. In drug court, an individual takes responsibility for their actions, goes through rehabilitation, and avoids jail time. If drug court works, it can be preferable to simply sending someone to jail.

The first step in the drug court process is typically a prosecutor referring a defendant to drug court and getting them out of the regular assembly line that is criminal court.<sup>364</sup> Unfortunately, overburdened prosecutors might not have time to study a casefile closely enough to realize that a defendant would be a good candidate for drug court.<sup>365</sup>

Take a defendant who has been arrested multiple times for theft or prostitution. A prosecutor who only has moments to review the casefile will see the routine crimes of theft and prostitution – charges that come across their desk every day – and make a standard plea bargain offer.

If the prosecutor had time to investigate further however, she might learn that the defendant engaged in theft or prostitution to pay for their drug habit. The underlying drug problem makes the defendant a good candidate for drug court. But that will never happen unless the prosecutor has the time to recognize the drug problem and the time to make the referral. The overburdened prosecutor with a huge caseload is much more likely to just take the quicker path and slap the same standard plea offer on the file that office policy dictates for most theft or prostitution charges.

### **4. Excessive Caseloads Prevent Prosecutors from Recognizing Which Defendants Deserve More Generous Plea Offers**

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<sup>363</sup> See *id.* at 287-88.

<sup>364</sup> See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1540 (2004) (“In most jurisdictions, the district attorney prosecuting the case makes the initial determination to divert defendants to the drug court program.”).

<sup>365</sup> See Gershowitz & Killinger, *supra* note 19, at 282.



Overburdened prosecutors lack the time to determine which offenders are more culpable and which are deserving of mercy. As a result, they make suboptimal plea bargain offers. As every observer knows, the criminal justice system runs on plea bargaining.<sup>366</sup> And while there is a “going rate” for many crimes, the plea bargain calculus is more complicated than simply plugging in the crime and a defendant’s criminal history and spitting out a plea offer. Prosecutors consider a host of other factors such as whether the defendant was a major player in the crime, or a follower who was minimally involved.

For instance, imagine a robbery with three defendants. Two people pointed guns at a man on the street and demanded his money while the third hung back by the getaway car. All three were arrested a few days later, and all three claim to be the one by the car without a gun. A prosecutor with enough time would review video surveillance footage from nearby stores and talk personally to witnesses. But the prosecutor is busy and she relies heavily on the police report, which makes no distinction between the three defendants. The prosecutor thus extends an identical plea offer to all three defendants because she lacks the time to do anything more nuanced.

The less culpable defendant could go to trial, where he would likely still be convicted. His best hope would be to convince the judge at sentencing that he was the guy by the car without a gun. But there’s no telling whether the judge would find that sympathetic. And, of course, pushing to trial carries the risk of the judge imposing a “trial penalty”<sup>367</sup> and a greater sentence than the prosecutor’s standard plea offer. The smart move is for the defendant to plead guilty and accept the same sentence as the other two robbers, even though he is less culpable and more deserving of a sentencing break.<sup>368</sup>

This scenario is of course not limited to robbery cases. Overburdened prosecutors who lack the time to investigate might fail to recognize defendants who were mentally challenged or those who committed crimes because of bad life circumstances. When years of incarceration are on the line, we should want prosecutors to have the time to investigate each case carefully before defaulting to the “standard” plea offer.

## 5. Excessive Caseloads Lead to Unintentional Brady Violations

Ethical prosecutors with excessive caseloads commit *Brady* violations because they are simply too busy to notice exculpatory or impeachment evidence or because they lack the training to spot Brady evidence.<sup>369</sup>

When people think of Brady violations, their natural first reaction is to imagine prosecutors hiding evidence. For example, the classic Brady violation is a prosecutor

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<sup>366</sup> See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

<sup>367</sup> Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 419 (2008) (“[I]t is well recognized that judges routinely impose substantial penalties at sentencing on those defendants with the temerity to go to trial, sometimes doubling the punishment, or worse.”)

<sup>368</sup> See Gershowitz & Killinger, *supra* note 19, at 280-81.

<sup>369</sup> See *New Perspectives*, *supra* note 36, at 1985.

interviewing a witness who provides an alibi for the defendant and then burying that witness statement in a drawer where the defendant will never see it. To be sure, there are plenty of intentional Brady violations in the United States each year.<sup>370</sup> But there are also accidental Brady violations that happen because of excessive prosecutor caseloads.

Let's begin with the Brady evidence that prosecutors fail to recognize because their office had no time to train them and because vacant positions and huge caseloads have re-directed supervisors to other work. Exculpatory or impeachment evidence does not come to prosecutors with a bright red sticker on it. Prosecutors must realize that evidence is favorable in order to know that they have to provide it to the defense. When a witness confesses to being the real killer, it is obvious to any sensible prosecutor that they are dealing with Brady evidence. But what about more nuanced evidence?

Consider a domestic violence victim who initially denies that her boyfriend hit her, but later acknowledges the abuse.<sup>371</sup> The victim's first denial is Brady evidence that must be disclosed, but junior prosecutors will likely not realize it. The average law student receives minimal Brady training in their ethics or criminal procedure classes. And if they join an overburdened prosecutor's office with little time or resources to offer training, the prosecutor may not learn much else. Perhaps the district attorney's office is structured to teach junior prosecutors about Brady evidence by having a senior lawyer in each courtroom to monitor and mentor junior lawyers. But in an overburdened office where 25% of the prosecutor positions are vacant, supervisors may be triaging cases themselves or, worse yet, the supervisor positions may be completely vacant. Junior prosecutors with minimal training and without adequate supervision make inadvertent Brady errors.<sup>372</sup>

Prosecutors also make inadvertent Brady errors because they lack the time to properly coordinate with other players in the criminal justice system. A key point to understand about the Brady doctrine is that it applies not just to evidence held by the prosecutor directly, but also to any evidence held by the prosecution team.<sup>373</sup> Prosecutors must turn over evidence held by the police, crime laboratories, the agency that handles 911 calls, and a host of other actors in the criminal justice system.

Unfortunately, the criminal justice "system" is no system at all, but instead a "tiny jigsaw puzzle with a thousand tiny pieces in which no one is really in charge."<sup>374</sup>

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<sup>370</sup> See Brandon Garrett, Adam M. Gershowitz, & Jennifer Teitcher, *The Brady Database*, 114 J. CRIM. L. & CRIMINOLOGY \_\_ (forthcoming 2024) (finding more than 80 Brady violations in a sample of roughly 800 cases that analyzed *Brady* claims); Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 307 (2019) ("Despite being settled law for over fifty years, noncompliance with *Brady's* constitutional protections persists."); Vida B. Johnson, *Federal Criminal Defendants Out of the Frying Pan and into the Fire? Brady and the United States Attorney's Office*, 67 CATH. U. L. REV. 321, 364, n.49 (2018).

<sup>371</sup> See Gershowitz & Killinger, *supra* note 19, at 285.

<sup>372</sup> See *New Perspectives*, *supra* note 36.

<sup>373</sup> See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

<sup>374</sup> LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993) (internal quotations omitted).

There is no one directing traffic in each case telling the police and the lab technicians to send every last scrap of paper and evidence to the prosecutor's office. Rather, the prosecutor is responsible for going out and ensuring that she has all the evidence. And that takes not just time, but also the foresight to know where to look and who in those departments to ask for it. Add to the equation that many cases are on the cusp of plea bargaining and that most jurisdictions do not require Brady evidence to be disclosed when a defendant pleads guilty.<sup>375</sup> An overwhelmed prosecutor with an excessive caseload may put off dealing with searching for evidence held by other agencies since those cases may "go away" via plea bargaining anyway.

Finally, and most simply, prosecutors with excessive caseloads drop the ball on their Brady obligations because they are so busy that they fail to review their files in the leadup to trials. If a prosecutor has 200 active cases and four serious felony defendants set for different trials next week, the prosecutor has no choice but to triage.<sup>376</sup> The prosecutor may pay less attention to a robbery case set 10 days in the future because the defense attorney in that case has strongly signaled that the defendant will accept an offer to plead guilty to a lesser offense. The prosecutor thus turns to the other three felony cases that are more likely to go to trial. But the robbery defendant never agrees to plead guilty. A few days before the trial date, the defense attorney calls the prosecutor and says "I guess I was wrong and that we're going to trial."

The prosecutor now has to play catch up. And he may make a mistake. In interviewing the victim again, the prosecutor may fail to recognize that the victim has made a new statement that is inconsistent with something she told the police at the crime scene. Or perhaps one of the key witnesses had a clean criminal history when the victim was originally robbed, but in the last few months that witness was arrested on theft charges. In the hectic few days before trial, the prosecutor may fail to re-run the witness's criminal history or overlook inconsistent statements, both of which are impeachment evidence that should be disclosed under the Brady doctrine.

In sum, there are numerous ways for overburdened prosecutors to commit unintentional Brady violations. In these cases, the exculpatory or impeachment evidence might have been the difference between a defendant being convicted and being acquitted. Of course, in most cases we will never know because most Brady violations never come to light.<sup>377</sup> The violations remain hidden and the defendants will remain incarcerated simply because the prosecutor's office was too overburdened and under-staffed for its lawyers to recognize the Brady evidence in the first place.

#### **IV. Not All Prosecutors' Offices Are Suffering From Vacancies**

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<sup>375</sup> See *United States v. Ruiz*, 536 U.S. 622 (2002) (not requiring disclosure of impeachment evidence during plea bargaining); Cameron Casey, Comment, *Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on Brady Obligations During Plea Bargaining*, 61 B.C. L. REV. E. SUPP. 73 (2020) (describing circuit split on the question of whether prosecutors must disclose exculpatory evidence during plea bargaining).

<sup>376</sup> This example is drawn from Gershowitz & Killinger, *supra* note 19, at 283-84.

<sup>377</sup> See Garrett, Gershowitz, & Teitcher, *supra* note 370.

Not every prosecutor's office in the United States is under-staffed. Some offices have vacancy rates of only a few percent. And some offices are even fully staffed. Table 2 provides a list of such offices, though it is surely under-inclusive.<sup>378</sup>

**Table 2: Prosecutors' Offices That Are Fully or Nearly Fully Staffed**

County	Prosecutor Positions Allocated	Prosecutor Positions Filled	Prosecutor Positions Vacant	Percentage of Prosecutor Positions Vacant
Fort Bend, TX <sup>379</sup>	85	81	4	5%
Halifax, VA <sup>380</sup>	6	6	0	0%
Kings (Brooklyn) NY <sup>381</sup>	510	510	0	0%
Lane, OR <sup>382</sup>	29	29	0	0%
Manhattan <sup>383</sup>	561	545	16	3%
Montgomery, TX <sup>384</sup>	56	56	0	0%
Norfolk, VA <sup>385</sup>	39	38	1	2%
Palm Beach, FL <sup>386</sup>	120	120	0	0%
Santa Clara, CA <sup>387</sup>	180	172	8	5%
Tarrant (Ft. Worth), TX <sup>388</sup>	185	185	0	0%

Why are these offices not suffering massive prosecutor shortages? After all, most (but not all) of the offices in Table 2 pay comparable salaries to the under-staffed offices described in Part III. The answer is complicated and varies from place to place. But a common theme seems to be that these offices are still giving attorneys

<sup>378</sup> As noted in Part I, I contacted only a fraction of the more than 2,000 prosecutors' offices in the nation. And news outlets typically do not write stories about offices that are fully staffed and functional.

<sup>379</sup> Of the five vacancies, three were for positions that had been newly created about a month prior. See Email from Wes Wittig, Second Assistant District Attorney, Fort Bend County District Attorney's Office to Adam Gershowitz, Nov. 8, 2023.

<sup>380</sup> See Martin Interview, *supra* note 49.

<sup>381</sup> See Yaniv Email, *supra* note 61.

<sup>382</sup> See Perlow email, *supra* note 186.

<sup>383</sup> The Manhattan District Attorney's Office was not able to provide an exact number of allocated positions. The 561 figure represents the number of prosecutors that they had in 2019. See Email from Emily Tuttle, Deputy Director of Communications to Adam Gershowitz, Nov. 13, 2023.

<sup>384</sup> See Holley Interview, *supra* note 47.

<sup>385</sup> See Email from Ramen Fatehi, Norfolk Commonwealth's Attorney, to Jane Chambers, Nov. 28, 2023.

<sup>386</sup> See Email from Marc Freeman, Public Information Officer, Palm Beach County State's Attorney's Office, to Adam Gershowitz, Sept. 18, 2023.

<sup>387</sup> See Telephone Interview with James Gibbons-Shapiro, Santa Clara County District Attorney's Office, Oct. 2, 2023.

<sup>388</sup> See Email from Anna Tinsley Williams, Communications Officer, Tarrant County District Attorney's Office, to Adam Gershowitz, Sept. 20, 2023.

something in addition to the “white hat” that comes with being on the prosecution team. Put differently, every prosecutor’s office – including the under-staffed ones – provides lawyers who prefer the prosecution side of the table to feel like they are on the side of justice.<sup>389</sup> But the offices in Table 2 above seem to be providing something more than a feel good job. The something else varies by office though.

## 1. High Prestige Offices

Some district attorneys’ offices are able to maintain staffing based on the prestige of the office. Take the Manhattan and Brooklyn offices to start with. They both pay poorly – less than \$80,000 a year to live in one of the most expensive cities in the country. But they are both very high-prestige offices. The Manhattan District Attorney’s Office is often called the most prestigious prosecutor’s office in the nation.<sup>390</sup> And Brooklyn is not far behind. Lawyers who go to work there can move up the pecking order to high prestige positions in New York or elsewhere in the country. Prosecutors who work there might not make a lot of money, but the resume value and experience are incredibly valuable.

Of course, the prestige of the Manhattan and Brooklyn offices is not to say that those offices have no problems. As the *New York Times* reported, time-consuming discovery obligations have led to a large number of prosecutor departures.<sup>391</sup> But the prestige of the office resulted in a robust number of applications and the office being able to offset the departures with new hires.

## 2. Manageable Caseloads

Some prosecutors’ offices are able to remain well-staffed because they have more manageable caseloads. For example, the Fort Bend County District Attorney’s Office in Texas is well regarded but it lacks the national reputation of Manhattan’s office. Nevertheless, it is able to remain nearly fully staffed because it has a more reasonable caseload than many offices, particularly the much larger Harris County District Attorney’s Office in neighboring Houston.

During the pandemic, the Fort Bend office fought the tide to avoid a backlog of cases. According to a senior prosecutor in that office, “we put eyes on every pending case. We asked: How old? How good? Why is it still here? We trimmed the fat. When we opened back up, we were lean and mean and ready to go.”<sup>392</sup>

Next door, the much larger Harris County District Attorney’s Office was not in the same position. Before the Covid pandemic caused a backlog of cases around the country, Harris County was already suffering from flooding caused by Hurricane

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<sup>389</sup> Of course, prosecutors do not have a monopoly on justice. Lawyers can certainly feel that they are pursuing justice by working in the public defender’s office. The point here is that some lawyers lean toward favoring prosecution work, just as others lean toward favoring defense work.

<sup>390</sup> See Chaffin, *supra* note 205.

<sup>391</sup> See Bromwich, *supra* note 221.

<sup>392</sup> Wittig Interview, *supra* note 21.

Harvey in 2017. The Criminal Justice Center that housed the district attorney's office was so badly damaged that it had to be evacuated. Hurricane Harvey knocked the Harris County District Attorney's Office out of its office for five years.<sup>393</sup> The district attorney's staff had to be scattered among seven different locations around the city.<sup>394</sup> In one office building, 90 misdemeanor prosecutors worked "elbow-to-elbow; instead of being an elevator ride away from court, prosecutors are working blocks or even miles away."<sup>395</sup> Harvey forced the district attorney's office to handle cases in a paper-driven format.<sup>396</sup> That drove up the number of pending cases right before the Covid pandemic, which then amplified the backlog.

Of course, some lawyers were still drawn to the bustling Harris County office with its higher profile cases. But with the challenges faced by Harris County it is not hard to see why the some of the large pool of Houston lawyers made their way to the neighboring Fort Bend office.

### 3. Higher Salaries

One of the primary reasons for prosecutor vacancies is low salaries. But not all offices pay poorly. For instance, the starting salary for the Santa Clara County District Attorney's Office is between \$129,000 and \$135,000.<sup>397</sup> Not surprisingly, the office is close to fully staffed.

Moreover, increasing salaries – even if not to a huge amount – can help to fill vacancies. In Lane County, Oregon, the office was bleeding lawyers.<sup>398</sup> Prosecutors were departing for positions with the state or county prosecutor positions that paid better. The elected district attorney candidly told the press that continued vacancies would lead to the office being unable to prosecute some non-violent crimes, including felonies..<sup>399</sup> The Board of Commissioners listened and authorized a pay raise, even though the county's contract with the prosecutor's office was not up yet.<sup>400</sup> As a result of the pay raise, the office is now fully staffed.<sup>401</sup>

### 4. Remote Work Options

Another major reason for prosecutor attrition was the post-Covid desire for remote work options. As explained in Part IV.E above, most district attorneys' offices are not able to allow remote working. A substantial part of a prosecutor's job is to appear in court, and courts operate in person.

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<sup>393</sup> See Ogg Interview, *supra* note 15.

<sup>394</sup> See Brian Rogers, 'Harvey Deals' The New Normal; Makeshift Hearings Held as Flood-Damaged Courthouse Is Repaired, HOUS. CHRON., Nov. 14, 2017.

<sup>395</sup> *Id.*

<sup>396</sup> *See id.*

<sup>397</sup> See Gibbons-Shapiro Email, *supra* note 199.

<sup>398</sup> See Elliott, *supra* note 183.

<sup>399</sup> *See id.*

<sup>400</sup> See Perlow Email, *supra* note 186..

<sup>401</sup> *See id.*

At least one well-staffed prosecutor's office has allowed remote work however. In one large county, prosecutors are permitted to work at home up to two days per week.<sup>402</sup> This office also has a higher salary than most district attorneys' offices. A senior prosecutor explained that "the combination of good salary plus work at home options is a big seller to prospective hires."<sup>403</sup>

## 5. Positive Office Culture and Mission

Finally, multiple offices that were fully staffed pointed to their positive work environment as a reason. One prosecutor explained that "we offer an environment that is good for growth, camaraderie, professional development. It's an enjoyable place to work. We don't tolerate god complexes. We're small enough to know each other's names. If we were larger we'd have a hard time doing that. At the same time, we're modern and progressive."<sup>404</sup>

A prosecutor in another fully staffed office explained that maintaining a positive environment is something the senior management prosecutors consciously work on. "You have to be very intentional about hiring lawyers who will work to build a good community."<sup>405</sup> The prosecutor elaborated that it is "very dangerous to lower standards. If you wouldn't have taken an applicant in the past, you can't take them now because you need a person in the spot. You don't want to hire people who create problems by cutting corners."<sup>406</sup>

A Virginia prosecutor also pointed to office culture and training as crucial for attracting young attorneys. He noted that because some nearby offices pay higher salaries, we are "never going to win on money. I have to win on work environment and training. A major part of people applying to us is our reputation."<sup>407</sup>

Relatedly, a progressive prosecutor pointed toward the office's reform mission as a basis for attracting lawyers. The prosecutor explained that "Hillary Clinton and Donald Trump are both politicians, but they are not the same person. Similarly, all prosecutors and prosecutors' offices are not the same from place to place."<sup>408</sup> That progressive prosecutor said he was able to staff his office because my very public progressive prosecutor stances has helped me to attract applicants who would not work in other offices."<sup>409</sup>

Prosecutors who highlighted office culture said that it can be the difference that attracts an applicant who might have gone to another district attorney's office. Of course, there is likely a Lake Wobegon effect when it comes to office culture.<sup>410</sup> Many employers (including many prosecutor offices) likely think that their office

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<sup>402</sup> See Interview with Anonymous Prosecutor, Oct. 2, 2023.

<sup>403</sup> *Id.*

<sup>404</sup> Wittig Interview, *supra* note 21.

<sup>405</sup> Holley Interview, *supra* note 47.

<sup>406</sup> *Id.*

<sup>407</sup> Collins Interview, *supra* note 14.

<sup>408</sup> Fatehi Interview, *supra* note 176.

<sup>409</sup> *Id.*

<sup>410</sup> See GARRISON KEILLOR, LAKE WOBEGON DAYS (1985).

environment is better than their peers. Determining which offices are correct is not always easy.

### **Conclusion**

Many prosecutors' offices around the country are suffering from massive vacancies. In Houston and Los Angeles, roughly 15% of prosecutor positions are vacant. In Detroit 22% of prosecutor position are unfilled. In Miami, 33% of prosecutor positions are open. And that is after all of those offices raised salaries dramatically.

Matters are worse in some smaller offices. In St. Louis, the prosecutor vacancy rate exceeded 60% this year. In Athens, Georgia, the district attorney's office was missing 84% of its prosecutors. And in one small Wisconsin every one of the five prosecutor positions was empty – not only was there no prosecutor steering the ship, there was no one even on it.

In some instances, bad management explains why prosecutors quit. But more often, low salaries and huge caseloads explain the attrition. While salaries vary around the country, entry-level prosecutors are typically paid in the neighborhood of \$70,000. In exchange, many prosecutors are asked to handle hundreds of cases and work relentlessly with no relief on the horizon. Not only can these prosecutors make more money in private practice, they can also work remotely in other legal jobs, something that the prosecutor's office is unlikely to ever offer again in the post-Covid crisis. Prosecutors therefore quit for greener pastures.

District attorneys' offices are constantly searching for replacement prosecutors. But applications are down dramatically across the nation. Even prestigious district attorneys' offices and offices located in beautiful cities are experiencing a drop in applications. In part, this is due to lower law school enrollment and lower bar passage rates. But it is also due to reduced interest in prosecutor positions than in the recent past. Following the murder of George Floyd, students have gravitated away from law enforcement work, believing that to be on the side of justice they must work as public defenders, not prosecutors.

Without the ability to replace vacancies, some offices are forced into a downward spiral. Prosecutors quit because they have too many cases. When they quit their work is re-assigned to existing prosecutors who will now have even higher caseloads. Some of those prosecutors eventually quit. And the vacancy problem grows larger and harder to dig out of.

In the meantime, over-burdened prosecutors cannot effectively handle their cases. Guilty defendants go free. Junior prosecutors who are not ready for prime time are promoted to senior positions. Fewer experienced prosecutors are left to train entry-level lawyers. And there are not enough prosecutors to staff specialized divisions like the family violence unit or the gang violence division.

Prosecutor vacancies also pose disastrous problems for criminal defendants. Overwhelmed prosecutors lack the time to promptly dismiss weak cases, leaving innocent defendants to languish in jail for days or weeks longer than necessary. Busy prosecutors do not have the time to investigate the nuances of their cases, which



prevents them from offering more generous plea deals to less culpable defendants. And prosecutors who are under-water fail to notice favorable evidence that should be disclosed to defendants under the Brady doctrine.

In short, the prosecutor staffing crisis is bad for the prosecutors who work in the system and for the district attorneys' offices that should be protecting the public. And prosecutor vacancies are nothing short of a disaster for the innocent and less culpable defendants who are caught up in the criminal justice system.

The news is not all bad though. Some prosecutors' offices are functioning at full capacity. These offices are able to attract lawyers because they have higher salaries or more manageable caseloads, or both. Other offices draw lawyers because of their prestige. And still other offices are able to attract applicants because the camaraderie and positive culture are palpable. These offices can be a guide star for district attorneys' offices that are struggling with vacancies.

Salary increases are a key starting point. While myriad problems have contributed to the prosecutor vacancy problem, low salaries are likely the biggest factor. Once a district attorney's office is able to raise salaries, neighboring counties can argue to their appropriating bodies that they also need a salary increase to compete for talent. In Texas, Harris County recently raised salaries to \$88,000 for entry-level lawyers. Most Texas counties do not pay \$80,000, and some still pay less than \$70,000. There is hope – or at least an argument – that the rising tide in Houston should lift boats elsewhere in the state.

In addition to higher base salaries, there are other financial tools to deal with the vacancy problem. Cost-of-living adjustments for expensive metropolitan cities are important. When an entry-level lawyer looks at housing prices in an expensive city and a cheaper city and sees that the salary is the same in both locations, she is drawn to the cheaper city. Therefore, it is not surprising, for example, that Miami is suffering from a 33% vacancy rate while Palm Beach County is fully staffed. Florida (and other states) should institute a reasonable cost-of-living adjustment to help expensive cities reduce their vacancy rate.

Prosecutors' offices should also provide enhanced retirement benefits to attract lawyers. The Lane County District Attorney's Office filled vacancies by increasing salaries and by moving its prosecutors into the more attractive retirement plan previously reserved for police officers and fireman.<sup>411</sup> This enabled prosecutors to vest for retirement after 25 years of services, rather than 30 years.<sup>412</sup> Offering enhanced retirement options might even serve to attract more senior lawyers who ordinarily would not be enticed by salaries that are far below the private sector.

Counties should also invest in technology and support staff to meaningfully reduce the burden placed on prosecutors by the crushing demands of complying with discovery obligations. We live in a digital world, and district attorneys' offices should be able to provide most discovery electronically without having to reproduce paper

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<sup>411</sup> See Perlow Email of Nov. 20, *supra* note 186.

<sup>412</sup> See Email from Patricia Perlow, Elected Lane County District Attorney, to Adam Gershowitz, Nov. 28, 2023.

records. And district attorneys' offices need staff – non-lawyers – who can help sift through body camera footage and other recordings that are bogging down prosecutors.

Spending money is necessary to solve the prosecutor vacancy problem, but it cannot be the only answer and it cannot be one-sided. Appropriating bodies must still provide equivalent funding to public defender's offices.

State legislatures and the public must do their part as well. Legislatures should enhance loan forgiveness programs to further incentivize public-interest careers. They should also re-examine low-level misdemeanor statutes to see what crimes can be decriminalized and taken off the district attorney's plate. And the public should read the news coverage to learn whether their local prosecutors (and public defenders) are being adequately funded.

Finally, prosecutors themselves bear responsibility for solving the vacancy problem. When new prosecutors are elected – whether they be progressive or “traditional” – they should be cognizant about only firing the number of prosecutors that they can plausibly replace in a timely fashion. Additionally, prosecutors must create an office culture where lawyers feel supported and want to come to work. The data and interviews in this article demonstrate that entry-level lawyers will come to work in spite of low salaries and high workloads if an office has a positive culture and prioritizes mentoring and growth. Finally, elected prosecutors must have the courage to speak truth to power, not just to gripe about under-staffing behind closed doors. When a district attorney's office begins to lose prosecutors because of low salaries and high caseloads the elected prosecutor must speak up quickly and loudly to the appropriating body, even if it jeopardizes the prosecutor's political standing.

The prosecutor vacancy problem did not happen overnight and it did not result from just one cause. Filling prosecutor vacancies to protect the public and criminal defendants is a long-term challenge that will require bold action from elected prosecutors, legislators, and the public.