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Anna Offit, *Prosecuting in the Shadow of the Jury*, 133 **Nw. U. L. Rev.** _ (forthcoming, 2019), available at SSRN.

Scholars often speculate about how prosecutors exercise their vast discretion. Most of these critics make well-founded conclusions based on educated guesses about how prosecutors make the critical decisions that affect the fate of individual defendants and more broadly shape the community and legal system as a whole. In *Prosecuting in the Shadow of the Jury*, Anna Offit conjures a rare bird—empirical evidence about how prosecutors make discretionary decisions. Her evidence shows that prosecutors frequently make decisions by invoking a hypothetical juror to test arguments and assess the fairness of their proposed actions.

Professor Offit bases her conclusions on 133 interviews with Assistant United States Attorneys over a five year period of time. Her work offers unique insight into the way prosecutors think and reason through their cases. She finds that prosecutors frequently consider the "jury appeal" of witnesses and evidence when they decide whether or not to charge an individual with a crime. By doing so, the prosecutor projects common sense sources of concern onto a hypothetical juror. For example, a slew of questions by confused grand jurors often lead Offit's interviewees to consider difficulties in proving the case to an actual jury down the line. In assessing their police officer and cooperating witnesses' credibility, the prosecutors frequently consider whether a juror would believe the witness. In doing so, they absolve themselves of the responsibility of criticizing their own witnesses by projecting their concerns on the imagined juror. Freeing themselves to be aggressive advocates and reasoned critics at the same time, this method ensures that prosecutors consider not only weaknesses in their cases, but also fairness and equity. They look at their cases not only through their own eyes but also through the eyes of a skeptical observer.

In addition, the prosecutors Offit interviewed discuss whether a potential juror would have sympathy for a defendant or the victim. Even at the investigatory stage, potential jurors shape prosecutors' views about the strength of the developing evidence and the propriety of law enforcement techniques. This supposed reaction of jurors not only shapes the investigatory and charging decisions, but also enters into prosecutors' plea bargaining discussions. Of course, we should be less sanguine about this method of decision making if the prosecutor projects racial or other cognitive biases onto the imagined juror. If the hypothetical juror expresses such pernicious views, the prosecutor could absolve herself of responsibility by suggesting that she is making a decision not because of her own bias but due to an objective reality—the jurors' perspective. Prosecutors in Offit's study do not seem to do this—the imagined jury serves as an ethical check—but it would be interesting to see if this, more corrosive side-effect plays a role in different prosecutors' offices.

It is now common knowledge that the prevalence of jury trials is a thing of the past. Approximately 95% of state and federal criminal cases resolve in plea bargains. (P. 9.) Many historians and scholars of the criminal justice system have lamented that this important popular restraint on prosecutors' conduct is nearly gone.[1] Offit's work suggests the ghost of the jury lives on, reminding prosecutors to be fair and just.

The significance of Offit's work is not just in offering a corrective to the assumption that the lay influence on prosecutor decision-making has disappeared along with the criminal jury trial, it is also evidence that the duty to do justice remains a motivating ideal for prosecutors. Mercy may be an important purpose of the jury, a component that Professor Rachel Barkow has argued is increasingly banished from our criminal justice system, but as Offit demonstrates, mercy is not gone.[2] It continues to play a role in prosecutors' decision making. Even when no one is looking over their shoulders, prosecutors imagine that they are. They outsource their conscience to an imagined public to remind them of their

duties to be fair and even-handed.

Offit explains that the hypothetical juror serves three purposes. First, on a practical level, this method of decision making helps prosecutors prepare for trial, serving as tool to assess the strengths and weaknesses of a case. Second, this trope enables prosecutors to engage in a more collaborative process, discussing their cases with others while projecting the more divisive or controversial perspective onto a fictional layperson. Finally, the imagined juror proves an "ethical resource" for prosecutors, a justification for a more measured, less aggressive approach to prosecution. The prosecutors' job, the pursuit of justice, is vague. Some have argued that the dominant, and at times exclusive, consideration is pursuing convictions.[3] But the make-believe jury lends the pursuit of justice an alternate meaning and value. Thus the aggressive prosecutorial bias that many scholars have posited is, or at least can be, modulated through this instinctive reference to future jurors.

Of course, as Offit acknowledges, these hypothetical juries may not be playing the same role as real ones and the lack of transparency in a system that resolves most cases by plea bargain continues to be a problem. Prosecutors themselves may be able to project some generic concerns onto imagined jurors. They may be able to correct their more aggressive urges by imagining a skeptical and merciful jury, but they cannot truly summon a democratically accountable public. Thus, the evolving moral compass of the public enters the system only indirectly and imperfectly now. Even though Offit's interviews of federal prosecutors do not give cause for concern, in the hands of other prosecutors, this mechanism might reinforce rather than correct prosecutor bias by providing a kind of deniability, a way to distance and absolve themselves of responsibility for racial or ethnic bias. If Offit were to replicate her study in other offices, it would be interesting to see whether this sort of decision making plays a similar role and whether it ever seems to have a corrosive rather than salutary effect.

If jury trials were to disappear entirely, this productive discourse within prosecutors' offices would likely cease. As a result, her work lends additional weight to calls to reinvigorate the jury. But Offit's account contradicts the more extreme argument that ideals like the "duty to do justice"are empty promises that potentially do more harm than good.[4] Rather than abandon these aspirations, we need to figure out how to give them more traction, and Professor Offit's work offers a significant step in that direction.

1. Robert M. Ackerman, *Vanishing Trial, Vanishing Community?: The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 **J. Disp. Resol.** 165, 176–77; Stephan Landsman, *So What?: Possible Implications of the Vanishing Trial Phenomenon*,1 **J. Empirical Legal Stud.** 973, 974–76 (2004).
2. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 **Harv. L. Rev.** 1332, 1334-35 (2008).
3. Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor (2007).
4. Eric S. Fish, *Prosecutorial Constitutionalism*, 90 **S. Cal. L. Rev.** 237 (2017).

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