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## Cultivating Sense: Cultural Change in the Prosecutor's Office

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# Cultivating *Sense*: Cultural Change in the Prosecutor's Office

Shih-Chun Steven Chien\*

## Abstract

Prosecutors exercise broad discretion. They are widely viewed as the gatekeepers of the criminal justice system. To date, studies on prosecutors in different jurisdictions have largely focused on how to conceptualize, manage, and eventually control the exercise of prosecutorial discretion. Scholars have recently turned their attention to the importance of internal organizational management and leadership's role in changing office culture as a means to regulate prosecutorial discretion. But we have limited empirical evidence as to how changes occur within a prosecutor's office and what precise role organizational leaders play during this process.

This Article constructs a new paradigm for the understanding of cultural change within prosecutors' offices. It reveals a troublesome paradox about modern prosecutorial power: I argue that, to transform

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\* Assistant Professor of Law, Cleveland State University College of Law; Research Social Scientist, American Bar Foundation; JSD, Stanford Law School. For extremely valuable comments and discussions I thank Ronald J. Allen, Sarah Brayne, Michael Benza, Stephen Daniels, Angela Davis, Shari Diamond, Lawrence M. Friedman, Bryant Garth, John Hagan, Deborah Hensler, Tonja Jacobi, Joshua Kleinfeld, Richard A. Leo, Jessica Lopez-Espino, Anna Lvovsky, Ajay K. Mehrotra, Elizabeth Mertz, Laura Beth Nielsen, Robert L. Nelson, Anna Offit, Jothie Rajah, Carolyn Rouse, Christopher Schmidt, Jonathan Simon, David A. Sklansky, Arielle Tolman, Jonathan P. Witmer-Rich, Charles D. Weisselberg, and George Wilson. I owe thanks to Zohra Ahmed, Valena Beety, Cynthia Godsoe, Bruce Green, Thea Johnson, Peter Joy, Jennifer Laurin, Kay L. Levine, Sam Levine, Justin Murray, Anna Offit, Lauren Ouziel, Jenny Roberts, Rebecca Roiphe, Maybell Romero, Jessica Roth, Omavi Shukur, Jocelyn Simonson, Abbe Smith, Cara Suvall, Lars Trautman, Elizabeth Webster, Ronald Wright, Ellen Yaroshefsky for their insightful contributions to the workshop discussion at the Criminal Justice Ethics Schmooze in June 2022. I am also grateful to the editors of the Minnesota Journal of International Law for their outstanding editorial work.

organizational culture, prosecutors need to forge a new type of power based on what I refer to as “sense-making authority.” Meanwhile, the same power enables prosecutors to create an opaque process that bypasses organizational structure and reduces external accountability. To build my theory of cultural change, I rely on a comparative case-study approach based on ethnographic research. The research sites of the Article were a group of district attorneys’ offices led by “progressive prosecutors” across the United States and a district prosecutor’s office located in a metropolitan area of Taiwan.

This Article proposes a contested cultural change model and explores ways in which the model could contribute much-needed theoretical and strategic groundings to the comparative study of prosecutorial reforms across different jurisdictions.

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## INTRODUCTION: THE TROUBLING NATURE OF PROSECUTORIAL DISCRETION

Prosecutors exercise broad discretion by putting the law into action.<sup>1</sup> Their discretionary decisions shape the daily functioning of the criminal justice system.<sup>2</sup> For years, scholars have been pondering how to control, sometimes even to eliminate, the exercise of prosecutorial discretion.<sup>3</sup> Since the initiation of the American Bar

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1. *E.g.*, Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 823 (2013) ("[Prosecutors'] discretionary decisions . . . play a very significant role in creating and maintaining the racial disparities in the criminal justice system."); Angela J. Davis, *Prosecutors, Democracy, and Race*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 195, 196–202 (Maximo Langer & David A. Sklansky eds., 2017); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012) (examining how implicit bias affects the exercise of discretion); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001); Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943, 958 (2012); *The Kings of the Courtroom*, THE ECONOMIST (Oct. 4, 2014), <https://www.economist.com/united-states/2014/10/04/the-kings-of-the-courtroom>; Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, in CRIME & JUSTICE IN AMERICAN HISTORY: COURTS AND CRIMINAL PROCEDURE 384, 384 (Eric H. Monkkenen ed., 1990) ("[T]he American prosecutor enjoys an independence and discretionary privileges unmatched in the world.").

2. In his examination of American criminal justice system, Herbert Packer stated: "The basic trouble with discretion is simply that it is lawless, in the literal sense of that term. If police or prosecutors find themselves free (or compelled) to pick and choose among known or knowable instances of criminal conduct, they are making a judgment which in a society based on law should be made only by those to whom the making of law entrusted." HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTIONS* 290 (1968). For the exercise of prosecutor's discretion, see generally Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010); Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System? and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1429–1436 (2017); David A. Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 456 (2018) (discussing the relations between prosecutorial discretion and prosecutorial power). *See also* PAUL BUTLER, *CHOKED: POLICING BLACK MEN* 221 (2017) ("prosecutors have so much discretion it will be virtually impossible for your lawyer to prove you are getting treated worse because you are black, even though everyone knows it's true."); Davis, *In Search of Racial Justice: The Role of the Prosecutor*, *supra* note 1.

3. *See, e.g.*, HOWARD ABADINSKY, *DISCRETIONARY JUSTICE: AN INTRODUCTION TO*

Foundation (ABF) Survey of the Administration of Criminal Justice in the 1950s, the exercise and control of discretionary decisions made by prosecutors and other criminal justice agencies have become a central criminal justice policy issue.<sup>4</sup> Since then, prosecutors have been seen as more than just “blind enforcers of the law.”<sup>5</sup> One of the paradigm-shifting contributions of the ABF study was not only the discovery of discretion in the criminal justice system, but also the clear articulation that complete elimination of prosecutorial discretion is neither possible nor desirable.<sup>6</sup>

Today, prosecutorial discretion is believed to be an essential component of the criminal justice system.<sup>7</sup> Through the exercise of

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DISCRETION IN CRIMINAL JUSTICE 61–63, 79–84 (1984); LIEF H. CARTER, *THE LIMITS OF ORDER* (1974) (suggesting that attempts to impose organizational control over individual prosecutors will either fail or impair individualized decision-making); JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 195–97 (1980); ERIK LUNA & MARIANNE WADE, *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 189, 190 (Erik Luna & Marianne L. Wade eds., 2012) (“[S]tatutes threatening harsh deterrent punishments upon conviction . . . became powerful weapons in the hands of prosecutors, who could force defendants to accept plea bargains so as to avoid these harsh sentencing consequences.”); Sklansky, *supra* note 2, at 456; Smith & Levinson, *supra* note 1, at 804.

4. Studies on the role of discretion in the criminal justice system were only in their infancy in 1965 following the publication of a groundbreaking book series from the ABF’s Survey of the Administration of Criminal Justice in which discretion was finally put under the spotlight. See LLOYD E. OHLIN & FRANK J. REMINGTON, *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* (1993); FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 293–345 (1969).

5. John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 13 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008). For recent discussions of prosecutors’ power and their ability to bring changes to the criminal justice system, see Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 739–41 (2020); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 189–97 (2021); Anthony C. Thompson, *A Progressive Vision: Leading the District Attorney’s Office*, in *PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE* 19–54 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022); Julia Wick, *Newsletter: What Does It Mean to Be a Progressive Prosecutor?*, L.A. TIMES (Nov. 12, 2019), <https://www.latimes.com/california/story/2019-11-12/progressive-prosecutor-gascon-chesa-boudin>.

6. See generally Luna & Wade, *supra* note 2, at 1417 (2010) (“[A]cademic solutions to the problems of prosecutorial discretion [have] two forms: the promulgation of internal office guidelines to control prosecutorial decision-making and the development of external limitations through restrictive legislation or heightened judicial review.”).

7. Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, THE ATLANTIC (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/>; Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 187 (2021). But see Jeffery Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172

discretion, prosecutors can determine the number and nature of charges, allocate limited resources, and establish policy that sets priorities among offenders, offenses, and law enforcement strategies.<sup>8</sup> In the face of the renewed concerns over social and racial justice, a growing number of elected chief prosecutors are reimagining their roles in the criminal justice system.<sup>9</sup> Many of these newly elected D.A.s consider themselves progressive reformers, indicating a different approach to their role.<sup>10</sup> These newly elected prosecutors, and many

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(2019) (challenging the claims about prosecutorial preeminence and discussing the role of judges, legislators, governors, and police in checking prosecutors' power). For the relations between prosecutors and mass incarceration, see generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSE OF MASS INCARCERATION – AND HOW TO ACHIEVE REAL REFORM* 140–41, 206 (2017) (arguing that “prosecutors are the only actors in the criminal justice system who have successfully held on to almost all the discretionary power accorded to them” and that prosecutors have been and remain the cause of mass incarceration); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 520–23, 550–52 (2001) (arguing that prosecutors have an interest in broad criminalization because it greases the wheels of plea bargaining and legislators also have an interest in accommodating prosecutors because it ensures the enforcement of criminal law).

8. Prosecutors in civil law tradition, on the other hand, are subject to the “legality principle,” or mandatory prosecution, which originated from the civil-law tenet that is believed to substantially limit room for prosecutorial discretion in individual cases. However, echoing the findings of the ABF survey, a growing number of comparative studies have shown that it is unrealistic to think that any criminal justice system can operate without prosecutorial discretion. In fact, European prosecutors are beginning to look more like their American counterparts. *See* Luna & Wade, *supra* note 2, at 1417 (claiming that prosecutorial discretion has been eliminated in the European system, or is supervised closely, are largely exaggerated); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 *YALE L.J.* 240, 240–41 (1977). *But see generally* John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 *YALE L.J.* 1549 (1978).

9. *See, e.g.*, Chesa Boudin, *The Opportunity in Crisis: How 2020’s Challenges Present New Opportunities for Prosecutors*, 110 *J. CRIM. L. & CRIMINOLOGY* 23, 24–25 (2020); Dan Satterberg, *2020 Vision and the Five Pillars of Criminal Justice Reform*, in *PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE* 55, 55–94 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022); Kimberly M. Foxx, *The Crucible of Progressive Prosecution: Notes from the Field*, in *PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE* 252 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022). For the rise and proliferation of progressive prosecutors across the country, *see* RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 154–60 (2019); EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* 147–73 (2019); Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 *FORDHAM L. REV.* 8, 10 (2018); David A. Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 *OHIO ST. J. CRIM. L.* 647, 647–49 (2017) (examining local district attorney elections and discussing how electoral democracy can serve as a tool for reforming prosecutors’ offices).

10. *See* LARRY KRASNER, *FOR THE PEOPLE: A STORY OF JUSTICE AND POWER* 180–91 (2021); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 *MINN. L. REV.*

other reform-minded incumbents, are often called “progressive prosecutors.”<sup>11</sup> These prosecutors are beginning a movement that is trying to shake up business as usual.<sup>12</sup> They are using their power to reinvent how prosecutors’ jobs are done and to move beyond incarceration-driven approaches by developing policies and programs that offer more social services and diversion programs,<sup>13</sup> bring transparency to their offices,<sup>14</sup> address wrongful convictions,<sup>15</sup>

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1415, 1417 (2021) (arguing that the term “progressive prosecutor” means “many different things to many different people”).

11. Green & Roiphe, *supra* note 5; Smith, *Can You Be a Good Person and a Good Prosecutor?*, *supra* note 1, at 398 (noting the existence of “unorthodox, independent-minded, or ‘progressive’ prosecutors,” and naming four); Smith, *Are Prosecutors Born or Made?*, *supra* note 1, at 958. For a more detailed and coherent overview of these reform prosecutors and their goals, see FAIR AND JUST PROSECUTION & BRENNAN CENTER FOR JUSTICE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 14 (2018), [https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP\\_21\\_Principles\\_Interactive-w-destinations.pdf](https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21_Principles_Interactive-w-destinations.pdf) [hereinafter *FJP/Brennan, 21 Principles*]. See also Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

12. BAZELON, *supra* note 9, at 147–73; Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 26–27 (2019).

13. See, e.g., Armando Tull, *How a D.C. Diversion Program Helps Get Young Lives Off the Ropes*, WAMU (June 30, 2016), [https://wamu.org/story/16/06/30/dc\\_diversion\\_program\\_helps\\_get\\_young\\_lives\\_off\\_the\\_ropes/](https://wamu.org/story/16/06/30/dc_diversion_program_helps_get_young_lives_off_the_ropes/). See also CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 141–43 (2021) (arguing that even reform-oriented chief prosecutors “want to use the criminal justice system to punish more people; they just want to punish different people . . . and so they were not interested in trying to help limit prosecutorial power”).

14. See, e.g., Somil Trivedi, *Chicago’s Top Prosecutor Walks the Walk on Transparency*, ACLU (Mar. 15, 2018), <https://www.aclu.org/blog/smart-justice/prosecutorial-reform/chicagos-top-prosecutor-walks-walk-transparency>; Don Stemen, *Prosecutors’ Offices as Data-Driven Organizations: Improving Effectiveness and Fairness*, in PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE 217–19 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022).

15. See, e.g., *Conviction Integrity Unit*, COOK CNTY. STATE ATT’Y, <https://www.cookcountystatesattorney.org/conviction-integrity-unit> (last visited Nov. 22, 2022); *Brooklyn DA Eric Gonzalez to Dismiss 378 Convictions That Relied on 13 Officers Who Were Later Convicted of Misconduct While on Duty*, BROOKLYN DA (Sept. 7, 2022), <http://www.brooklynda.org/2022/09/07/brooklyn-da-eric-gonzalez-to-dismiss-378-convictions-that-relied-on-13-officers-who-were-later-convicted-of-misconduct-while-on-duty/>; Letter from Criminal Justice Leaders to Kansas City Board of Commissioners (Aug. 8, 2018), <https://fairandjustprosecution.org/wp-content/uploads/2018/08/KCK-CIU-SIGN-ON-LETTER-FINAL.pdf> (the letter states that “reviewing and correcting past injustices is squarely within the DA’s role, and indeed his obligation.”).

reform bail systems,<sup>16</sup> and deal with racial disparities<sup>17</sup>—all for a more equitable justice system.<sup>18</sup> They are now pulling back from a mindless pursuit of more convictions and long sentences.<sup>19</sup> Many commentators think that the movement marks a hopeful moment for changes in the criminal justice system.<sup>20</sup>

However, challenging unjust laws and old practices may lead to intense backlash.<sup>21</sup> Despite finding political success in local elections, many progressive leaders are facing pushback upon taking office as they quickly realize that getting everyone on the same page is not easy.<sup>22</sup> Setting new priorities and policies does not necessarily mean

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16. See, e.g., Evan Sernoffsky, *San Francisco DA Chesa Boudin Ends Cash Bail for All Criminal Cases*, S.F. CHRON. (Jan. 29, 2020), <https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-ends-cash-bail-for-14996400.php>.

17. See, e.g., Evan Sernoffsky, *DA Chesa Boudin Sets New Policies on SF Police Stops, Gang Enhancements, Three Strikes*, S.F. CHRON. (Feb. 28, 2020), <https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-sets-new-policies-15091160.php>; Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 11, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment>.

18. For an overview of race-conscious criminal justice reform, see generally FJP/Brennan, *21 Principles*, *supra* note 11, at 14. See also Levin, *supra* note 10, at 1418 (constructing a typology of four “ideal types” of progressive prosecutors, including: (1) the progressive who prosecutes; (2) the proceduralist prosecutor; (3) the prosecutorial progressive; and (4) the anti-carceral prosecutor).

19. See, e.g., Angela J. Davis, *Transforming the Culture: Internal and External Challenges to a New Vision of Prosecution*, in PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE 102 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022) (illustrating the importance of establishing the Conviction Integrity Units to “identify, remedy and prevent wrongful convictions”). See also Joyce White Vance, *Want to Reform the Criminal Justice System? Focus on Prosecutors*, TIME (July 7, 2020), <https://time.com/5863783/prosecutors-criminal-justice-reform/> (suggesting that structural reforms in D.A.s’ offices should begin with a cultural change among prosecutors); The Crime Rep. Staff, *Why Culture Change for Prosecutors is ‘More Than Hiring People of Color’*, CRIME REP. (Mar. 11, 2021), <https://www.prosecution.org/why-culture-change-for-prosecutors-is-more-than-hiring-people-of-color> (emphasizing that “while diversity in hiring is part of the solution, it is just one step in a long and challenging process to create a culture of racial equity within prosecutors’ offices”). See also I. Bennett Capers, *The Prosecutor’s Turn*, 57 WM. & MARY L. REV. 1277, 1306 (2016).

20. See, e.g., David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 UC DAVIS L. REV. ONLINE 25, 26 (2017).

21. HESSICK, *supra* note 13, at 139 (stating that “district attorneys do not work in a vacuum; they are part of a larger political system, and other actors in that system can frustrate or even block their reforms.”); Davis, *supra* note 19, at 105–14 (discussing the internal and external challenges facing reform-oriented chief prosecutors). For cultural change in organizational settings, see generally Debra Meyerson & Joanne Martin, *Cultural Change: An Integration of Three Different Views*, 24 J. MGMT. STUD. 623 (1987); EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 245–51 (2017).

22. See, e.g., Del Quentin Wilber, *Once Tough-On-Crime Prosecutors Now Push*

the message will automatically trickle down.<sup>23</sup> When reform-minded prosecutors announce policies that seem unprecedented, they are likely to encounter pushback that comes from both *within* and *outside* their offices.<sup>24</sup>

A fundamental problem for chief prosecutors is how to exercise adequate control in their organizations in order to end draconian practices and to cultivate buy-in from line prosecutors.<sup>25</sup> Many of the new progressive leaders have learned that they can write whatever policy memo or protocols they want and email them out to the entire staff. But that does not ensure that everyone will pay attention and follow them.<sup>26</sup> Therefore, many of the new D.A.s soon become aware

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*Progressive Reforms*, L.A. TIMES (Aug. 5, 2019), <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms> (reporting the comments of U.S. Attorney William McSwain—a leading adversary of Krasner—that “Philadelphia doesn’t have a prosecutor” and that “[t]he city has a public defender with power”); Michael Brice-Saddler, *41 Prosecutors Blast Attorney General Barr for ‘Dangerous and Failed’ Approach to Criminal Justice*, WASH. POST (Feb. 13, 2020), <https://www.washingtonpost.com/national-security/2020/02/13/attorney-general-barr-prosecutors/> (reporting former U.S. Attorney General William Barr’s attack on progressive prosecutors, calling them “anti-law enforcement” and “social justice reformers” who will send the cities where they serve “back to the days of revolving-door justice” with the consequence of “[m]ore crime; more victims”); Richard A. Oppel Jr., *These Prosecutors Promised Change. Their Power Is Being Stripped Away*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/prosecutors-criminal-justice.html> (reporting pushback faced by Larry Krasner, Marilyn Mosby, Glenn Funk, and many other reform-minded elected D.A.s).

23. There is a popular assumption that organizational culture is largely shaped top-down by an organization’s leaders, or, more precisely, by those individuals who possess bureaucratic authority. Under this perspective, culture serves as a toolkit for founders or leaders in dismantling and reassembling basic building blocks. See KIM S. CAMERON & ROBERT E. QUINN, *DIAGNOSING AND CHANGING ORGANIZATIONAL CULTURE* (3rd ed. 2011); Jennifer A. Chatman & Sandra Eunyong Cha, *Leading by Leveraging Culture*, 45 CAL. MGMT. REV. 20 (2003). However, empirical evidence for the influence of organization’s management on culture formation and change remains inconclusive. See, e.g., Benjamin Schneider, Mark G. Ehrhart & William H. Macey, *Organizational Climate and Culture*, 64 ANN. REV. PSYCH. 361, 372 (2013) (suggesting that empirical studies supporting the role of leaders in organizational culture are difficult to find).

24. Jonah E. Bromwich, *Can a Progressive Prosecutor Survive a 40% Spike in Homicide?*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/2021/05/17/us/philadelphia-prosecutor-election-larry-krasner.html>; Emily Bazelon & Jennifer Medina, *He’s Remaking Criminal Justice in L.A. But How Far Is Too Far?*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/11/17/magazine/george-gascon-los-angeles.html>.

25. As Philadelphia District Attorney Larry Krasner eloquently put it, “the coach gets to pick the team.” Chris Palmer & Julie Shaw, *New DA Krasner on Ousters: ‘The Coach Gets to Pick the Team’*, PHILA. INQUIRER (Jan. 9, 2018), <https://www.inquirer.com/philly/news/crime/philly-da-larry-krasner-defends-firings-20180109.html>.

26. Conference Call with Texas based District Attorney’s Office (July, 2018) (transcript on file with author).

of the importance for *cultural change*, and they come to believe they can serve as the stewards of a fundamental change to their office culture.<sup>27</sup> After taking office, these progressive leaders want their own behaviors and mindsets to reverberate throughout the organization.<sup>28</sup> They set policies and standards that seek to influence the ways that line prosecutors make decisions, hoping that a change in culture will follow suit.<sup>29</sup>

"*Culture eats policies for breakfast*," said one of the progressive prosecutors in a law school lunch talk, "culture is deep, extensive, and stable . . . . If you do not manage culture, it will manage you."<sup>30</sup> Indeed,

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27. Davis, *supra* note 19, at 114–24; KRASNER, *supra* note 10, at 180 ("In any social justice movement attempting to fix and rebuild broken, entrenched institutions, culture change is required and achievable only if personnel embrace the change."). See also David A. Sklansky, *The Future of the Progressive Prosecutor Movement*, 16 STAN. J. C.R. & C.L. i, iv (2021) (suggesting that "[c]ulture comes from the top down, and the values embraced by the head of the office matter. By shifting the official values of their offices, progressive district attorneys are changing who applies for jobs in their offices, who gets hired, who sticks around, and how they think about and talk about their jobs."); Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUSTICE: A REVIEW OF RESEARCH 224 (Michael Tonry ed., 2012) (suggesting that the American criminal justice system "still leaves a remarkable amount of room for prosecutors in each district to develop their own cultures and priorities").

28. Culture can be seen as "the set of understandings and interpretations that are shaped within a group, that create meanings for the significant events and challenges the group experiences, that guide how members of the group deal with each other and those outside the group, that assist them in managing the strains of their shared tasks, and that distinguish the group and its members from outsiders." See Stephen D. Mastrofski & James J. Willis, *Police Organization*, in THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 491–92 (Michael Tonry ed., 2011). See also David A. Klinger, *Environment and Organization: Reviving a Perspective on the Police*, 593 ANNALS AM. ACAD. OF POL. & SOC. SCI. 119, 126 (2004) (suggesting that more research should be done on studying culture in police agencies); Ronald F. Wright & Kay L. Levine, *Place Matters in Prosecution Research*, 14 OHIO STATE J. CRIM. L. 675, 677 (2017) (examining the "reasons why studies of offices of different sizes, located in demographically and culturally different regions, might reveal different truths about how prosecutors behave").

29. Foster Steinbeck, *Newly Elected Athens District Attorney Deborah Gonzalez Announces Day One Reforms, Plans*, THE RED & BLACK (Dec. 7, 2021), [https://www.redandblack.com/athensnews/newly-elected-athens-district-attorney-deborah-gonzalez-announces-day-one-reforms-plans/article\\_44a32178-4ee8-11eb-b51f-7726db9cae10.html](https://www.redandblack.com/athensnews/newly-elected-athens-district-attorney-deborah-gonzalez-announces-day-one-reforms-plans/article_44a32178-4ee8-11eb-b51f-7726db9cae10.html).

30. Miriam Aroni Krinsky, Executive Director, Fair and Just Prosecution, 21<sup>st</sup> Century Prosecutors: A Panel Discussion with Reform-Minded District Attorneys, (Oct. 29, 2019). Meanwhile, public defenders' offices can be subject to a different type of toxic culture, see JONATHAN RAPPING, GIDEON'S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE, at 79–80 (2020) (suggesting that public defenders in New Orleans have learned their practice through a "sink or swim culture" that normalizes trying cases with insufficient investigation and little preparation. Such a culture also reflects the lack of respect public defenders

while setting new office policy offers a formal logic for organizations' goals and orients prosecutors around them, this does not necessarily change the more elusive level of organizational behavior: its culture.<sup>31</sup> Organizations are notoriously resistant to change. Change, if it comes, will not be immediate.<sup>32</sup>

This Article seeks to construct a new normative paradigm for understanding organizational management and cultural change in prosecutors' offices by studying a group of reform-oriented prosecutors in the United States and a metropolitan prosecutor's office in Taiwan. In *Part I*, I first posit that the current conceptualization of cultural change is far too narrow and thus only accounting for an incomplete aspect of institutional change's rich and complex structure. Focusing on the "progressive prosecution movement" in the United States, this section presents two conventional theories of how a new culture is adopted by prosecutorial organizations. One considers culture as a particular "fit" between organizations and individuals and the other views culture as a means of formal institutional control. I argue that existing approaches are insufficient to explain the dynamic process of cultural change within a prosecutor's office.

*Part II* introduces my ethnographic case study of the Taiwan Office. This case study enables me to explore new theoretical concepts and normative framework with regard to institutional management in a prosecutor's office. Recognizing the differences between the two criminal justice systems, I demonstrate that the main features of the modern Taiwanese prosecutorial system—heightened external restrictions and scrutiny over prosecutors' power, a highly-structured internal bureaucratic management system, and the influence of the

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ultimately possess for their own clients).

31. EDGAR H. SCHEIN, *CAREER DYNAMICS: MATCHING INDIVIDUAL AND ORGANIZATIONAL NEEDS* (1978).

32. See BAZELON, *supra* note 9, at 149 (suggesting that "changing the judgment calls made in court and redefining what it meant to get it right was not so easy"); Sklansky, *supra* note 20, at iii ("Cultural change inside district attorneys' offices takes longer; it is hard to change the attitudes and orientation of line prosecutors."). Culture has long been seen as a persistent barrier to police reforms. Scholars have described the role of culture in shaping police behaviors, perceptions, and attitudes. See, e.g., WILLIAM K. MUIR, *POLICE: STREETCORNER POLITICIANS* 190 (1977) (arguing that a successful policeman must be alert to the different responses his authority evokes and describing four types of policeman); ELIZABETH REUSS-IANNI, *TWO CULTURES OF POLICING: STREET COPS & MANAGEMENT COPS* 86 (Howard S. Becker ed., 1983) (discussing the situation in the New York Police Department has wider implications for understanding of police behavior nationwide and the theme in the "two cultures of policing"); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 233 (1968) (discussing how to understand the concept of political culture and how political culture affects police behaviors).

American legal system and legal profession—make the Taiwan Office ideal for comparative analysis and for constructing a comprehensive theory of institutional management and change in a modern prosecutorial organization.

*Part III* and *Part IV* illustrate that cultural change was built on the premise of the exercise of *good sense*. What binds a community of prosecutors together is a nuanced psychological process I refer to as *sense-making*. I argue that cultural change should be seen as a “jurisdictional battle” and that cultural change is manifested in this *contested process*. Culture, under my framework, is shaped during the process within which *sense makers* seek to construct their legitimate authority to *sort* individuals and to *manage* them accordingly. To change existing culture, sense makers must wield *jurisdictional control* over certain domains and be recognized as legitimate actors in a given field. Based on their expertise, knowledge, and legitimate status, sense makers exert power and influence over other individuals within certain professional jurisdictions and they may well undermine the legitimacy of other competing groups or of potential resistance. Thus, cultural change consists of actions of continuous *boundary work* that occur within a professional field. Under my processual model, this Article argues that prosecutors have three options to settle jurisdictional battles: (1) establish jurisdictional control by carving out new task domains<sup>33</sup> (2) delegitimize existing sense makers by eliminating certain domains;<sup>34</sup> and (3) coordinate with existing sense makers by maintaining or expanding current domains.<sup>35</sup>

*Part V* makes normative and policy suggestions on how to reimagine prosecutorial organization in a post-bureaucratic context.<sup>36</sup> I offer a critical cautionary tale by showing that even in an

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33. *E.g.*, Andrew Guthrie Ferguson, *Big Data Prosecution and Brady*, 67 UCLA L. REV. 180 (2020) (adopting “intelligence-driven” strategies in prosecutors’ offices); Judith N. Phelan & Michael D. Schrunk, *The Future of Local Prosecution in America*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 247 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

34. *E.g.*, Levin, *supra* note 10 (refusing to prosecute certain offenses or ending the use of sentence enhancements).

35. *E.g.*, establishing the Conviction Integrity Unit and engaging with the innocence network. See Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2017); *Establishing Conviction Integrity Programs in Prosecutors’ Offices*, CENTER ON THE ADMINISTRATION OF CRIMINAL LAW (2012); John Hollway, *Conviction Review Units: A National Perspective*, QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUSTICE (Apr. 2016) [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship).

36. See also William H. Simon, *The Organization of Prosecutorial Discretion*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 175, 182-91 (Maximo Langer

organization that largely operates in a hierarchical and rule-governed manner, cultural change involves a tacit process of management for which the conventional bureaucratic model fails to provide an accurate and comprehensive explanation. This Article warns that using culture as a strategic tool of institutional management may end up enabling the exercise of prosecutorial discretion to remain beneath the surface, raising potentially grave ethical concerns. Such a hidden system can be used by prosecutors—even well-intentioned, reform-minded individuals—to circumvent external oversight and create a veneer of legitimacy.<sup>37</sup> This finding reveals an often-neglected limitation of existing tools designed to hold prosecutors accountable.

#### I. ENGINEERING OFFICE CULTURE: TWO CONVENTIONAL APPROACHES IN THE UNITED STATES

Translating reform visions to the everyday practices in a prosecutor's office can be demanding. Of all the challenges reform prosecutors encounter, perhaps none is greater than changing office culture.<sup>38</sup> As one progressive prosecutor said, "You can't make them do anything. They have to want to."<sup>39</sup> Thus, progressive prosecutors' ability to direct line prosecutors' exercise of discretion in desirable directions—i.e., to make them want to be part of the reform movement—is based on building a new culture that members will incorporate as an integral part of their professional identity.<sup>40</sup>

Scholars and commentators have recently highlighted the need to pay attention to culture within prosecutors' offices.<sup>41</sup> For reform-

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& David A. Sklansky eds., 2017) (demonstrating main features of a post-bureaucratic organization).

37. See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 41 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Catherine J. Turco, *Difficult Decoupling: Employee Resistance to the Commercialization of Personal Settings*, 118 AM. J. SOCIO. 380 (2012).

38. Thompson, *supra* note 5, at 50–51 ("[E]very leader casts a broad shadow that establishes a tone within the office and shapes – or misshapes – the office culture."). See also Victor Ray, *A Theory of Racialized Organizations*, 84 AM. SOCIO. REV. 26, 27 (2019) (suggesting that "[r]ace connects cultural rules to social and material resources through organizational formation, hierarchy, and processes).

39. Zoom Interview with Georgia based District Attorney (Aug. 2021) (transcript on file with author).

40. For an early study regarding the shaping of prosecutors' professional identity, see JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 273–95 (1980).

41. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008); Sklansky, *supra* note 20, at 26; Melanie D. Wilson,

minded leaders, culture offers opportunities for questioning and altering traditional work practices in their offices. However, empirical studies and social science literature have provided few accounts as to whether and how culture can be managed to support change in prosecutors' offices. In this section, I explore the two *conventional analytical approaches* for analyzing how a new culture is adopted by prosecutors' offices. One considers culture as a particular "fit" between organizations and individuals, the other sees culture as a means of formal control.<sup>42</sup> I argue that these two approaches are insufficient to explain cultural change in prosecutors' offices because they only show part of the structure of cultural change without considering its processual and dynamic nature.

#### A. HIRING AND FIRING: CULTURE AS FIT

*I manage a big office, with hundreds of prosecutors. Some are junior, some have been there for a decade, some have been there for about 30 years . . . You have to admit that cultural change is not going to happen overnight. But a key part of the culture change in my office involves the way we hire. The kind of questions we ask when we are hiring is a lot different . . . We used to hire people who wanted to be tough on crime and people who wanted to be the best trial attorneys. We now look for people who want to do justice and understand it's a very different obligation than just going into the courtroom and winning a case.*

Eric Gonzalez, Elected D.A.<sup>43</sup>

Robust hiring and firing practices are often used by progressive prosecutors.<sup>44</sup> They hope to achieve an ideal fit between person and organization through screening the best candidates or facilitating the turnover process.<sup>45</sup> This is why when many progressive prosecutors

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*Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67 (2008).

42. See, e.g., Davis, *supra* note 19, at 114 (suggesting that a reform-oriented chief prosecutor "should know how to organize and supervise her staff, set goals and expectations, and evaluate the performance of employees").

43. Eric Gonzalez, Dist. Att'y, Brooklyn Dist. Att'y Office, Address at the Stanford Criminal Justice Center and the Center for the Legal Profession, Conversation with Progressive Prosecutors (Oct. 15, 2020).

44. BAZELON, *supra* note 9, at 147–73; Davis, *supra* note 19, at 115, 117–18.

45. SCHEIN, *supra* note 31. See also Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1703–05 (2018).

first take office they let go of those individuals on staff who do not seem to fit within the desired new culture and then hire those who seem to—usually young, newly-minted attorneys or even lawyers who have been working in public defenders' offices.<sup>46</sup>

Like Philadelphia's Larry Krasner, many progressive prosecutors come to elite law schools to swap ideas and discuss the reforms they have put in place in their offices.<sup>47</sup> More importantly, they use such events as platforms to recruit law students.<sup>48</sup> "We are looking for those who want to serve," said one of the newly elected prosecutors I met in 2021.<sup>49</sup> When prosecutors' offices are hiring, they often focus on whether a person is the right "fit" for the organization.<sup>50</sup> One of the main objectives during the hiring stage is examining the compatibility between job-seekers and an organization's values, goals, and ethical standards. Hiring new blood is often seen as a critical element of progressive prosecutors' blueprint for building a new office culture.<sup>51</sup> Empirical studies have highlighted the importance of hiring decisions in reinforcing and legitimizing organizational culture.<sup>52</sup> Employers tend to rely on initial screening practices to look for candidates who

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(discussing the acceptable narratives for job candidates during the interview process in D.A.s' Offices).

46. See, e.g., Michael Barba, *New DA Boudin Hires Public Defenders Amid Staffing Shake-up*, THE S.F. EXAM'R (Jan. 13, 2020), <https://www.sfexaminer.com/news/new-da-boudin-hires-public-defenders-amid-staffing-shakeup/>; Max Marin, *Why Is the Philly DA's Office so White?*, BILLY PENN (Apr. 24, 2019, 8:30 AM), <https://billypenn.com/2019/04/24/why-is-the-philly-das-office-so-white/> (reporting that Krasner's office has implemented a new recruitment program to seek out diverse candidates).

47. Zoom Interview with Michigan based District Attorney (Oct. 2021) (transcript on file with author). "Fit," under this context, refers to not only the necessary technical skills and competencies for successful job performance but also a cultural component that reflects an organization's values, goals, and motivation structures.

48. *Id.* Studies suggest that better fit leads to beneficial work outcomes, such as increased job satisfaction and organizational commitment and decreased job turnover intention. See generally Jennifer A. Chatman, *Matching People and Organizations: Selection and Socialization in Public Accounting Firms*, 36 ADMIN. SCI. Q. 459 (1991); Jeffrey R. Edwards & Daniel M. Cable, *The Value of Value Congruence*, 94 J. APPLIED PSYCH. 654 (2009); Amy L. Kristof, *Person-Organization Fit: An Integrative Review of Its Conceptualizations, Measurement, and Implications*, 49 PERS. PSYCH. 1 (1996).

49. Zoom Interview with Colorado based District Attorney (Nov. 2021) (transcript on file with author).

50. See, e.g., Lauren A. Rivera, *Hiring as Cultural Matching: The Case of Elite Professional Service Firms*, 77 AM. SOCIO. REV. 999 (2012).

51. Zoom Interview with Pennsylvania based District Attorney (June 2021) (transcript on file with author). See also Timothy A. Judge & Daniel M. Cable, *Applicant Personality, Organizational Culture, and Organization Attraction*, 50 PERS. PSYCH. 359 (1997).

52. LAUREN A. RIVERA, PEDIGREE: HOW ELITES STUDENTS GET ELITE JOBS (2015).

demonstrate qualities that are similar to their own and can fit into the organization's culture.<sup>53</sup> Hiring, under this perspective, is more than a process of skills sorting; it is a process of cultural mating between candidates, evaluators, and organizations.<sup>54</sup> When done well, hiring for cultural fit allows the organization to avoid potential person-culture mismatch and unnecessary reality shock.<sup>55</sup>

In fact, many newly elected D.A.s have pursued a robust hiring practice. They rigorously assess their own hiring methods, and their record, to ensure that they are indeed recruiting the *right* people into their offices.<sup>56</sup> Some prefer to hire attorneys who have prior experience, some even openly favor those who have defense experience.<sup>57</sup> Others choose to hire most of their attorneys fresh out of law school, sometimes targeting graduates who spent time during law school clerking for the prosecution or worked for criminal justice reform organizations.<sup>58</sup>

Regardless of the types of candidates an office prefers, a hiring committee, usually in consultation with the elected district attorney, will administer the recruiting process.<sup>59</sup> During the review and

53. *Id.*; CATHERINE J. TURCO, *THE CONVERSATIONAL FIRM: RETHINKING BUREAUCRACY IN THE AGE OF SOCIAL MEDIA* (2016); Lauren A. Rivera & András Tilcsik, *Scaling Down Inequality: Rating Scales, Gender Bias, and the Architecture of Evaluation*, 84 AM. SOCIO. REV. 248 (2019).

54. See, e.g., Amy L. Kristof-Brown et al., *Consequences of Individuals' Fit at Work: A Meta-analysis of Person-Job, Person-Organization, Person-Group, and Person-Supervisor Fit*, 58 PERS. PSYCH. 281 (2005) (examining the relationship of different types of fit and individual-level outcomes); see also Jennifer A. Chatman & Charles A. O'Reilly, *Paradigm Lost: Reinvigorating the Study of Organizational Culture*, 36 RSCH. IN ORGANIZATIONAL BEHAV. 199 (2016).

55. For instance, various studies have shown that the initial experience of day-to-day police work, actually in person and out on the streets, has often conveyed a reality shock. See generally Nigel Fielding, *Police Socialization and Police Competence*, 35 BRIT. J. SOCIO. 568 (1984); Nigel Fielding, *Competence and Culture in the Police*, 22 SOCIO. 45 (1988); PETER MOSKOS, *COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT* (2008).

56. See generally Chatman, *supra* note 48, at 459, 473; John P. Meyer et al., *Person-Organization (Culture) Fit and Employee Commitment Under Conditions of Organizational Change: A Longitudinal Study*, 76 J. VOCATIONAL BEHAV. 458 (2010).

57. Zoom Interview with Pennsylvania based District Attorney (July 2021) (transcript on file with author); Zoom Interview with Georgia based District Attorney (Aug. 2021) (transcript on file with author).

58. Zoom Interview with Michigan based District Attorney (Sept. 2021) (transcript on file with author).

59. It is typical that the recruitment process in prosecutors' offices consists of multiple rounds of interviews that focuses primarily on individuals' trial skills and work ethic. See, e.g., Iman G. Lyons, *Memorandum*, GEO. WASH. U. L. CAREER CTR. (July 24, 2017), <https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Prosecution%20Office%20Memo.pdf> (surveying the hiring practices at prosecutors' offices in major U.S. markets).

interview process, the attitude, achievement, ability, and motivation of an applicant will be fully examined.<sup>60</sup> Many prosecutors I spoke to commented that they believe if you hire the “right” people in the beginning, you do not have to hover over their shoulders to micro-manage (and, of course, in turn, you do not have to socialize them rigorously and supervise them strictly).<sup>61</sup> One managing prosecutor of a unit remarked to me: “. . . if we don’t trust our prosecutors and always have to keep a close eye on them, why are we hiring them in the first place?”<sup>62</sup>

However, relying on hiring for cultural fit to promote change has many limitations. To begin with, hiring practices can stray from goals.<sup>63</sup> Studies have shown that, instead of hiring for person-organization fit, managers may instead turn to personal and social fit with individual employees.<sup>64</sup> As a result, managers often mistake rapport for cultural fit, which makes their gut judgements of fit poor

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60. See Wright & Levine, *supra* note 45, at 1705–09 (suggesting that the hiring process in D.A.s’ Offices often operate with “imperfect clues” and that interviewers may not learn enough about the applicants’ true motives).

61. See, e.g., Zoom Interview with Oregon based District Attorney (Oct. 2021) (transcript on file with author).

62. Interview with California based District Attorney (Dec. 2018) (transcript on file with author). See also Sameer B. Srivastava et al., *Enculturation Trajectories: Language, Cultural Adaptation, and Individual Outcomes in Organizations*, 64 MGMT. SCI. 1348 (2018) (finding that individuals who do not conform to cultural norms of the organization are rejected by their colleagues and ultimately forced to exit. The study also finds that those who subsequently exhibited a “decline in cultural fit” tend to leave voluntarily).

63. There have been well-documented concerns with regard to law firm hiring practices. The way that law firms hire has a detrimental effect on “students of color, students who have a non-traditional background, and first-generation students.” Zack Needles, *Big Law Doesn’t Have a Pipeline Problem. It Has an Elitism Problem*, LAW.COM (Feb. 15, 2021, 11:00 PM), <https://www.law.com/2021/02/15/law-com-trendspotter-big-law-doesnt-have-a-pipeline-problem-it-has-an-elitism-problem/> (reporting that the conventional notion of “Big Law material” leads to biased and exclusionary hiring practices). See also Michael W. Kraus et al., *Evidence for the Reproduction of Social Class in Brief Speech*, 116 PROC. NAT’L ACAD. SCI. 22998 (2019) (finding that bias in hiring decisions reproduces social inequality. The study demonstrates that recruiters, even with substantive experience interviewing candidates, instinctively use social class cues as proxies for job skills and cultural fit).

64. RIVERA, *supra* note 52. There is little empirical evidence that *perceived* fit during attraction and recruitment periods is an accurate reflection of *objective* fit relationships. This means that decisions by both applicants and recruiters are being made based on flawed (or at least uninformed) information. Studies found that, without establishing clear criteria for hiring, people tend to adjust their rational for cultural fit to match with the person they want to hire. See, e.g., Eric L. Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCH. SCI. 474 (2005) (finding that individual evaluators redefine the criteria used to assess merit in a manner tailored to the idiosyncratic strengths of an applicant of the desired gender).

indicators for future job performance.<sup>65</sup> Moreover, hiring extra prosecutors means seeking approval from other governmental officials, which takes time and effort.<sup>66</sup> Hiring new attorneys can also cost the office more in terms of the spending required for onboarding and training.<sup>67</sup> Not to mention that it takes time for new hires to gain the necessary experience and technical skills to perform as well as their senior counterparts. Finally, tensions may grow when new employees find themselves in sharp conflict with the existing office culture.<sup>68</sup> Many anecdotes from prosecutors' offices have shown that existing members may not be convinced of the wisdom of hiring decisions and may end up mocking the inexperience of those who are newly hired or circulating gossip and rumor about their missteps.<sup>69</sup>

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65. While many organizations invoke cultural fit as a reason to hire someone, far more common is its use to *not* hire someone. According to a recent meta-analysis of field experiments, high levels of hiring discrimination against Black men have remained relatively constant since the late 1980s, and discrimination against Latinos has only decreased a little. See Lincoln Quillian et al., *Meta-analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time*, 114 PROC. NAT'L ACAD. SCI. 10870 (2017).

66. In fact, cultural fit is tough to gauge—in part because organizational culture is difficult to clearly define and measure and can easily become a disguise for bias. When done wrong, hiring for cultural fit can undermine diversity and be used to exclude minority and underrepresented groups, especially those from lower social-class origins. A large body of empirical research has found that recruiters display bias against underrepresented minorities. See generally JENNIFER L. EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* (2019); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004). See also David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 553 (1996) (discussing the “invisible stage” of law firm recruiting process, where firms ask almost no substantive questions and focus on assessing whether the applicant will fit in to the firm’s culture).

67. THOMPSON, *supra* note 5, at 32–33 (discussing the importance of in-house training programs).

68. See, e.g., Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y. L. SCH. L. REV. 70 (2019) (arguing that hiring “good prosecutors” who care about criminal justice reforms will not help change the office culture because individuals eventually “became increasingly punitive, and no amount of training could counter this trend”).

69. Moreover, hiring for fit can have its darker side, with recruiters unconsciously falling prey to a reflect a “similar-to-me” effect rather than being indicative of actual fit within the organization’s culture. Recruiters tend to mistake alignment between themselves and the candidate for alignment between the candidate and the organization. See, e.g., RIVERA, *supra* note 52, at 143–47 (demonstrating that labor market matching, at least in the elite firms, is inherently related to the cultural capital that job applicants possess); Lauren A. Rivera, *Guess Who Doesn’t Fit In at Work*, N.Y. TIMES (May 30, 2015), [https://www.nytimes.com/2015/05/31/opinion/sunday/guess-who-doesnt-fit-in-at-work.html?\\_r=1&mtref=undefined&gwh=17DE4120763365C6B265FA695DC6621E&gwt=pay&asset](https://www.nytimes.com/2015/05/31/opinion/sunday/guess-who-doesnt-fit-in-at-work.html?_r=1&mtref=undefined&gwh=17DE4120763365C6B265FA695DC6621E&gwt=pay&asset)

Other than recruiting new prosecutors, another conventional way to foster a new culture is by *replacement* or *firing* existing members.<sup>70</sup> “Strong cultures die hard, if they die at all,” said Kim Ogg, Harris County, Texas District Attorney in November 2016.<sup>71</sup> Her first move toward change was to send 37 veteran prosecutors packing as she prepared to take office. Ogg said that the firings were part of her vision for a cultural change at the office.<sup>72</sup> Some prosecutors described this as the “Christmas Massacre.”<sup>73</sup> A few years later, Ogg even asked county officials to increase her office’s budget in order to hire about 100 new prosecutors as part of her progressive reforms.<sup>74</sup> Ogg is not alone. Many other newly elected prosecutors also consider replacement as the required underpinning for their vision of cultural change.<sup>75</sup> Often at the beginning of their terms of office, these

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Type=opinion.

70. For instance, Kim Ogg, a newly elected Harris County, Texas District Attorney in November 2016, started by firing 37 veteran prosecutors. Ogg said that the firings were part of her vision for an organizational change at the office. See Meagan Flynn, *Incoming DA Kim Ogg Prepares to Fire Dozens of Prosecutors*, HOUS. PRESS (Dec. 16, 2016), <https://www.houstonpress.com/news/incoming-da-kim-ogg-prepares-to-fire-dozens-of-prosecutors-9034289>; Matt Sledge, *For Insight into DA-Elect Jason Williams, Look to ‘Progressive Prosecutors,’* THE TIMES-PICAYUNE (Dec. 12, 2020), [https://www.nola.com/news/courts/article\\_91bd2408-3ca6-11eb-a142-df7dab535c9e.html](https://www.nola.com/news/courts/article_91bd2408-3ca6-11eb-a142-df7dab535c9e.html) (reporting that layoffs are inevitable if “people don’t believe in the culture change in the office”). See also Davis, *supra* note 19, at 117 (“If education, training, and supervision do not successfully engage staff lawyers, then the DA may need to fire them”).

71. See generally Kary Antholis, *A Conversation with Paul Butler about Progressive Prosecutors*, CRIME STORY (Feb. 24, 2020), <https://www.crimestory.com/2020/02/24/a-conversation-with-paul-butler-about-progressive-prosecutors/> (explaining the importance of dealing with prosecutors who are resistant to change and noting the need to “fire a lot of people”).

72. Meagan Flynn, *Incoming DA Kim Ogg Prepares to Fire Dozens of Prosecutors*, HOUS. PRESS, <https://www.houstonpress.com/news/incoming-da-kim-ogg-prepares-to-fire-dozens-of-prosecutors-9034289>; Gabe Greschler, *Why Did San Francisco’s New District Attorney Fire Seven Prosecutors?*, KQED (Jan. 12, 2020), <https://www.kqed.org/news/11795676/why-did-san-franciscos-new-district-attorney-fire-seven-prosecutors>.

73. *Id.*

74. Roxanna Asgarian, *D.A. Who Ran as a Reformer Says She Needs 100 More Prosecutors*, THE APPEAL (Feb. 8, 2019), <https://theappeal.org/da-who-ran-as-a-reformer-says-she-needs-100-more-prosecutors/>.

75. See, e.g., Shelly Bradbury, *Elected as A Reformer, Jefferson County’s Incoming District Attorney Is Pushing Out the Office’s Top Prosecutors*, THE DENVER POST (Dec. 4, 2020), <https://www.denverpost.com/2020/12/04/alexis-king-district-attorney-jefferson-county-fires-top-staff/> (reporting that various newly elected prosecutors in Colorado have seen dismissals as part of their effort to reform office practices); Chris Palmer et al., *Krasner Dismisses 31 from Philly DA’s Office in Dramatic First-week Shakeup*, THE PHILADELPHIA INQUIRER (Jan. 5, 2018), <https://www.inquirer.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html-2>.

progressive prosecutors send out messages that their prosecutors must develop new ways of thinking and behaving, or else they will be forced out of their current positions and replaced by prosecutors who can fit into the new office culture.<sup>76</sup>

However, replacement can often only reach management rank prosecutors, who do not enjoy civil servant protections.<sup>77</sup> Even without such bureaucratic barriers, large-scale dismissals of current members may harm office morale, diminish organizational memory, and even trigger specific pushbacks from within the organization.<sup>78</sup>

In sum, for the old culture to be replaced, many progressive leaders in the United States believe that their organizations have to recruit new members who can fit in well with the new culture while getting rid of the old culture carriers who may be unable or too stubborn to convert to new norms and practices.<sup>79</sup>

#### B. CULTURE AS FORMAL INSTITUTIONAL CONTROL

While many supervising prosecutors I spoke with stressed the importance of the hiring and firing process, not everyone sees cultural change through the lens of “fit.” As one progressive prosecutor recounted,

*I understand that sometimes firing is an unpleasant but necessary step to lead the office, as many of my colleagues believe . . . ideally, every prosecutor that I work with should be handpicked by me . . . but I don't like the idea of mass layoffs . . . I also have a duty to prevent my ship from sinking.<sup>80</sup>*

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76. BAZELON, *supra* note 9, at 159.

77. In some offices—such as L.A. County DA's Office—line prosecutors are protected by strong civil service laws. Unlike in Philadelphia, San Francisco, and many other so-called “at will” offices, line prosecutors in L.A. cannot be fired without just cause, and any decisions to terminate employment will be subject to multiple layers of review.

78. See ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS AND WELFARE* 23 (1953).

79. MIRIAM ARONI KRINSKY, *CHANGE FROM WITHIN: REIMAGINING THE 21<sup>ST</sup>-CENTURY PROSECUTOR* 167–69 (2022); Angela J. Davis, *Transforming the Culture: Internal and External Challenges to a New Vision of Prosecution*, in *PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE* 117–18 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022).

80. Kim Foxx, Dist. Att'y, Cook County State Att'ys Office, Keynote Address at the Northwestern Pritzker School of Law, The Children and Family Justice Center and American Constitution Society (Sept. 24, 2019) (notes on file with the author).

It is unrealistic to think that managers can achieve cultural change by simply hiring good people and getting rid of those individuals who are unable or unwilling to convert. Leaders of a prosecutor's office have to accept the fact that, in most circumstances, they are stuck with the majority of their existing members. Therefore, another management technique that has attracted the attention of socio-legal scholars and progressive leaders is the idea of "teaching an old dog new tricks."<sup>81</sup>

Even after an organization hires people for cultural matching, there may be new employees who do not have the ability to advance in the organization.<sup>82</sup> Some candidates may be quite sophisticated during the interview process and incorrectly convey high levels of cultural fit. Recruiters may suffer from cognitive biases and hire candidates who do not *actually* fit into the organizational culture. In any event, the organization will still have to rely on a post-entry mechanism: organizational socialization.<sup>83</sup> Given the diverse and complex topics of today's prosecutorial reforms, post-entry socialization is vital.<sup>84</sup> A well-managed socialization process can ensure prosecutors acquire the requisite knowledge and skills and internalize new norms and standards.<sup>85</sup> Through socialization, the organization's values, norms, knowledge, skills, and behavioral patterns are transmitted to its members.<sup>86</sup> If a progressive leader can

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81. See generally Ellen Yaroshefsky & Bruce A. Green, *Prosecutor's Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 286 (Leslie C. Levin & Lynn Mather eds., 2012) (2012) (suggesting that informal socialization has a deeper impact on prosecutors' behaviors); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutor Syndrome*, 56 ARIZ. L. REV. 1065 (2014) (arguing that as prosecutors gain experience, they are better able to adjust their responses to individual cases and to avoid going to trial just to prove their professional worth).

82. See Rivera, *supra* note 50, at 1008.

83. See also ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* *passim* (2007) (discussing the transformative impact of legal education and law school socialization on students' understanding of what it means to be a lawyer).

84. Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012).

85. For empirical study on prosecutors' socialization experience, see Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 L. & SOC. INQUIRY 648 (2017); Wright & Levine, *supra* note 81. For the formation of the "us versus them" mentality, see, e.g., Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors' Morality Tales*, 5 VA. J. CRIM. L. 38 (2017) (discussing prosecutors' professional self-images and narratives regarding their own duties and those of their adversarial counterparts. The study finds that "wearing the white hat," "going over to the dark side," "being a true believer," and "drinking the Kool-Aid" are common descriptive phrases used by state prosecutors).

86. A primary objective of organizational socialization is the "control of the

successfully socialize his or her subordinates, the leader will feel confident regarding their abilities to perform the job; sense that they are accepted by their colleagues; and trust that they fully share the assumptions, norms, and values that are the prerequisite for the new culture.<sup>87</sup>

Many progressive prosecutors develop robust management systems for their offices, mainly by measuring either performance outcomes or behaviors, and sometimes by measuring both.<sup>88</sup> Under this system, new units are often created, new memos are circulated, and office protocols and standard operation procedures are strictly implemented.<sup>89</sup> Line prosecutors are routinely evaluated by their supervisors based on their productivity or the quality of their

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heart." See generally Norman Conti, *Role Call: Preprofessional Socialization into Police Culture*, 16 POLICING & SOC'Y 221 (2006) (discussing the selection process as a crucial component of police professional socialization); WILLIAM K. MUIR JR., POLICE: STREETCORNER POLITICIANS (1977); John Van Maanen & John Edgar H. Schein, *Toward a Theory of Organizational Socialization*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR 209 (1979); John Van Maanen, *The Smile Factory: Work at Disneyland*, in REFRAMING ORGANIZATIONAL CULTURE 58 (Peter J. Frost et al. eds., 1991).

87. But see Charles A. O'Reilly III et al., *The Promise and Problems of Organizational Culture: CEO Personality, Culture, and Firm Performance*, 39 GRP. & ORG. MGMT. 595, 597 (2014) (indicating that the empirical evidence supporting the proposition that organizational culture is shaped by an organization's leaders is "fragmented and inconclusive").

88. See, e.g., Memorandum from District Attorney Deborah Gonzalez on Fairness and Equity in the Western Judicial Circuit District Attorney Office (Jan. 1, 2021), <https://drive.google.com/file/d/1SHwcNeKMZmsCMJkddUvC7nu6ycS.GG9l/view> (announcing more than 40 new policies); Prosecutorial Performance Indicators, PPI Brochure (Sept. 2020), <https://ppibuild.wpengine.com/wp-content/uploads/2020/09/PPI-Brochure-Inside-Sept-2020.pdf> (providing an overview of performance indicators for reform-oriented prosecutors' offices). In addition, a growing number of scholars have suggested need for a more centralized prosecutorial administrative and management system to improve consistent and accountable application of rules and policies. See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98 (1975); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 L. & SOC. REV. 247, 300-03 (1998); Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor's Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169 (2020); Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 399-401 (2017). The hierarchical structure of the prosecutors' offices is believed to reinforce their professional identities and shape office outputs, including charging decisions, case dispositions, and relationships with police. See Levine & Wright, *supra* note 84. Incorporating better institutional design and structural changes could make managers more effective in shaping the work of their staff and policing prosecutors' individual decisions. See Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

89. One of the permanent examples for this type of organizational reconstruction is the creation and proliferation of the Conviction Integrity Unit or the Conviction Review Unit. See Scheck, *supra* note 35; *Establishing Conviction Integrity Programs in Prosecutors' Offices*, *supra* note 35; Hollway *supra* note 35.

decisions, among many other types of performance measurements.<sup>90</sup> The assumption is that bureaucratic devices—a set of formal control mechanisms such as training, programs, policies, rules, supervision, and review-and-approval protocols—play a crucial role in enabling leaders to shape culture.<sup>91</sup> The rationale is that the policies and incentive structures leaders put in place, and hierarchical structures inside their offices, are supposed to have a tremendous impact upon line prosecutors. Progressive leaders can then design (or redesign) key features of performance standards, training, procedures, policies, the use of supervisory approval, and programs to cultivate office buy-in.<sup>92</sup> Some offices have even started using “DASTAT,” a management and technological system that modifies the COMPSTAT<sup>93</sup> in police departments to provide managers information and indexes at different levels in the organization, such as charge rates, warrant declination rates, caseloads, trial outcomes, and individual unit performance outcomes.<sup>94</sup>

Culture change, channeled through a set of formal institutional control mechanisms designed from the *top-down*, requires the organization to develop or recalibrate extrinsic rewards (promotion, compensation, benefits, etc.).<sup>95</sup> For such a control mechanism to be fully operative it needs to direct behaviors, meaning that line prosecutors have to perceive those top-down instructions as legitimate. Under this perspective, to change culture is to change prosecutors’ deeply held assumptions as well as redefine what ends

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90. Prior studies in the organizational culture tradition focuses primarily on senior leaders’ *bureaucratic authority* to constitute and reconstitute an organization’s culture. Under this approach, culture can serve as a toolkit for founders or leaders of an organization in dismantling and assembling the basic building blocks of an office—usually through a set of formal control mechanisms such as trainings, programs, policies, rules, supervision or review-and-approval protocols, and rewards. See KIM S. CAMERON & ROBERT E. QUINN, *DIAGNOSING AND CHANGING ORGANIZATIONAL CULTURE* (3d ed. 2011).

91. ABADINSKY, *supra* note 3, at 83–84 (discussing different organizational designs for case processing).

92. Pamela J. Utz, *Two Models of Prosecutorial Professionalism*, in *THE PROSECUTOR* 114–19 (William F. McDonald ed., 1979) (discussing the institutional conditions of prosecutors’ offices).

93. See SARAH BRAYNE, *PREDICT AND SURVEIL: DATA, DISCRETION, AND THE FUTURE OF POLICING* (2020); James J. Willis et al., *Making Sense of Compstat: Theory-Based Analysis of Organizational Change in Three Police Departments*, 41 L. & SOC’Y. REV. 147 (2007). See also ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 38–42 (2018).

94. Fieldnotes from California based District Attorney’s Office (Sept. 2017) (notes of file with author).

95. Jennifer A. Chatman & Sandra Eunyoung Cha, *Leading by Leveraging Culture*, 45(4) CALIFORNIA MANAGEMENT REV. 20 (2003) (“Formal rules are useful for standardizing performance and avoiding having to relearn things each time.”).

they are to consider legitimate.

Nonetheless, there are at least three limitations to this approach. First, relying on a formal control system to foster cultural change means an organization has to use direct supervision to monitor performance. Yet direct supervision is one of the most expensive methods by which information on work activities can be acquired. Direct observation of some aspects of prosecutors' performances may not be possible. As some prosecutors have pointed out, the scrutiny required to directly observe line prosecutors may be difficult for supervisors to manage given the potential negative effects on those being supervised.<sup>96</sup> Moreover, as a practical matter, this type of scrutiny can rarely apply to the management of the office, who often play a key role in shaping organizational culture.<sup>97</sup>

Second, research has shown that overreliance on extrinsic rewards and sanctions can reduce individuals' sense of autonomy and competence.<sup>98</sup> This is particularly true for prosecutors, as many believe their intrinsic motivations to "do justice" should be the main originators of their own behaviors rather than external rewards that reduce them to pawns without true volition. Very few will want the proper function of the prosecution to be instrumentally linked to extrinsic rewards.<sup>99</sup> Changing organizational culture through material rewards or sanctions tends to build up individuals' self-oriented interests as the basis for conforming to the new mandates, rather than convincing them that these new values and practices are worthy of internalization in their own right.<sup>100</sup>

The third limitation of this approach is that individual prosecutors do not always consider authority from the upper echelon as legitimate authority.<sup>101</sup> As many newly elected district attorneys

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96. Fieldnotes from California based District Attorney's Office (Aug. 2018) (notes on file with author).

97. See Antholis, *supra* note 71.

98. See Edward L. Deci et al., *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCH. BULL. 627, 628 (1999).

99. Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1667 (2018).

100. BAZELON, *supra* note 9, at 159–61 (describing how line prosecutors often feel frustrated by how little discretion they are able to exercise). See also Ellen Yaroshesky, *Can a Good Person Be a Good Prosecutor*, 87 FORDHAM L. REV. ONLINE 35, 38 (2019) ("[Young prosecutors] may believe that they are a good prosecutor until . . . they are overruled by a superior and told to advocate for high bail, a criminal conviction, or a lengthy sentence. Following orders may be necessary to maintain employment, but it does harm if that young prosecutor knows that it does short- and long-term damage to the individual charged and ultimately to the community.").

101. See Antholis, *supra* note 71 (warning law students that working within the

have learned, when confronted with influence attempts from others, especially when such appeals take the form of arbitrary orders or commands, individual prosecutors consistently experience strong psychological recalcitrance and shift their attitudes and behaviors in a direction opposite to those being advocated or demanded.<sup>102</sup> For those reform-minded prosecutors who entrust their cultural change agenda to formal institutional control systems, it is crucial to be aware that they are walking a fine line between the exercise of legitimate authority and the potential for reactance or loss of intrinsic motivation among their prosecutors.<sup>103</sup>

To conclude this section, the two dominant approaches of cultural change each have their limitations that cannot account for the nuanced and dynamic processes of cultural change that occur within an organization. As prosecutorial reforms become more complex and the need for flexibility and adaptability increase, changing organizational culture through hiring or formal institutional control systems will be less effective and sometimes more costly. Moreover, not every office can engage in robust hiring and firing practices like the largest and best-funded jurisdictions.<sup>104</sup>

However, since the two mechanisms have traditionally dominated the attention of both prosecutors and legal, as well as non-legal, scholars, we have had few opportunities to explore other possible channels and a more rounded theoretical model for cultural change and, more generally, to inquire about institutional management in modern prosecutorial organizations. To further explore an alternative theoretical and normative paradigm, this Article has turned to *comparative institutional analysis*.

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system contributes to mass incarceration and racial disparities).

102. Davis, *supra* note 19, at 105 (“[N]ewly elected progressive prosecutors face the challenges of transforming offices full of ADAs with entrenched views about what it means to be a prosecutor.”).

103. In fact, many reform-oriented offices involved in my study are facing pressing morale issues and some even have retention problems.

104. A newly elected prosecutor in Georgia was able to hire 14 new line prosecutors among the 17 positions in the office. However, she indicated that much of her focus during the hiring was to find someone who can fill those open positions and process large number of cases. Zoom Interview with Newly Elected Line Prosecutor in Georgia (Aug. 20, 2021) (transcript on file with author).

## II. TAIWAN OFFICE: A CASE STUDY OF A POST-BUREAUCRATIC PROSECUTORIAL OFFICE

### A. THE PROSECUTORIAL SYSTEM IN TAIWAN AND THE MAKING OF A NEW PROFESSION

Given the inadequacies of the two conventional approaches regarding cultural change discussed above, I am introducing an ethnographic case study of Taiwanese prosecution as an alternative channel to unpack institutional management strategies in a *post-bureaucratic* context.<sup>105</sup> This section will explain why I believe the prosecution in Taiwan provides a strong case for such theoretical construction.<sup>106</sup>

As a relatively new democracy, Taiwan did not enjoy self-government until the first direct presidential election in 1996.<sup>107</sup> Over the past two decades, the Taiwanese political system and its legal system have been gradually transformed from authoritarian rule to a peaceful, self-governing democracy committed to due process and human rights protection. Criminal trials in Taiwan also took a big step from being non-adversarial toward a much more adversarial process.<sup>108</sup>

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105. See MARTYN HAMMERSLEY, *READING ETHNOGRAPHIC RESEARCH: A CRITICAL GUIDE* xii (1990 Longman) (introducing the nature of ethnographic research and providing criteria by which ethnographic studies should be evaluated). See also JOHN VAN MAANEN, *TALES OF THE FIELD: ON WRITING ETHNOGRAPHY* (1988) (discussing different narrative and rhetorical conventions of ethnography).

106. See generally Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071 (2019) (implementing a similar research approach to study U.S. federal prosecutors).

107. Throughout the late 1980s and early 1990s, Taiwan transitioned from the one-party (Kuomintang) military dictatorship established by Chiang Kai-shek in 1949 to a multi-party democracy, see LIQUN CAO ET AL., *POLICING IN TAIWAN: FROM AUTHORITARIANISM TO DEMOCRACY* 6 (2014). The Taiwanese experience of democracy is unique in its practices and structures. Although theories and practices of democracy in other countries have led to significant changes in Taiwan's political landscape, Taiwanese democracy continues to show its special character, see PHILIP PAOLINO & JAMES MEERNIK, *DEMOCRATIZATION IN TAIWAN: CHALLENGES IN TRANSFORMATION* 2 (Ashgate Publ'g Co. 2008); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 108 (Cambridge Univ. Press, 2003) (suggesting that one of the distinctive elements of Taiwan's experience is its "gradual and extended democratic transition"). See also Margaret K. Lewis, *Forging Taiwan's Legal Identity*, 44 BROOK. J. INT'L L. 489, 503–11 (2019) (discussing the development of modern Taiwanese law).

108. See generally WANG TAI-SHENG, *TAIWAN FALU XIANDAIHUA LICHENG: CONG NEIDI YANCHANG DISTRICT ATTORNEY'S OFFICE ZIZHU JISHOU* [THE PROCESS OF LEGAL MODERNIZATION IN TAIWAN: FROM THE EXTENSION OF MAINLAND TO INDEPENDENT RECEPTION] (2015) (discussing the evolution of modern Taiwan's criminal justice

Since Taiwanese prosecutors wield vast discretion not commonly known by persons outside the system and make critical decisions during the investigation phase, the prosecutorial system has long been criticized for its lack of accountability and transparency. Like its U.S. counterpart, reforming the prosecutorial system is one of the core tasks of Taiwan's modern criminal justice reforms.<sup>109</sup> In 1999, Taiwan convened the First National Judicial Reform Conference (the First NJRC) and introduced multiple reform agenda items.<sup>110</sup> The First NJRC marked a milestone in a series of progressive, and perhaps radical, criminal justice reforms in the short period of just two decades. As the centerpiece of the First NJRC, reformers sought to increase public trust in the judicial system and to clarify the roles of prosecutors by making trials more contested and emphasizing the prosecutor's burden of proof.<sup>111</sup> The transition to the "modified adversarial system" (*Gai Liang Shi Dang Shi Ren Jin Xing Zhu Yi*) was perhaps the most noticeable proposal, among many others.<sup>112</sup>

Meanwhile, reform-minded prosecutors, mostly younger generations in their late 20s and 30s, had continuously cried out for a systematic change from within.<sup>113</sup> They heavily criticized nepotism-

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system); WANG TAI-SHENG, JURISPRUDENCE WITH HISTORICAL THINKING: COMBINATION OF TAIWANESE SOCIAL HISTORY OF LAW AND LEGAL REASONING 274–328 (2010) (discussing the historical development of Taiwanese prosecutorial system).

109. See Tom Ginsburg, *The Warren Court in East Asia: An Essay in Comparative Law*, in EARL WARREN AND THE WARREN COURT 265, 283–86 (Harry N. Scheiber ed., 2007) (explaining that Taiwan's criminal procedure was underdeveloped under authoritarian rule). For an overview of Taiwan's modern legal reform, see Sifa Gaige Shi Zhounian de Huigu yu Zhanwang Huiyi Shilu [The Tenth Anniversary of National Conference on Judicial Reform: Retrospect and Prospect (Symposium Records)] (Tang De-Chung & Huang Kuo-Chang eds., 2010).

110. The First National Judicial Reform Conference met under the leadership of the then-president Lee Teng-hui.

111. In a series of reforms since 2002, criminal trials in Taiwan began to take steps from a non-adversarial system toward a more adversarial one. Prior to 2002, the prosecutor would simply read the opening statement word for word, and the defense attorney had little if any role to play during trial proceedings. The revisions of the Code of Criminal Procedure reiterated that the burden of proof should be on the prosecution, not on the judge. By design, the judge is expected to play a much more neutral, passive role. See generally Brian L. Kennedy & Chun-Ling Shen, *The Best of Times and the Worst of Times: Criminal Law Reform in Taiwan*, 12 AM. J. CHINESE STUD. 107, 115–18 (2005); Margaret L. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT'L L. 651, 662–79 (2009).

112. Lewis, *supra* note 111, at 662–79; Margaret K. Lewis, *Who Shall Judge? Taiwan's Exploration of Lay Participation in Criminal Trials*, in TAIWAN AND INTERNATIONAL HUMAN RIGHTS 437, 440 (Jerome A. Cohen et al., eds., 2019).

113. Tsai Pi-Yu, SIHFA CHIH LU: Falyuren De Shengya Tansuo Yu Jyueze [The Role to Justice: Career Opportunities and Choice of a Lawyer] (2019) (discussing the role and ethical challenges of prosecutors in the changing Taiwanese society).

based promotional practices and an allegedly constant and reckless intrusion from the Ministry of Justice (MOJ) upon individual prosecutors' decisions.<sup>114</sup> The reform movement gradually gained major momentum in 2016. Since President Tsai Ing-wen launched in late 2016 her own judicial reform agenda, known as the Second National Judicial Reform Conference (the Second NJRC), hundreds of editorials and comment pieces regarding Taiwanese prosecutors have been published on multiple platforms. The Tsai administration's goal is to restore public confidence in Taiwan's legal system.<sup>115</sup> Discussions at the Second NJRC accelerated a huge public debate on issues surrounding procuracy.<sup>116</sup> Critics labeled the Taiwanese prosecution as a "mafia-like organization";<sup>117</sup> a group of "conservators who play old tricks";<sup>118</sup> or "corrupted bribe-takers".<sup>119</sup> Once again, prosecutors have become the central target of criminal justice reform.<sup>120</sup>

#### B. WHY THE TAIWAN OFFICE?

My choice of the Taiwan District Prosecutor's Office (*hereinafter* Taiwan Office) was a strategic one. Like its U.S. counterpart, the prosecutorial system in Taiwan has long been criticized by

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114. For the impact of criminal justice reforms on prosecutors' role, see MINISTRY OF JUSTICE, KUA SHIDAI DE ZHENGYI [JUSTICE IN THE NEW ERA] (2008); see also CHIANG SHYH-MING, Falu Lunlixue [LEGAL ETHICS] 164-94 (discussing the role and functions of Taiwanese prosecution and ethical standards for prosecutors) (2018).

115. See Lewis, *supra* note 107, at 511 ("In her May 2016 inaugural remarks, [President Tsai] highlighted 'social fairness and justice' as a key area for her administration to address and cautioned that people feel the current judicial system is unable to fight crime effectively.").

116. See Lewis, *supra* note 107, at 512 (arguing that transparency, clarity, and participation are three "animating principles of Taiwan's legal system").

117. Jin Heng-Wei, *Wan Ru Hei Bang De Jian Cha Ti Xi* [Prosecution, A Mafia-Like Organization], LIBERTY TIMES NET (May 2, 2017) (Taiwan), <http://talk.ltn.com.tw/article/paper/1098989>.

118. Lin Meng-Huang, *Shei Zai Wan "Lao Ba Xi"? Cong Jian Gai Hui Yao Jian Cha Guan Dai Biao Tui Chu Si Gai Hui Yi Tan Qi* [Who Is Playing Old Tricks], SHANG BAO (May 3, 2017, 7:02 AM) (Indon.), [http://www.upmedia.mg/news\\_info.php?SerialNo=16393](http://www.upmedia.mg/news_info.php?SerialNo=16393).

119. Zhang Jing, *Pei Shen Zhi Shih Tai Wan Shi Fa Jie Chu Shi De Liang Fang* [Jury Trial is the Cure for Taiwan's Judiciary], SHANG BAO (Feb. 25, 2017, 7:00 AM) (Indon.), [https://www.upmedia.mg/news\\_info.php?SerialNo=12638](https://www.upmedia.mg/news_info.php?SerialNo=12638).

120. A senior prosecutor serving as a committee member of the Second NJRC, warned that "[e]nemies are at the gates and we prosecutors have become the central target," Yang Guo-Wen & Xiang Cheng-Zhen, *Chen Rui Ren Dui Jian Cha Guan Ji Fa Gong Kai Xin: Yi Bing Lin Cheng Xia* [A Letter to Prosecutors], LIBERTY TIMES NET (Mar. 10, 2017, 9:29 PM) (Taiwan), <https://news.ltn.com.tw/news/politics/breakingnews/2000572>.

progressive advocates for its lack of efficiency, accountability, and transparency. The new generation of Taiwanese prosecutors have to deal not only with the changing landscape of criminal trials but also face increasing legal restrictions on their investigative power and public criticism.<sup>121</sup>

Against this backdrop of progressive reform momentum created by the NJRC, Chen Wu-syong,<sup>122</sup> who has now been promoted to another position, was appointed by the justice minister as the chief prosecutor for the Taiwan Office in the summer of 2016.<sup>123</sup> Just a few days after Chen took over that position, major turmoil was looming at the top of the prosecutorial hierarchy. The Legislative Yuan, the highest legislative organ of Taiwan, was actively considering the abolition of the Special Investigation Division (SID) of the Supreme Court Prosecutor's Office—a unit led by the prosecutor general that had long been criticized as becoming abusive of its power. The SID was set up in 2007 under former President Chen Shui-bian to investigate and prosecute corruption, financial crimes, and other abuses of power by those at the highest levels of government.<sup>124</sup> Suspicions among lawmakers and the public that the SID had become a tool of political retribution eventually did seal its fate.<sup>125</sup> In November 2016, Taiwanese lawmakers voted to officially dissolve the SID. All its cases were handed over to the county and municipal prosecutors' offices. For Chen, this was an unprecedented opportunity as new task domains opened up.<sup>126</sup>

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121. Recent years have seen many amendments aimed at restraining prosecutors' powers to (1) detain suspects; (2) conduct search and seizure; and (3) engage in communication surveillance. See Wang Tay-Sheng, Juyou Lishi Siwei De Faxue: Jiehe Taiwan Falushehuishi Yu Falu Lunzheng [Jurisprudence with Historical Thinking: Combination of Taiwanese Social History of Law and Legal Reasoning] 219-23 (2010) (discussing the historical development of Taiwanese prosecutorial system); *Legislative History*, LAW & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, <http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?PCode=C0010001> [<https://perma.cc/F6BQ-FU6K>] (last visited Aug. 20, 2022) (listing the legislative history of the Code of Criminal Procedure).

122. In order to protect individuals' identities, all of the names that appear in this article are pseudonyms.

123. Fieldnote no. 24, at 2 (notes on file with author).

124. See Press Release, Supreme Prosecutors Office (Mar. 30, 2007), <https://www.tps.moj.gov.tw/media/54479/71015152854181.pdf?mediaDL=true> (announcing the starting date for the operation of the SID).

125. See Press Release, Supreme Prosecutors Office, News Release of The Supreme Prosecutors Office (Sept. 15, 2008), <https://www.tps.moj.gov.tw/media/54483/8926104832501.pdf?mediaDL=true> (clarifying the controversial role of the SID during the investigation of former Taiwanese President Chen Shui-bian and his family members' alleged involvement in corruption with state affairs funds and money laundering).

126. Fieldnote no. 24, at 5 (notes on file with author).

In my first meeting with him back in 2016, Chen expressed great interest in responsibly inheriting the legacy of the SID. To do so, he was determined to revitalize the morale of the Taiwan Office and to develop a “proactive and fighting institutional culture,” in which prosecutors had the skills, ability, and courage to investigate and prosecute complicated crimes, particularly those involving politically powerful figures, wealthy corporate leaders, and their heirs. “A new and bold office culture, supported by cutting-edge management strategies, is essential,” Chen emphasized to me during a dinner we later had together in 2019. What Chen envisioned was an office culture in which prosecutors would be willing and able to “deal with big cases” (*Ban Da An*)—cases that are considered of high value—while maintaining an appropriate public image.<sup>127</sup>

After initial data collection, it became apparent from the initiation of the Second NJRC and Chen’s vision to rectify the Taiwan office, along with the fierce public debate about and growing demand for prosecutorial reforms, that an unprecedented opportunity had dawned for the study of cultural change within a non-U.S. prosecutor’s office. I determined that a different methodological approach with a more nuanced data collection protocol was required to capture individuals’ narratives regarding culture formation and cultural change. Specifically, the combination of *external* demands for prosecutorial reforms and *internal* incentives for institutional change made the Taiwan office an ideal research site for expanding the conceptualization of cultural change within prosecutors’ offices. Like American prosecutors’ offices, the Taiwan Office must attend to wider ideological expectations about what the organization should look like, how resources should be allocated, what goals should be served, and what culture should be sustained.<sup>128</sup>

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127. Fieldnote no. 24, at 6 (notes on file with author). The notion of *big cases* usually refers to sensitive or high-profile cases. However, there is no clear definition of what exactly constitutes a big case and what the organizational environment surrounding the investigation of big cases looks like. It is largely a culturally constructed idea conditioned upon the given circumstances. The seriousness of the charges and the harms caused to the victims no doubt make a case appear more likely to be a big one. But there are plenty of examples where quite routine practices of criminal case investigation, as information continued to be collected, later turned it into a cause célèbre. Therefore, many Taiwanese prosecutors believe that almost any matter can turn into a big case, depending on the nature of the crimes involved and how criminal investigation is developed.

128. For comments from Taiwanese prosecutors regarding criminal justice reforms, see generally Tsai Pi-Yu, *Jiancha Shouji: Ni Suo Buzhi District Attorney’s Office de Jianchaguan* [A Prosecutor’s Private Notes: What You Don’t Know about Prosecutors] (2013); CHEN RUI-REN, ZHIFA SUOSI [LAW & ORDER, JUDICIAL REFORM] (2014); JIANCHAGUAN GAIGE XIEHUI [PROSECUTORS REFORM ASSOCIATION], ZHENGYI ZHI JIAN: JIANGAIHUI SHIZHOUNIAN JINIAN ZHUANJI [10<sup>TH</sup> ANNIVERSARY OF PROSECUTORS REFORM

As the chief prosecutor of the Taiwan Office, Chen had to respond to multiple and sometimes conflicting external demands, which could not always be easily reconciled with the organization's own incentives. The Taiwan Office thus provided me a platform to examine whether and how members inside a prosecutor's office create and maintain a mobilized network, as well as a management strategy, in order to respond to reformers' demands to bring about institutional change. It further allowed me to interrogate whether organizational elites in a prosecutorial organization made visible, public commitments to satisfy external demands for change while treating such commitments as just "myth and ceremony" by ensuring that the real day-to-day, behind-the-scenes work was unaffected by those public commitments.<sup>129</sup>

Two features of the Taiwanese prosecutorial system further make the Taiwan Office ideal for posting my theoretical construction of institutional management and cultural change, including how Taiwanese prosecutors are recruited and the highly hieratical organizational structure in Taiwan.<sup>130</sup>

One of the distinctive features of Taiwanese prosecution is its lack of robust *hiring* and *firing* practices. Entry into a prosecutor's office is a one-sided selection process in which individuals choose the place where they want to work, while the offices do not normally have the ability to review and select (or reject) individuals.<sup>131</sup> As a result, it is common for prosecutors' offices to be assigned new prosecutors about whom they know relatively little, let alone have any information concerning whether the hires will fit within the existing organizational culture. Admittedly, one would expect that the lack of discretion during the initial entry phase—accompanied by a rigid rule of civil servant protection that limits chief prosecutors' power to let go of line prosecutors, and a sophisticated bureaucratic technology for

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ASSOCIATION ARCHIVES] (2008).

129. See Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407, 410 (1999) (suggesting that organizations and professions strive to construct rational responses to law).

130. See LIN YU-HSIUNG, XINGSHI SUSONG FA [CRIMINAL PROCEDURE LAW] PART I 7–13 (7<sup>th</sup> ed. 2013); Zhang Li-Qing, *Xingshi Susong Fa Bainian Huigu yu QianZhan* [Overview of the Past Hundred Years of Criminal Justice Reform], 75 YUEDAN FAXUE ZAZHI [TAIWAN L. REV.] 40, 40–59 (2001) (examining Taiwan's criminal justice reform).

131. Candidates who are about to graduate from the Academy for the Judiciary in Taiwan will participate in an assignment forum and openly announce their placement preferences. The final grade regarding an individual's performance determines his or her priority during the assignment process. Once a candidate makes the determination regarding which district court or prosecutor's office to work in, it is often irrevocable. As long as candidates receive high grades in the academy, they then can join and work in any office they prefer.

hierarchical review and internal control as part of the legal heritage drawn from Japan<sup>132</sup>—will inevitably force prosecutorial offices to turn to robust post-entry management systems in order to control individual prosecutors and to achieve cultural change.<sup>133</sup>

Surprisingly, as I detail later in this Article, this assumption was largely unsupported by my fieldwork.<sup>134</sup> To ensure that individual prosecutors acquired the knowledge, value, and skills necessary to assume and fulfill their roles as prosecutors, and to adapt to the new culture, I argue that Chen's Taiwan Office had to gradually develop a managerial structure that has never been documented in any previous social science studies on prosecutors. Thus, the structure of the Taiwanese prosecution makes the Taiwan Office an ideal site for my inquiry into cultural change and its conceptualization.

Finally, as a comparative matter, a growing number of scholars in the United States have suggested the need to create more centralized prosecutorial hierarchies in order to improve the consistent and accountable application of rules and office policies.<sup>135</sup> A hierarchical structure of the prosecutors' offices is believed to reinforce prosecutors' professional identity and shape office outputs, including charging decisions, case dispositions, and relationships with police.<sup>136</sup> My case study of the Taiwan Office further enabled me to demonstrate how such a centralized bureaucratic system—like the one in place in the Taiwan Office—*actually* functioned and to offer comparative

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132. See generally WANG TAY-SHENG, QU FAYUAN XIANGGAO: RIZHI TAIWAN SIFA ZHENGYIGUAN DE ZHUANXING [GO TO COURT: THE TRANSFORMATION OF "JUDICIAL CONSCIOUSNESS" IN TAIWAN UNDER JAPANESE RULE] (2017) (discussing the legal heritage under Japanese rule).

133. Multiple bureaucratic mechanisms—such as routine internal reviews, performance evaluations, and data collection—were developed to improve consistent and accountable application of office policies, as well as to create an environment for managers to know about and monitor line attorney performance, see Hsu Heng-da, *The Development and Reform of Taiwan's Prosecutorial System: 1945-2014*, in JUDICIAL REFORM IN TAIWAN: INSTITUTIONALIZING DEMOCRACY AND THE DIFFUSION OF LAW 68, 77 (Neil C. Routledge ed., 2020).

134. FIELDWORK EXPERIENCE: QUALITATIVE APPROACHES TO SOCIAL RESEARCH 7 (William B. Shaffir et al., eds., 1980) (stating that "[f]ield research is accompanied by a set of experiences that are . . . unavailable through other forms of social scientific research").

135. See Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEXAS L. REV. 2055 (2006). See generally Levine & Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, *supra* note 85, at 627 (arguing that incorporating a better institutional design—such as training, articulated standards, and internal reviews of individual decisions—can make offices more effective in redefining prosecutor's role by monitoring and modifying their own conduct).

136. See Levine & Wright, *supra* note 84, at 1120.

implications for future research.<sup>137</sup>

### C. UNPACKING THE BLACK BOX: AN ETHNOGRAPHIC APPROACH

To be candid, conducting an ethnographic project about institutional management and cultural change within a prosecutor's office is challenging. Much of a prosecutor's work is not transparent.<sup>138</sup> To trace organizational culture, a researcher has to document and understand the shared meanings, assumptions, norms, and values governing individual prosecutors' work behaviors.<sup>139</sup> Yet the common tools scholars employ for measuring culture—*interviews, surveys, and questionnaires*—are insufficient.<sup>140</sup> Self-reported data are often unreliable or at best inconclusive. The values and beliefs that people have narrated are often not reflected in how they think or behave.<sup>141</sup> In addition, the conventional measurement methods

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137. See JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (1991); COLIN P. A. JONES & FRANK S. RAVITCH, *THE JAPANESE LEGAL SYSTEM* 235–39 (2018).

138. Prosecutors are frequently considered “behind the curtain” and prosecutors’ offices are almost “black boxes,” Miller & Wright, *supra* note 41, at 129. See also Pfaff, *supra* note 7, at 158, 209 (arguing that prosecutors’ offices “are generally black boxes” and that “the lack of data makes it nearly impossible for scholars, policymakers and voters to understand what prosecutors are doing, why they are doing, and what we can do to change problematic behavior.”); Kimberly M. Foxx, *Progressive Prosecution: Race and Reform in Criminal Justice*, in *PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE* 274 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022); Brandon L. Garrett et al., *Open Prosecution*, *STAN. L. REV.* (forthcoming 2022) (manuscript at 8); Brian Forst, *Prosecution*, in *CRIME AND PUBLIC POLICY* 438 (James Q. Wilson & Joan Petersilia eds., 2011) (suggesting that “prosecutors are by many accounts the most powerful and least understood” actor in the criminal justice system). Lack of data about prosecutors’ offices makes it difficult for scholars, policymakers, and other stakeholders to understand what prosecutors are doing, why they are doing it, and what can be done to regulate powers and foster accountability. See DAVIS, *supra* note 2, at 15 (arguing that “prosecutors . . . have escaped the kind of scrutiny and accountability that we demand of public officials in a democratic society.”).

139. See Steven P. Feldman, *Management in Context: An Essay on The Relevance of Culture to The Understanding of Organizational Change*, 23 *J. MGMT. STUD.* 587 (1986) (explaining that culture is often encompassed in the symbolic, textual, and narrative structures through which norms, values, and meanings are encoded).

140. See *EXPERIENCING FIELDWORK: AN INSIDE VIEW OF QUALITATIVE RESEARCH* 143, 144 (William B. Shaffir & Robert A. Stebbins eds., 1991) (suggesting that developing trust and rapport are crucial for field research, because they are “[t]he key to success in interacting with subjects” and that “[w]hen rapport is established, the subject shows a willingness to cooperate in achieving the goals of the study and trusts the researcher to handle personal and often sensitive information with tact and objectivity.”).

141. Colin Jerolmack & Shamus Khan, *Talk Is Cheap: Ethnography and the Attitudinal Fallacy*, 43 *SOCIO. METHODS & RSCH.* 179 (2014).

provide only *static snapshots* of institutional culture.

For purposes of interrogating the process of cultural change and the implementation of different types of organizational management strategies, I gained four years of access to a Taiwanese District Prosecutor's Office Between November 2015 and December 2019. I documented—through hundreds of interviews and meetings<sup>142</sup> with prosecutors,<sup>143</sup> former prosecutors,<sup>144</sup> police officers,<sup>145</sup> defense attorneys,<sup>146</sup> officials from the Ministry of Justice (MOJ),<sup>147</sup> media reporters,<sup>148</sup> and reform advocates<sup>149</sup>—the operation of the prosecution function.<sup>150</sup>

To place my findings in context, I have employed an ethnographically grounded approach.<sup>151</sup> This method has allowed me to interrogate cultural change in the Taiwan Office through managerial conceptions of what culture should be constituted of, the enactment of the new culture, and the responses of individuals surrounding the office. More importantly, such a method has allowed me to understand the structure of fields and the prevailing “*rules of the game*.”<sup>152</sup> Instead of focusing exclusively on formal organizational

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142. Interviews ranged in duration from 45 to 180 minutes, and were conducted in Mandarin Chinese, Taiwanese, or both languages, according to interviewee's preferences. Detailed notes were taken at each interview, and interviews were tape-recorded if allowed by the interviewees. I digitally recorded and transcribed interviews but did not translate the transcriptions because I wanted to preserve participants' language, which often contained terminology specific to the prosecutors' subculture. Throughout this Article, the interviewees' points of view are illustrated by quotation and analysis. The quotations serve as a bridge between a general thematic category and specific experiences. In this way the quotations serve to facilitate the relationship between interviewees' experiences and general categories or concepts. Fieldnotes were used to document contextual information and my reflections about the Taiwanese criminal justice system and prosecution practices. Initial fieldnotes, which contain detailed information about individuals I met and activities I observed, were written every day after my visit to prosecutors' offices or interviews with prosecutors.

143. No. = 99.

144. No. = 12.

145. No. = 43.

146. No. = 39.

147. No. = 18.

148. No. = 10.

149. No. = 12.

150. The career trajectory of 89 Taiwanese prosecutors were closely traced. To protect the interviewees' identities, I use pseudonyms for their names and their jurisdictions. All prosecutor quotations in this Article are labeled with the interviewee's assigned number.

151. See ROBERT M. EMERSON ET AL., *WRITING ETHNOGRAPHIC FIELDNOTES* (2d ed. 2011); KATHERINE C. KELLOGG, *CHALLENGING OPERATIONS: MEDICAL REFORM AND RESISTANCE IN SURGERY* 14–16 (2011).

152. See Ronit Dinovitzer & Bryant Garth, *The New Place of Corporate Law Firms*

structure, ethnography permits a focus on the routines, the everyday life that comprises organizational culture.<sup>153</sup> I closely observed prosecutors' work environment and engaged in long-term formal and informal conversations with individual prosecutors about their reflections on and interpretations of their practice.<sup>154</sup> I have captured the environmental, organizational, and top-manager characteristics, as well as organization members' capacities to comply with or resist cultural change.<sup>155</sup> The data used in the study accordingly provides a rich and detailed picture of the Taiwan Office that is comparably invisible in tables of quantitative data.<sup>156</sup>

### III. CULTIVATING GOOD SENSE

The following sections explain how prosecutors in the Taiwan

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in the *Structuring of Elite Legal Careers*, 45 L. & SOC. INQUIRY 339, 366 (2020). See generally FIELDWORK EXPERIENCE: QUALITATIVE APPROACHES TO SOCIAL RESEARCH, *supra* note 134 (explaining the process of learning to conduct ethnographic research, particularly learning the cultural norms of behavior).

153. See REUBEN JONATHAN MILLER, *HALFWAY HOME: RACE, PUNISHMENT, AND THE AFTERLIFE OF MASS INCARCERATION* 283–97 (2021) (discussing the value of “proximity” in the practice of ethnography). For the use of the ethnographic approach in understanding culture formation within an organization, see, e.g., GIDEON KUNDA, *ENGINEERING CULTURE: CONTROL AND COMMITMENT IN A HIGH-TECH CORPORATION* (rev. ed. 2006).

154. For a review of sampling methods in qualitative studies, see generally Mario Luis Small, *How Many Cases Do I Need? On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 5 (2009) (assessing the incorporation of quantitative methods into qualitative ethnographic case studies).

155. This Article is about all of the visible and invisible work it takes to “make a prosecutor.” I have attempted to expose processes and practices of the Taiwanese prosecution that would otherwise go unseen. Of course, the prosecution is not unique among professions for keeping secrets in its closet. Also, it is essential to note that the *meanings* I have worked to reveal in this Article are not some pristine object that was “out there” waiting to be “discovered.” Instead, this was interpretive construction assembled and conveyed by me. My role as an ethnographer was not only to understand prosecutors' categories but also to explain how prosecutors use terms in specific interactional situations and how all of the involved parties differentially evoke, understand, and act upon various situations. See generally Richard G. Mitchell, Jr., *Secrecy and Disclosure in Fieldwork*, in EXPERIENCING FIELDWORK: AN INSIDE VIEW OF QUALITATIVE RESEARCH 97 (William B. Shaffir & Robert A. Stebbins, eds., 1991) (discussing the notion of secrecy in fieldwork and the role the researcher).

156. For interviews, I assigned a code to each of my interviewees (interview no. 1 to interview no. 204). Individuals who were interviewed several times were assigned different numbers. I later generated a codebook that contains twenty main topics and about eighty sub-topics. Finally, I used the codebook to arrange my fieldnotes into 103 documents (fieldnote no. 1 to fieldnote no. 103). For the process of Qualitative data analysis, see generally MATTHEW B. MILES ET AL., *QUALITATIVE DATA ANALYSIS: A METHODS SOURCEBOOK* (3d ed. 2014).

Office learn to exercise their good sense and how sense makers mobilize the “two management systems” to draw symbolic boundaries in order to cultivate individuals’ sense. I conceptualize cultural change as a contested process: a jurisdictional battle between sense makers—those who help individual prosecutors “make sense of” their roles, responsibilities, and skillsets. Through the process of professional socialization, prosecutors develop and re-construct their professional identities and their *sense of good judgment* in ways that are compatible with the norms of the profession and their organizational culture.<sup>157</sup>

#### A. WHERE IS YOUR SENSE?!

When Ding Hui-min, a male prosecutor with nine years of experience, was assigned a financial fraud case directly from his supervisor, he took it seriously as an opportunity to prove himself. The case involved a famous Taiwanese corporation. The firm’s chief executive had apparently maintained good relations with some governmental officials. Ding knew this could potentially become a “*Da An*,” i.e., a high-profile case. His role during the criminal investigation phase would be critical to the success of the prosecution and leave a record for future performance evaluation. Ding assembled a team of investigators to help him proceed with the investigation. However, when he presented his initial evidence to his supervisor, he was immediately admonished. The supervisor told him, “Don’t play smart with me. Don’t assume that every time the boss gives you a case, the boss really is asking you to vigorously pursue it for conviction at any cost. *Where is your sense?!*” [emphasis added]<sup>158</sup>

Ding suddenly realized that he might have misinterpreted some subtle messages he had received previously from his superior. It turned out that due to the sensitivity of the identity of the potential suspect, the head prosecutor in Ding’s unit did not want him to doggedly pursue the case, which could have caused an unwelcome political uproar. “The most sensible way to proceed,” Ding recounted, “was simply to terminate my investigation at an ‘appropriate’ time and move ahead to prosecute whoever with whatever I had in hand.”<sup>159</sup>

Indeed, in the Taiwan Office, line prosecutors have to accurately

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157. *But see* RAPPING, *supra* note 30, at 165–70.

158. Fieldnote no. 20, at 3 (notes on file with author).

159. Interview no. 25 with Taiwan based Prosecutor (Mar. 2017) (transcript on file with author).

interpret many subtle clues from their superiors. Often this interpretation involves the exercise of one's personal sense of judgment. But just how could Ding successfully figure out his superiors' expectations? Perhaps he could have bluntly asked his superiors what they meant or what he should do. Having worked in the Taiwan office for several years, Ding was eager to prove that he had what it took to be promoted.<sup>160</sup> Yet this time he probably had blown his chances for that. He was certain that requesting direct instructions from supervisor(s) would make him look indecisive or even incompetent. Certainly, promotional evaluation is not something that has a standard formula. Individuals being evaluated for promotion not only have to demonstrate enthusiasm for heavy investigatory assignments<sup>161</sup> and mastery of the skills of criminal investigation, but also need to evince their adaptability. Prosecutors in the Taiwan Office often need to quickly react to procedural or rule changes; work under high pressure; and communicate fluidly with supervisors and external administrative and investigative agencies. More importantly, they have to demonstrate their readiness to accept challenges and that they are capable of exercising good sense. However, *sense* can neither be taught nor officially defined. Having to ask for specific instructions from others signals incompetence and shows that an individual prosecutor is "not one of our guys."<sup>162</sup>

The following discussion of two cases illustrates how prosecutors can mistakenly evaluate a situation. The term "unfriended" (*La Hei*) is often used to describe those prosecutors who have been pulled off the ladder of career advancement. Once labeled as lacking in good sense (or good judgment), they are no longer seen as part of the group of elites, and more significantly, may well come to be actively exiled.<sup>163</sup>

The first example is the investigation of a series of high-profile commercial fraud cases that emerged in 2017.<sup>164</sup> During an informal chat in the Taiwan Office, an investigating prosecutor received a lead from a news reporter that numerous senior citizens had been victimized by a crime syndicate. The prosecutor was excited and felt that if she were to continue to investigate this case it had the potential to develop into a highly valuable case for her career advancement. The timing appeared perfect because, by the end of the next year, her

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160. Fieldnote no. 20, at 07 (notes on file with author).

161. It is not uncommon for Taiwanese prosecutors to investigate a single case for months before making a charging decision.

162. Interview no. 66 with Taiwan based Prosecutor (Aug. 2017) (transcript on file with author).

163. Fieldnote no. 28, at 1 (notes on file with author).

164. Fieldnote no. 4, at 2 (notes on file with author).

window for receiving promotion would close.<sup>165</sup> Grabbing the opportunity, she reported to the chief prosecutor and received permission to take charge of the investigation. She brought together a special task force comprising prosecutors and special prosecutorial investigators. But soon after they started the investigation, they realized the network of the crime syndicate was too big for them to handle. They had to bring in two other units from the office as well as several other law enforcement agencies. The massive scope of the investigation almost paralyzed regular unit functions.<sup>166</sup> Hundreds of suspects and witnesses were questioned by prosecutors. Boxes of evidence were stacked high throughout the office.<sup>167</sup> As the investigation proceeded, all began to realize that the majority of cases had to be dismissed due to the lack of sufficient evidence. In the end, although more than a hundred suspects were prosecuted, most of them could only be charged with and convicted of minor crimes. After the massive scale of the investigative operation, a number of prosecutors were bitter, thinking that the results were not worth all the time and resources expended, and these individuals complained that the prosecutor in charge had bitten off more than she could chew.<sup>168</sup>

The second example is about a large-scale counter-narcotics operation. The investigating prosecutor successfully cracked down an international drug trafficking network. More than four hundred pounds of cocaine were seized. The sheer quantity of the seized drugs was unprecedented in the history of Taiwan. However, the aftermath of the investigation triggered serious controversy. Due to the large amount of seized cocaine, each of the agencies involved in the investigation could potentially receive a financial reward from the government based on their individual contributions. Per past precedent, the prosecutor's office usually would receive only about 11 percent of the total bonus available. Yet the investigating prosecutor wrote a statement claiming that her unit was the *only* team of prosecutors who worked on the investigation. It came to light eventually that she was trying to take much more credit than she deserved. The office discovered that she had overstated the contribution of her own unit and deliberately omitted significant efforts made by other prosecutors. Moreover, she had demanded that all the seized drugs be transported back to the prosecutor's office for demonstration and storage purposes. This move directly interfered

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165. *Id.* at 10.

166. *Id.* at 12.

167. Fieldnote no. 5, at 4 (notes on file with author).

168. Fieldnote no. 14, at 5 (notes on file with author).

with the purview of the law enforcement agencies involved. Indeed, the case had been rigorously pursued by the members of the Investigation Bureau for a period of almost two years. Aside from receiving monetary rewards, being able to showcase seized drugs and hold a triumphal press conference can quite rightly be considered a major benefit of a successful “big case” prosecution. After all, publicity is the key for one’s career advancement. However, the investigating prosecutor’s demand immediately came to the attention of the chief of the Investigation Bureau and upset him.<sup>169</sup> According to a news report, the chief expressly ordered his team to disobey the direction of the prosecutor and insisted that they bring all the seized drugs back to the Bureau. Another wrinkle in the case was that, after another year had elapsed, it turned out rather unexpectedly that the chief was promoted and became the direct superior of the investigating prosecutor.

Both of the above cases provided a cautionary tale for prosecutors: exercising good sense is critical to one’s career success. In the two examples, the prosecutors’ careers were severely jeopardized by the decisions they made.<sup>170</sup> In the first case, the prosecutor made a bad decision in selecting the case in which she wanted to engage for reasons of career advancement. She also began with an overly ambitious plan.<sup>171</sup> When she was overwhelmed by all the matters coming into her unit, she revealed weakness in her supervisory skills and had to make up for it by requesting that her office provide extra resources and help. The suspects involved in the operation also turned out to be mostly minor, street-level criminals.<sup>172</sup> Thus, the media and the public did not pay too much attention to the case.<sup>173</sup> In addition, the facts and the legal issues surrounding the case were relatively simple. It was the type of investigation that just did not impress others. She had essentially pulled many of her colleagues into a wild goose chase.<sup>174</sup> The rewards from the case turned out to be minimal and other prosecutors privately described this prosecutor as leaving them with a “bad taste” in their mouths.<sup>175</sup>

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169. Fieldnote no. 25, at 17 (notes on file with author).

170. Fieldnote no. 26, at 8 (notes on file with author). *See also* Smith, *Are Prosecutors Born or Made?*, *supra* note 1, at 954 (stating that prosecutors who can’t fit in the office culture “rarely last more than a few years, and are often not the most popular in the office and usually leave disgusted with their office culture”).

171. Fieldnote no. 29, at 1 (notes on file with author).

172. *Id.*

173. *Id.*

174. Fieldnote no. 27, at 12 (notes on file with author).

175. *Id.*

The second case was more complex to interpret because of the circumstances involving multiple agencies and players. The investigation of an international drug trafficking network was no doubt a major high-profile event. Generally, in this type of investigative operation, the responsible prosecuting organization often must allow for a huge amount of discretion in the leading prosecutor(s). Routine review and supervision mechanisms are difficult to enforce. Yet without them, there is no shared responsibility.<sup>176</sup> The leading prosecutor(s) will have to deal with all the potential backlash, internally and externally. By exploiting other agencies—actually or just allegedly—the leading prosecutor in this second case damaged the rapport between her office and law enforcement agencies, something that Taiwanese prosecutors have always highly valued. This gave many of her potential competitors a further reason to criticize her. “The most damaging pieces of information about a prosecutor are the seemingly accurate rumors,” said a head prosecutor in the Taiwan Office.<sup>177</sup>

In short, dealing with criminal cases requires prosecutors to exercise astute sense, and there is no clear correlation between hard work and success. There is no standard metric that managers in the Taiwan Office use to figure out the worth of one’s work. Whether a prosecutor can stand out depends largely on evaluations that supervisors make of their work and, more fundamentally, their exercise of good sense, all of which may vary significantly and be hard to perceive.<sup>178</sup>

For the line prosecutors I encountered in the Taiwan Office the problem of uncertainty during the criminal investigation, accompanied by the inability and unwillingness of managing prosecutors to state in advance what they really wanted, made the process of mastering good sense quite unpredictable. Accordingly, exercising one’s sense was like trying to predict “where the wind blows” (*Kan Feng Xiang*);<sup>179</sup> uncertainty was the norm. Personal values, motivations, or preferences, and even *distinctive tastes* may play roles in shaping an individual prosecutor’s interpretations.

In this arena, standards, procedures, formal norms, and official policies are hardly useful. Determining who has good sense is largely a subjective matter, dependent upon the preferences and

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176. *Id.*

177. Interview no. 61 with Taiwan based Prosecutor (transcript on file with author).

178. Fieldnote no. 30, at 7 (notes on file with author).

179. Interview no. 2, at 2 (transcript on file with author).

expectations of many actors.<sup>180</sup> Line prosecutors' increased connections and interactions with these actors—supervisors, the media, law enforcement agencies, administrative agencies, and officials from the MOJ, to name only the most prominent of them—introduce further uncertainty into prosecutors' work environment.<sup>181</sup> From a line prosecutor's perspective, not being able to exercise good sense will certainly place one's career at risk. But what does exactly it mean to exercise good sense?

#### B. THE ESSENCE OF GOOD SENSE

*When I pick my team members, I usually look for three characteristics: attitude, enthusiasm, and good sense.*

Head Prosecutor, Taiwan District Prosecutor's Office

In the Taiwan Office, cultural change was built on the premise of the exercise of individuals' good sense. On the one hand, the chief prosecutor and the unit supervisors—that is, those individuals who are acknowledged as having systematic and thorough knowledge and expertise—set obligatory standards, establish preference trends, and determined what constitutes a proper exercise of one's sense.<sup>182</sup> So these authoritative “culture builders” have far-reaching symbolic effects on the engineering of the office culture. On the other hand, cultural change also depended on individual line prosecutors' capacities to be discerning and discriminating vis-à-vis a variety of incidents and experiences. “Sense” thus helps connect the individual prosecutors' set of cultural capital to their structural position in a domain of professional activity: the office.<sup>183</sup>

One of the features of Chen's management style was his emphasis on transparency, autonomy, and individualism in the Taiwan Office.<sup>184</sup> Therefore, power had to be exerted, for the most part, quite subtly:

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180. Fieldnote no. 30, at 8 (notes on file with author).

181. Fieldnote no. 18, at 4 (notes on file with author).

182. For the notion of expert knowledge and its legal implications, see generally ANNA LVOVSKY, VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL (The Univ. of Chi. Press 2021); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

183. See Bryant G. Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 GEO. J. LEGAL ETHICS 1361, 1367 (2009) (suggesting that legal field is a “semi-autonomous social space with its own rules of the game”).

184. Fieldnote no. 10, at 4 (notes on file with author).

overt, centralized control and forced compliance would belie his official message and run the risk of being criticized as improper intrusions into each individual prosecutor's professional autonomy.<sup>185</sup> The golden rule for Chen's administration was not to try to suppress dissent, silence the deviant, or demand line prosecutors' support for the office's agenda. Instead, Chen relied on a delicate mechanism—what I referred to as *sense-making*—to cultivate individuals' attitudes and beliefs so as to legitimize new cultural norms and values.<sup>186</sup> Such a process is manifested in individuals' exercise of good sense.

Instead of relying on draconian bureaucratic control, the Taiwan Office adopted an overarching management system designed to give line prosecutors broad freedom and discretion in dealing with their tasks. The only expectation is for the prosecutors to develop and use their own good sense. To understand what this means and its implications in the Taiwan Office, I will first illustrate the notion of sense.

Supervising prosecutors in the Taiwan Office acknowledge that managerial hierarchies are often unable to monitor and coordinate the activities of prosecutors efficiently without triggering large-scale pushback. The tasks that prosecutors face require them not only to efficiently investigate the relevant facts but also to carefully manage various extra-legal factors. Prosecutors in the Taiwan Office constantly refer to sense as a sort of cognitive radar that allows them to detect valuable inputs from both the office and the external environment that guide their decisions in a sure-handed way.

But what is the essence of sense? For prosecutors in the Taiwan Office, sense implies judgments about the inherent quality of human behaviors and the ability to sift through and select from a store of knowledge appropriate to judge the value of those behaviors. In short, sense is one's ability to "play the game."<sup>187</sup> What brings a group of prosecutors together is the communal sense-making process. Sense refers to a cultivated skill in making discriminating judgments. It shapes the ways in which an individual prosecutor approaches and considers every decision point he/she encounters. Having good sense

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185. *Id.* at 7.

186. According to Weick, the basic idea of "sense-making" is that reality is an ongoing accomplishment that emerges from efforts to create order and make retrospective sense of what occurs. It describes the negotiation and creation of meaning and understanding that enables individuals to construct a coherent account of the world. See Karl E. Weick, *The Collapse of Sensemaking in Organizations: The Mann Gulch Disaster*, 38 ADMIN. SCI. Q. 628 (1993).

187. DEBORAH ANCONA, *SENSEMAKING: FRAMING AND ACTING IN THE UNKNOWN* 5 (2011); Garth & Sterling, *supra* note 183, at 1367.

increases one's ability to master rules of the profession and the overall culture of the game, which can be a major determinant of one's career success as prosecutor.

Sense is not constructed in a vacuum. Rather, it is constantly shaped in sociocultural contexts. Sense—conceptualized as an internal schema of assumptions, thoughts, beliefs, and perceptions—is directly formed and influenced by the environment in which an individual is situated and is unique to that individual. It refers to a specific type of reasoning that is both judicious and instinctual. Sense-making is a process by which particular objects, processes, institutions, etc. are imbued with significance that make them intelligible to others. Sense makers, under this view, are those who help recontextualize or define the accepted meaning of objects, processes, institutions, etc.—in the case of the prosecutors' offices, those who help individual prosecutors “make sense of” their professional roles, ethical responsibilities, unique skillset, and the like.

From this perspective, sense is a product of the socialization process by which prosecutors learn to classify people, things, and practices into categories of unequal value.<sup>188</sup> As such, individuals experience and navigate their sense-making process quite differently, from within their own situated context. Individuals who are well-socialized in a particular domain are able to cultivate good sense because they know what they should be focusing on—e.g., should one continue investigating a case to add additional charges or to identify extra defendants—and how to position themselves to seize career opportunities—e.g., what does the chief prosecutor expect.

Diverse standards of sense and sense cultures exist in a professional field.<sup>189</sup> In deciding whether individuals have good sense, prosecutors generally use a combination of personal judgments and collective social norms to form the proper standard. Meanwhile, each must position his/her personal sense within a range of acceptable social practice. Within a cultural domain, there exists a strong collective sentiment in definitions of good sense, or at the very least an effort to discipline individual prosecutors to fit in with that group feeling. As a prosecutor's experiences accumulate and his/her professional identity continues to develop, of ever increasing importance is the learning based on understanding of his/her personal beliefs, attitudes, and values in the context of the broader

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188. See Latham T. Winfree et al., *On Becoming a Prosecutor: Observations on the Organizational Socialization of Law Interns*, 11 *WORK & OCCUPATIONS* 207 (1984).

189. See David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 *MICH. L. REV.* 795, 805 (1997).

prosecutorial culture. For individual prosecutors, it is a situated activity that rests on acknowledging how to appraise specific performance of a practice—i.e., to properly exercise one's discretionary judgment.

To summarize, prosecutors' perceived competence on the exercise of good sense feeds back into their socialization experiences. Being able to properly exercise good sense reinforces an altered identity of self and helps a prosecutor to manage professional identity and reputation. Meanwhile, if certain prosecutors do not feel comfortable in exercising their good sense or are perceived by their colleagues or supervisors as lacking the capacity to exercise good sense, these individuals may lose their status, be isolated, and even be expelled from the elite group. Cultivating one's good sense may thus be viewed as a method of reputational management through which individual prosecutors acquire the ability to discriminate and to criticize based on knowledge that cannot be deciphered by principles or doctrines.<sup>190</sup>

As a product of professional socialization, prosecutors may be said to belong to a particular culture of sense—following their established personal preferences and the communal standards they adhere to concerning the appropriate ways to fulfill their tasks.<sup>191</sup> “A culture of sense” is thus an interpretive community with shared knowledge, preferences, dislikes, and criteria for good and bad sense. Under this perspective, exercising one's good sense is a judicious selection from existing knowledge and prior practices that are considered to be in alignment with the situations at hand. Supervisors may communicate such selective judgments in their control as well as by review or assessment and, thereby, contribute to the cultivation and continual refinement of sense.<sup>192</sup>

What I have found particularly intriguing is that some prosecutors remarked that what determines good sense is to a significant extent a matter of distinctive, individual taste subject to their superiors' preferences or even, to some degree, external manipulation.<sup>193</sup> Such positioned, perspectival judgments situated

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190. See generally James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOCIO. 95 (1988).

191. See, e.g., Yaroshefsky & Green, *supra* note 81 (arguing that offices' hiring policies may affect pretrial disclosure practices because offices can “seek to employ people who will act in accordance with those [offices'] standards” and that hiring can further “foster a kind of office culture.”). See generally Bibas, *supra* note 88 at 1007–11.

192. See generally Yves Dezalay & Bryant G. Garth, *Law, Lawyers and Social Capital: 'Rule of Law' Versus Relational Capitalism*, 6 SOC. & LEGAL STUD. 109 (1997).

193. Interview no. 54 with Taiwan based Prosecutor (Mar. 2017) (transcript on

within communities of prosecutorial practices are central to the evaluation of the competence of individual prosecutors. The commonly-shared idea in the Taiwan Office that the judgment of sense is a matter of taste appears to contradict the arguably ideal aim of transparency as advocated by Chen's administration, which is, making the evaluation processes and criteria for the performance of individual prosecutors explicit and clear. However, this does not mean that such judgment is arbitrary or without any recourse to principles or standards. In the following sections, I discuss the two management systems I observed in the Taiwan Office: one for those who have good sense and one for those who do not. Together, they function as *communication devices* and *dialogic tools* that enable individuals to perceive and refine their good sense of judgment.

### C. SENSE MAKERS AND PREMISE CONTROL: THE CRIME OF A FOREIGN MAYOR

*Sometimes you just don't need to express everything ... I personally favor the philosophy of unsounded communication.*

Chief Prosecutor, Taiwan District Prosecutor's Office

Sense-making is essentially a mechanism for distinction that members of the prosecution use to establish social status and test trustworthiness in others.<sup>194</sup> The upper echelons of the Taiwan Office leverage their credentials as sense makers in order to communicate both their expectations and work-related information, which can be difficult to in any other way. Sense makers are those who have mastered specialized knowledge about a given professional activity or field.<sup>195</sup> Together with the specialized knowledge they also possess a great deal of experience that enables them to rank, formally or informally, prosecutors; thereby, they establish a legitimized cultural hierarchy. They have gained their legitimacy by being recognized by other field actors as having legitimate authority over

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file with author); Interview no. 66 with Taiwan based Prosecutor (Aug. 2017) (transcript on file with author); Interview no. 73 (Dec. 2017) (transcript on file with author).

194. In a classic ethnographic study of professional socialization, Haas demonstrates how teasing and ridicule are crucial aspects of the initiation process for apprentice ironworkers. See Jack Haas, *Binging: Educational Control Among High Steel Ironworkers*, 16 AM. BEHAVIORAL SCIENTIST 27, 27–29 (1972).

195. See generally Ronit Dinovitzer, *Social Capital and Constraints on Legal Careers*, 40 L. & SOC. REV. 445 (2006).

the knowledge and expertise in a given professional domain. Such legitimacy comes from a generalized perception of or assumption that the actions, goals, expectations, of those sense makers are desirable, proper, or appropriate within a given field of norms, values, and beliefs. By imposing norms and standards about “who is a good prosecutor” or “who has good sense,” together with their ability to manage the premise and the context of decision making, they establish widely accepted preference trends and determine what is a legitimate exercise of judgment/discretion.<sup>196</sup>

As culture arbiters, sense makers determine, based on their well-recognized expertise, individuals’ cultural sensibilities and thus their cultural statuses within a given field. The establishment of such a cultural hierarchy turns the sense makers into gatekeepers who, by drawing symbolic boundaries, include some prosecutors while excluding others. By exercising their sense-making authority, they construct an informal hierarchy of prosecutors, and, within the hierarchy, also draw boundaries between good and mediocre prosecutors. As a result, the sense makers truly have a far-reaching impact on the formation of organizational culture.

In fact, the principal role of sense makers can be characterized as drawing proper distinctions among prosecutors and hence lending some individuals an aura of superiority. Having good sense facilitates individual accumulation of resources, knowledge, institutional secrets, and other “cultural capital,” which then makes the individual look distinctive and thus justifies the basis that determined his/her cultural sense to begin with. Sense makers simultaneously structure the experiences of prosecutors in different cultural domains. They are the main actors in a stream of discourse that defines the social and professional hierarchy within the prosecution. In short, sense determines one’s position in a professional field and produces an organizational culture that legitimates unequal status by marking some members as superior to other members. Therefore, those who demonstrate good sense are given status superiority.<sup>197</sup>

By influencing decision-making premises and context, sense makers in the Taiwan Office—i.e., chief prosecutors and a handful of managing prosecutors—have controlled the foundations of decision-making. Even without direct control of individual behaviors, the sense makers can still effectively prevent certain decisions from being made and foster the making of those that they actually desire. Premise control can be viewed as an unobtrusive and unconscious—yet

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196. Fieldnote no. 47, at 9 (notes on file with author).

197. See also ANNA OFFIT, *THE IMAGINED JUROR: HOW HYPOTHETICAL JURORS INFLUENCE FEDERAL PROSECUTORS* 24–28, 119–23 (2022).

critical—element of sense-making. It can be built into the vocabularies, structures of communication, attitudes, beliefs, rules, and procedures of a prosecutor's office. Although largely neglected by the mainstream literature on prosecutors, premise control exerts a decision outcome by shaping how line prosecutors think and act, i.e., their sense.<sup>198</sup> In short, sense—the capacity to be discerning and discriminating—is a cultural construct that can be managed and communicated.

Accordingly, sense-making can prevent line prosecutors from seeing alternative channels of formulating fundamental concerns and identifying different courses of action. A particular case that I refer to as the "*crime of a foreign mayor*" can be used here to illustrate how sense makers maneuver the premise of decision making and how sense functions in a prosecutor's daily working environment:

Zhu Li-xiu had been working as a prosecutor for nine years.<sup>199</sup> Zhu was known for always maintaining a mild-mannered, academic image. His career plans had never called for attempting to climb up prosecutorial ladder. "I'm not looking that far ahead" he explained to me. Nevertheless, Zhu had risen faster than his peers. The key to his success, according to his supervisor, was that Zhu "seems to always have the sense of what he is doing."<sup>200</sup> Zhu was recruited to a newly established unit that reported directly to the chief prosecutor. One night, Zhu received a call from his supervisor, who asked him to take charge of a case regarding alleged sexual molestation. Zhu immediately detected the seriousness of the allegation. Without asking too much about the details, he quickly returned to the office. There, he found a young female victim. She was serving as the personal translator of a mayor from a major city in Southeast Asia. She accused this male mayor of sexually harassing her during his visit in Taiwan. On the last day of the mayor's trip, she decided to report the misconduct to a local police station. The rank-and-file officer who interviewed the victim did not know how to deal with such a potentially high-profile, politically sensitive case. Instead of following routine protocol and reporting the case to the superior unit in the police department, the officer called the deputy chief prosecutor directly. The deputy chief prosecutor immediately ordered the police officer not to make any comments on the matter, not even to his supervisors. Before interviewing the victim, Zhu met with the deputy chief prosecutor and was instructed to "maintain a low profile" (*Di*

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198. See generally William G. Ouchi, *A Conceptual Framework for the Design of Organizational Control Mechanisms*, 25 MANAGEMENT SCIENCE 833, 833–48 (1979).

199. Interview no. 19, at 1 (transcript on file with author).

200. Interview no. 20, at 8 (transcript on file with author).

*Diao*). However, in this instance, maintaining a low profile had multiple meanings. It possibly meant quickly and accurately investigating the alleged offense to avoid any external influence or media attention. Or it possibly meant resolving any conflicts without resort to formal legal process. Zhu had to decide what direction he wanted to take. He had a long conversation with the victim and explained the options she had.<sup>201</sup>

After reflecting upon the situation, Zhu became convinced that there was only one *proper* course of action. He persuaded the victim not to press criminal charges against the mayor. Instead, he promised the victim that he would request that mayor personally come to the office and apologize to her. In order to show the victim that her resentment had been properly considered, Zhu proposed to have the mayor make a written, although unofficial, statement admitting his improper behavior and sincerely apologizing to her. The victim was satisfied with such an arrangement.<sup>202</sup>

Meanwhile, Zhu was still running against time. The mayor was shortly due to depart from Taiwan. Zhu had less than 24 hours to decide how he wanted to officially dispose of the case. His proposal to the victim would mean nothing if the mayor denied the accusation and refused to apologize. This was a classic “he-said-she-said” situation. The only evidence was the victim’s testimony. No physical evidence was available. Zhu had to make sure he had enough bargaining chips to deal with the mayor.<sup>203</sup> “What is the weakness of the mayor?” Zhu pondered. While he was struggling, a media reporter happened to pass by his office and greet him. And Zhu suddenly *sensed* how best to proceed with the mayor. He called the mayor into the office and explained to him in detail about the process in Taiwan following charges of sexual harassment. Zhu warned the mayor that if formal criminal charges were filed, the case would surely attract heavy media coverage. Even if the case was later dismissed by the court, the reputation of the mayor would be tarnished. Zhu pointed out to the mayor that there were plenty of media liaison outposts located in the justice building where they were meeting and that there was no way to stop reporters from inquiring into the details of the mayor’s case. Zhu emphasized to the mayor that this was not meant as coercion. Instead, Zhu explained, that he just wanted to clarify the situation—and he hoped that the mayor could “see the bigger picture.”<sup>204</sup>

In the end, the mayor accepted Zhu’s proposal for a written

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201. Fieldnote no. 35, at 9 (notes on file with author).

202. *Id.* at 17 (notes on file with author).

203. Fieldnote no. 37, at 3 (notes on file with author).

204. Interview no. 19, at 21 (transcript on file with author).

apology and the case was quickly dismissed. Records of the case are kept only in the office's internal database, so the file cannot be discovered by the media or anyone else in the public. From the outset of this potential diplomatic crisis to its resolution, Zhu managed to avoid any revelation of the "bargaining process" between the conflicted parties. Even after resolution, no media report ever covered this incident. The chief prosecutor was extremely satisfied with the result.<sup>205</sup>

What Zhu did not know is that before the case was assigned to him, his superiors had a call with MOJ officials and discussed what would be a preferable outcome for the case. They considered and all agreed that, because of the potential for collateral damage to Taiwan's foreign relations, it appeared best not to bring the case to light—although the MOJ officials also specifically acknowledged that the victim should be treated sensitively and respectfully. The worst outcome would have been for the victim to later accuse the office of "not taking the necessary steps to prosecute a crime" (*Chi An*).<sup>206</sup> It turned out that Zhu was selected to handle this "hot potato" largely because his superiors already thought that he "had the good sense to make the right decision."<sup>207</sup> And they were correct in so thinking.

An important implication of this case is that to manage an individual prosecutor's behavior, the management does not need to control the process of decision-making or to fully elaborate what the ideal outcome should be, but only set forth the bases on which responsible decisions can be made.<sup>208</sup> A common, recurring concern for the managements of the Taiwan Office was to make changes in the perspectives and values of individual prosecutors who had to deal with sensitive or high-profile cases without being open to accusations of improper intrusion into and interference with line prosecutors' professional authority and discretion. What the managing prosecutors in the Taiwan Office have done is essentially to select and elevate those prosecutors with good records of promoting what are widely perceived to be the proper perspectives and values of the office. When these selected individuals advance and are allowed the privilege of interacting with more experienced members of the office—usually through transitions to high-level units that handle white collar crime or governmental corruption or through

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205. Interview no. 14, at 10 (transcript on file with author).

206. Interview no. 21, at 7 (transcript on file with author).

207. *Id.* at 17 (transcript on file with author).

208. Jörgen Sandberg & Haridimos Tsoukas, *Making Sense of the Sensemaking Perspective: Its Constituents, Limitations, and Opportunities for Further Development*, 36 J. ORG. BEHAV. 6, 7–9 (2015).

participation in “high-value” criminal investigation operations—they are gradually presented with a more detailed and instructive image of the office that contributes to an understanding of the “bigger picture.”<sup>209</sup>

“The Buddha only lectures to those who have been selected to acquire knowledge” (*Fo Du You Yuan Ren*), a supervisor of the Taiwan Office’s esteemed white-collar-crime unit explained to me when describing the process of selecting candidates to join his unit.<sup>210</sup> The most ambitious prosecutors with the highest competence and a willingness to adopt organizational goals and preferences as their own will actively seek out opportunities in such a unit.<sup>211</sup>

In the long run, prosecutors who handle high-value cases will have access to valuable, behind-the-scenes information and will obtain and benefit from the perspectives and values deemed organizationally proper while continuing to develop their own personal competencies—all in order to better exercise good sense. This exercise of good sense in turn consolidates and concentrates the personal cultural capital—the beliefs, skills, knowledge, and dispositions—that enable success as a prosecutor.<sup>212</sup>

#### D. SENSE MAKERS AND PEOPLE SORTING: OUTCOME AND PROCESS CONTROL

*We are closely watched!*

Liu Yu-zhi, Taiwan Office

During my fieldwork in the Taiwan Office, one prosecutor told to me that dealing with a high-profile case in her first year was a bittersweet experience. She remembered that her superiors always advised her that she should avoid bothering other prosecutors. Junior prosecutors ought not to ask superior colleagues all of the questions that come up; “they cannot do all the work for you,” she said to me.<sup>213</sup>

However, she soon found out that under some situations, things work very differently.<sup>214</sup> In a murder case involving a well-known

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209. Fieldnote no. 33, at 2 (notes on file with author).

210. Interview no. 2, at 7 (transcript on file with author).

211. Edgar H. Schein, *Coming to a New Awareness of Organizational Culture*, 25 SLOAN MANAGEMENT REV. 3, 12 (1984).

212. See Dezalay & Garth, *supra* note 192.

213. Interview no. 4, at 3 (transcript on file with author).

214. *Id.*

social media influencer, her unit supervisor discussed the case with her on a daily basis and her senior colleagues were more than willing to provide potentially valuable resources to her. She knew that not only the media but also the managers in the office were watching her performance very closely. In the end, the case was successfully prosecuted, and she earned her reputation in the office. “Sometimes, though, I was not sure if they were showing me care and support or merely distrusted me as an inexperienced prosecutor handling that case,” she shrugged.<sup>215</sup>

As discussed earlier, sense-making requires that the sense makers identify not only those who can be trusted to exercise good sense but also those who are unable to do so.<sup>216</sup> The Taiwan Office has developed an implicit yet nuanced strategy—the “two systems of management”—as a “people sorting” mechanism to manage individuals according to their categorized status. Sense-making is essentially a process of sorting and categorizing, which is a core function of *boundary work*.<sup>217</sup> System 1, which I have discussed earlier, is for those individuals, like Zhu, who already have good sense. This management strategy is based upon the assumption that in order to shape prosecutors’ behaviors the office can shape the context or premises of decision-making and rely on individuals’ own exercise of their good sense. Nevertheless, the Taiwan Office has also developed a parallel system of management to clearly demark those symbolic boundaries. In fact, Chen’s administration effectively mobilized a second, traditional mechanism of bureaucratic control—which I refer to as System 2—to manage those individuals who were unable to demonstrate or had not yet demonstrated good sense.<sup>218</sup>

Following the classical model of bureaucratic management, the Taiwan Office actually operates a nuanced hierarchical structure to control the performance of all of its staff members. It is notable that System 2 has traditionally attracted the interest of scholars doing comparative analysis on prosecutorial systems. The conventional viewpoint of prosecutorial systems in Japan, South Korean, and many European countries maintains that comprehensive rules and procedures are in place to direct, supervise, and control the behavior of line prosecutors.<sup>219</sup> From arrest to pre-trial detention,

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215. *Id.*

216. Edgar H. Schein, *Culture: The Missing Concept in Organization Studies*, 41 ADMIN. SCI. Q. 229, 234–39 (1996).

217. See discussion *infra* Part IV.B.

218. See also Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOCIO. REV. 273, 286 (1986).

219. See generally Shawn Marie Boyne, *Uncertainty and the Search for Truth at*

investigation, charge, and trial, major discretionary decisions are perceived as being made collectively, after consultation between line prosecutors and supervising prosecutors.<sup>220</sup>

Under such a hierarchical structure, superiors tell their subordinates what the rule is, and each individual subordinate follows it or faces disciplinary measures.<sup>221</sup> Managing prosecutors approve and direct the initiatives, actions, and decisions of their subordinates.<sup>222</sup> Sometimes they may control line prosecutors' decisions through direct oversight—providing concrete instructions and feedback, frequent check-ins, and timely corrections.<sup>223</sup> Collective decision-making is often portrayed as the norm in many prosecutorial systems. According to Johnson's classic study, Japanese prosecution has developed a system of hierarchical review and internal control for the decisions made by line prosecutors. Under the mechanism of *kessai*—consultation and approval—line prosecutors are required to seek the approval of two to three supervisors (or more in high-profile cases) before making any charging decision.<sup>224</sup> Johnson has pointed out that the unique structure of the Japanese prosecutor's office brings out the institution's prioritization of fact finding, its dependence on mutual responsibility through the *kessai* system, and the inescapably hierarchical nature of the office. In his view, better decisions are made than when prosecutors with different perspectives participate in the decision-making-process. Johnson also argues that the *kessai* system performs critically important functions

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*Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases*, 67 WASH. & LEE L. REV. 1287 (2010); Shawn Marie Boyne, German Prosecutors and the Rechtsstaat, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 138 (Máximo Langer & David A. Sklansky eds., 2017); Henk van de Bunt & Jean-Louis van Gelder, *The Dutch Prosecution Service*, 41 CRIME & JUST. 117 (2012); A. Didrick Castberg, *Prosecutorial Independence in Japan*, 16 UCLA PAC. BASIN L.J. 38 (1997); Mathilde Cohen, *The French Prosecutor as Judge, The Carpenter's Mistake?*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 109 (Máximo Langer & David A. Sklansky eds., 2017); DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN (2002); CHANG-FA LO, THE LEGAL CULTURE AND SYSTEM OF TAIWAN (2006); Luna & Wade, *supra* note 2; THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna & Marianne L. Wade eds., 2012).

220. See Felkenes, *supra* note 88, at 111; Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, WIS. L. REV. 291 (2006).

221. CARTER, *supra* note 3, at 131–38.

222. DAVIS, *supra* note 2; David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480 (2016). See also Barkow, *supra* note 2.

223. David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 L. & SOC'Y REV. 247, 269 (1998).

224. For internal review procedures in the United States, see JOHNSON, *supra* note 219, at 151–54; MILLER, *supra* note 4, at 16–19.

in the Japanese ways of justice.<sup>225</sup> Such a mechanism ensures that like cases are treated alike so as to achieve consistency. The consequences of the *kessai* system are multifarious, including not only contributing to consistency across cases but also to education of subordinates, and risk-sharing. In short, *Kessai*, according to Johnson, provides a tool for Japanese prosecutors to ensure that they treat similar cases similarly and to eventually achieve a “high level of consistency.”<sup>226</sup>

But Johnson does not address how such a system can also be used by a prosecutor’s office as a communication tool to sort prosecutors based on whether they possess the “right” sense. According to Taiwanese law as well as the guiding legal principles, managing prosecutors have the power to approve and direct line prosecutors’ decisions through direct oversight and approval.<sup>227</sup> Scholars have long believed that this authority is vested in the chief prosecutor of the office, and the commands that issue forth from that individual direct what line prosecutors do. Yet in the Taiwan Office, I found that the vast majority of the activities of those who were deemed to have good sense proceeded entirely without top-down personal directives and supervision—and even without perfunctory bureaucratic rules and approvals. Largely overlooked by the existing literature, I observed that traditional bureaucratic control mechanisms are used at most only sporadically to enhance the consistency or the quality of decision-making. In practice, these bureaucratic measures are mainly used to signal certain individuals’ exclusion from elite circles.

For those who are subjected to System 2, they often have to pay close attention to maintaining acceptable workloads and managing stress from the top—a “lay low, do not make waves/do not stand out or cause trouble” approach. The rules of performance evaluations greatly enhance the degree to which managing prosecutors can supervise, oversee, and control their subordinates.<sup>228</sup> Such hierarchical structures, along with continuing audits of performance, are not merely appealing ways to ensure *consistency* and *efficiency* of the organization, more importantly, they are powerful *communication techniques* that effectively label one as an *outsider*.<sup>229</sup> In the Taiwan

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225. JOHNSON, *supra* note 223, at 270. See also David T. Johnson, *On Getting Used to It: The Desensitization of Prosecutors in America and Japan in*, 2 THE LEGAL PROCESS IN CONTEMPORARY JAPAN: A Festschrift in Honor of Professor Setsuo Miyazawa’s 70th Birthday 397–413 (Keiichi Ageishi, Hiroshi Otsuka, Katsuhiro Musashi, & Mari Hirayama eds. 2017).

226. Johnson, *supra* note 223, at 256–57.

227. Regarding the command and supervisory authority of chief prosecutors, see Court Organization Act (*Fa Yuan Zu Zhi Fa*), art. 63 (2018).

228. See JOHNSON, *supra* note 219, at 161–73.

229. Some individuals in the Taiwan Office also considered being assigned to the

Office, two types of mechanisms are crucial to System 2: *outcome control and process control*.

### 1. Outcome Control: The Assembly Line

The metaphor of the assembly line is often used by prosecutors in the Taiwan Office to describe their daily operations. The routine processing of criminal cases is like an assembly line in a modern industrial factory to the extent that it has the capacity to turn out products of uniform quality by controlling the types of inputs and the ways in which they are combined.<sup>230</sup> The outputs are subject to quality reviews. Although the assembly line leaves little room for improvising, innovating, or learning as prosecutors' tasks are performed, it is a powerful mechanism for controlling the outcome of prosecutors' discretion.<sup>231</sup>

In practice, the concept of an assembly line manifests in a comprehensive system of *review and approval* in the Taiwan Office—also known as *jue-xing*—a concept that historically originated from Japanese governmental management practices. The metaphor of an assembly line accurately describes the situation at the Taiwan Office on any given day—prosecutors dealing with routine and trivial cases—with the typical bureaucracy characterized by the systematic process of work on a routine, repetitive basis.<sup>232</sup>

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trial unit as a symbolic degradation of one's status. Handling normally pro forma trials in open court, instead of doing complex criminal investigations, is in fact commonly viewed by Taiwanese prosecutors as a "time for a break" or even the "dead end of one's career advancement." As a general policy, attorneys who have not been previously in the trial unit or who have made major contributions in the investigation unit may request to be assigned to the trial unit for at least a year. The assumption is that the nature of the assignment is less intensive and allows prosecutors to "go home on time" each workday. In the Taiwan Office, trial units also provide plenty of positions for the organization to relocate those prosecutors who are unpopular but who have demonstrated no formal reason to be disciplined. Senior prosecutors who are less productive or managers who fail to secure further career advancement within certain periods of time will be assigned to the trial unit indefinitely. How the office treats trial units actually reinforce individuals' perception that trial practice is merely a "frozen position," designed to corral disfavored persons and to prevent them from "messing things up." In short, the multiple attempts since 1999 to transform Taiwan's inquisitorial structure that characterized the old criminal justice into a more adversarial system that emphasizes contested trial activities have created a task domain for organizations to house those unpopular prosecutors.

230. Dianne Vaughan, *The Dark Side of Organizations: Mistake, Misconduct, and Disaster*, 25 ANN. REV. SOCIO. 271, 271–305 (1999).

231. JOANNE MARTIN, ORGANIZATIONAL CULTURE: MAPPING THE TERRAIN (2002).

232. See Charles A. O'Reilly & Jennifer A. Chatman, *Organizational Commitment and Psychological Attachment: The Effects of Compliance, Identification, and*

In order to make charge and other major case disposition decisions, line prosecutors must obtain the approval—whether in person or in paper—of their supervisors. Occasionally, line prosecutors must confront their supervisors and elaborate their reasons for deviance. The *jue-xing* system creates the classical hierarchy between the line prosecutors and managers by allowing supervisors to monitor the work of prosecutors under their control. However, this system lacks the flexibility we have seen under System 1. Supervisors cannot simply take line prosecutors off their tasks and put them on others capriciously, as the line of routine case processing would likely grind to a halt that way. Nor can supervisors change much about the structure of routine production because of the sheer number of cases. Rather, managers can only control the tempo of the production by routine supervision of case progress as well as final dispositions per a review and approval system. Liu Yu-zhi, a male prosecutor with about five years of experience provided me with a vivid analogy:

When I first became a prosecutor, all I wanted was to do justice! I didn't really think about handling high-profile cases or getting promotions. All I wanted was to do justice in every case I handled. Nothing more and nothing less . . . . But soon I found out that the heavy caseload did not allow me to think too much . . . . I just didn't have time . . . . We often describe ourselves as *case processing machines* (*Sui Zhi Ji*). We learn how to quickly resolve existing cases, just like solving law school hypotheticals.<sup>233</sup>

Another feature of outcome control is that the manager's participation in the criminal investigation or decision-making process is substantially limited. Instead, line prosecutors are assigned cases and are expected to produce "qualified results."<sup>234</sup> Once goals or procedures are established and line prosecutors have performance targets on which reviews or rewards will be based, many supervising prosecutors believe they can move on to other issues, knowing that line prosecutors will be working accordingly to established goals. Under this type of management system, supervising prosecutors focus on controlling the *production procedure* (such as the types of evidence that need to be collected and reviewed or whom to subpoena as witnesses) and monitoring *outcomes* (such as case deposition

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*Internalization on Prosocial Behavior*, 71 J. APPLIED PSYCH. 492, 492–99 (1986).

233. Interview no. 43, at 8 (transcript on file with author).

234. Fieldnote no. 41, at 1 (notes on file with author).

determinations and other critical decision points).

## 2. Process Control: The Wisdom of Dilution

In addition to controlling the outcome of decision-making, the Taiwan Office employs a second type of control mechanism—I refer to as process control—for inexperienced prosecutors and those who fail to demonstrate good sense.<sup>235</sup> Process control is a bureaucratic management technique that is developed due to practical needs.<sup>236</sup> Supervisors can use such a mechanism to interrupt the decision-making activities of their subordinates. When dealing with complex or sensitive cases, outcome control is often too little and too late. Managers are well aware that any attempts to impose rigid control over individual prosecutors through the *jue-xing* mechanism either will fail or will impair the quality of decision-making. For instance, when cases attract high public or political attention, line prosecutors are generally more protective about their own sense of agency and autonomy. Outcome control—having supervising prosecutors monitoring case outcomes, judging line prosecutors' final decisions and their exercise of discretion—can be viewed by line prosecutors as intrusive and improper. In fact, the *jue-xing* mechanism has a long history of being misused in Taiwan when it comes to supervising prosecutors recommending—often orally to avoid leaving any track record—that line prosecutors modify their decisions. Legal commentators have also criticized the practice for its lack of transparency and the difficulty of holding the *actual decision makers* accountable.

Furthermore, although Taiwanese law authorizes chief prosecutors to reassign cases to a different line prosecutor at any point in time, virtually no chief prosecutor will do so for fear of being seen as making a “shameless power grab.”<sup>237</sup> Chen and the managing prosecutors in the Taiwan Office were often more concerned about whether their priorities or policies would trigger internal, social, legal, and political backlash than maintaining consistency among cases. There is thus an *unwritten taboo* in the Taiwan Office: *one shall never reassign a case to someone else unless under extreme circumstances.*

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235. See also Ouchi, *supra* note 198, at 833–48.

236. See also RICHARD EDWARDS, *CONTESTED TERRAIN* 21 (1979); ALVIN W. GOULDNER, *PATTERNS OF INDUSTRIAL BUREAUCRACY: A CASE STUDY OF MODERN FACTORY ADMINISTRATION* 215–28 (1954).

237. Interview no. 5 with Taiwan based Prosecutor (transcript on file with author); Interview no. 67 with Taiwan based Prosecutor (transcript on file with author).

Reassignment carries significant negatives. Such an act from the chief prosecutor implies that the replaced prosecutor is not qualified and, moreover, it threatens the harmony of the office. Finally, outcome control is hardly a useful tool to constrain those individuals who may have decided to go rogue and disregard any internal bureaucratic procedures or potential disciplinary actions.<sup>238</sup> On many occasions, Chen had to resign himself to the fact that the line prosecutors who ended up handling potentially high-value cases would not be his top pick.

Therefore, Chen and many managing prosecutors in the Taiwan Office came to believe that it was necessary to “dilute” individuals’ decision-making authorities by including more prosecutors in the decision-making process. This has come to most commonly occur when individuals are dealing with the “big cases.” Unlike the assembly line, prosecutors cannot fully specify in advance what information they will receive and how they will process such information while dealing with complex or sensitive cases. When the law and the evidence are ambiguous, line prosecutors are likely to enjoy substantive leeway in terms of what information to collect, how to evaluate the information, and how to shape the contours of a case. In the meantime, managing prosecutors often find it difficult—and are perhaps quite rightly reluctant—to prescribe to line prosecutors what objectives to achieve or, based on the limited information available to the managing prosecutors, to specify in advance what actions or protocols should be employed in order to achieve the office’s objectives.

However, management typically does not want to take the risk of waiting too long to review the decisions made by subordinates and then need to change course at the last minute. Chen’s administration designed a system in which cross-unit and cross-hierarchical coordination was possible. In cases where Chen believed that close supervision was needed, senior prosecutors—i.e., those who could be trusted to exercise good sense—were often assigned to assist. Those prosecutors would schedule regular meetings to discuss and review the action plans that line prosecutors had developed. Information gathered from such meetings was then quickly transferred back to the higher management, without Chen’s direct influence, at least on the face of it.

At times, a single criminal investigation operation can be divided into multiple portions, allowing other designated prosecutors besides

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238. There are multiple incidents of line prosecutors going rogue in the modern history of Taiwanese prosecution. See Hsu Heng-da, *supra* note 133.

the assigned line prosecutor(s) to take over some decision-making authority. By determining how a decision should be made, who should be involved, and when the decision should be made, the chief prosecutor can control the ground rules that guide the decision-making process and eventually gain considerable impact on decision outcomes. Under this model, Chen determined if it was necessary to form a special committee or task force in which the designated managerial-level prosecutors could be included.

To sum up this section, the use of the two bureaucratic control mechanisms under System 2 has a broader symbolic implication beyond controlling case outcomes and individuals' behaviors. Individuals who are subject to rigid System 2 management tend not to be fully trusted by their colleagues, because if they were good enough then the constraints and supervision would be unnecessary. The continuous evaluation of individuals and the capacity of the management to flexibly move between System 1 and System 2 create a brilliant tool for sorting prosecutors in an on-going manner. The most powerful feature of System 2 is not that it assures decisions are made consistently but that the choice between the two systems is constantly adjusted based on sense makers' judgments of whether individuals have the right sense to handle cases.<sup>239</sup>

In other words, what I hope to demonstrate here is not merely the multiple types of management systems developed by the Taiwan Office. Instead, the more important aspect with regard to cultural change is how the switch between the two systems is used by the office to draw symbolic boundaries. In short, sense is not cultivated by any given control system but by the movement between systems. For instance, a managing prosecutor could quickly "unfriend" an individual by not allowing that person to take part in major criminal investigation task force or by nudging the person to take on more routine cases and to process those cases mechanically. Such a dynamic and interactive transformation between an individual's high status and low status within a given cultural arena makes continual socialization possible. When prosecutors demonstrate poor sense, the office can quickly resort to the old, disfavored means of management—review, close supervision, and dilution of decision-making authority. Of course, the symbolic consequences of System 2 can have a profound impact on individuals' perceptions regarding their identity and status. In this regard, even though the Taiwan Office does not engage in a conventional type of "hiring practice," by drawing symbolic boundaries among individuals, the office has generated a

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239. Mats Alvesson & Hugh Willmott, *Identity Regulation as Organizational Control: Producing the Appropriate Individual*, 39 J. MGMT. STUD. 619 (2002).

series of “quasi hiring practices” and thus been able to continuously evaluate whether individuals show good fit.<sup>240</sup>

The greater the extent of one’s demonstration of good sense, the greater the delegation of decision-making power, and this comes with a reinforcement of one’s sense of elite inclusion. Specifically, on issues involving progressive policy changes or the implementation of controversial office agendas, the Taiwan Office rarely rely on close surveillance or outcome checking. Nobody told Zhu specifically what to do about the case involving the investigation of the mayor. All his superiors did was to shape the context of Zhu’s behavior so as to allow him to “see things in a different light” by exercising his good sense of judgment.<sup>241</sup> In contrast, for inexperienced prosecutors and those demonstrating poor sense, direct orders, training, surveillance, standardization, development of processes, and bright-line rules and regulations, as well as dilution of decision-making authority, are commonly the means used for control and management.<sup>242</sup>

It is quite notable that System 2 remains a widely used tool in the Taiwan Office. What I am showing here is that such a bureaucratic control mechanism is not imposed monolithically and statically. Existing social science studies on prosecutors often focus on how a bureaucratic system is used to prevent line prosecutors from going astray from the norms and policies of the office,<sup>243</sup> or to ensure that “uneven assessments of like-situated suspects get smoothed out.”<sup>244</sup> What has been overlooked is that traditional bureaucratic control mechanisms can have a symbolic meaning too: *to signal individual prosecutors’ lack of ability and that they need to be closely watched and assisted*. In the end, many prosecutors in the Taiwan Office told me that the true motto of being a good prosecutor is to “be careful and always keep your nose clean” (*Xiao Xin Jin Shen, Jie Shen Zi Ai*).<sup>245</sup>

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240. See generally Rivera, *supra* note 50, at 999–1022 (discussing how and why firms evaluate the “fit” of job application).

241. Interview no. 3, at 1 (transcript on file with author).

242. Fieldnote no. 23, at 4 (notes on file with author).

243. Barkow, *supra* note 41, at 2091; Levine & Wright, *supra* note 84, at 1122.

244. JOHNSON, *supra* note 219, at 35, 215 (showing the difficulties to create or reform the law in Japan due to the norm of unanimity, and that scholars disagree on what a high conviction rate and a low acquittal rate in Japan mean); Patricia G. Steinhoff, *Pursuing the Japanese Police*, 27 L. & SOC’Y REV. 827 (1993) (providing an overview of a growing literature on the Japanese police). See also JOHNSON, *supra* note 219, at 161–73 (explaining the causes of consistency in Japanese prosecution through the lens of institutional culture and structure).

245. Interview no. 25, at 2 (transcript on file with author).

#### IV. CULTURAL CHANGE AS A CONTESTED PROCESS: A THEORETICAL CONSTRUCT

##### A. SAILING AGAINST THE WIND

*Being a prosecutor in this office is, after all, like sailing against the wind.*

Wang Zai-qin

The two systems of management discussed above provide the Taiwan Office with a robust yet subtle mechanism to cultivate individual prosecutors' sense. However, sense makers' ability to do so is conditioned upon the brokerage of some individuals. I start with a case to demonstrate how some individuals help convey top managers' expectations and translate what good sense means for line prosecutors. Performing their brokerage function, these individuals have the ability to both enhance or obstruct the authority of sense makers.<sup>246</sup>

Wang Zai-qin, a male prosecutor leading an investigative unit for the second year, faced critical challenges. In his early 40s, Wang belonged to the first generation of prosecutors after the adversarial reforms that occurred in Taiwan during the 2000s. But instead of pursuing a career in the criminal trial arena, Wang had decided to focus on refining his skills in white-collar-crime investigation. Wang had successfully been promoted to the management ranks and since then had served in different positions, including the SID before it was abolished in 2016. Due to Wang's experience, many Taiwanese prosecutors considered him a member of the "elite ranks" (*Jing Ying Jie Ceng*).<sup>247</sup>

Wang often refers to his most significant challenges as "external noises" that seek to interfere with the investigative process. Unlike his relatively junior fellow prosecutors, Wang has a sympathetic attitude toward his superiors who attempt to engage in "case-rigging" activities. He often tells his subordinates in his unit that because they are not in the position of the chief prosecutor or responsible officials in the MOJ, there is no way they can realistically speculate on the priority concerns of such higher-ups. However, in this particular instance, he might well have thought the chief prosecutor had crossed

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246. Fieldnote no. 8, at 6 (notes on file with author).

247. Interview no. 10, at 23 (transcript on file with author).

the line.<sup>248</sup>

It was a time of beautiful November weather in Taiwan and Wang had joined a few selected prosecutors from the district prosecutors' offices and the high prosecutors' offices at a resort nearby a famous scenic area for a two-day professional training program. During the morning of the second day, when the group of prosecutors was planning to visit a picturesque reservoir, Wang saw his supervisor drag large suitcases out of the resort and stumble around trying to locate his pick-up car. Concerned, Wang went up and asked the chief prosecutor what was wrong and whether there was an emergency. The chief prosecutor replied that some government agencies were abruptly visiting the office and so he had to get back quickly, before noon. Wang's instinct told him that this seemed like an excuse to shoo him away. However, Wang did not inquire any further.<sup>249</sup>

Later in the afternoon, when Wang himself returned to the office, one of the prosecutors from his unit reported that the chief prosecutor had requested on a rush basis all of the documents in one of the cases they were currently investigating. The line prosecutor told Wang that just a few hours before he had also received a call from a clerk saying that the chief prosecutor was requesting, in particular, the files on a suspect that the line prosecutor had just interviewed the day before. The line prosecutor was extremely nervous because the chief prosecutor had not provided any reason for his review. Wang tried to calm his subordinate down by assuring him that they had done nothing wrong in their unit, so there was no reason for them to panic. But at the same time, Wang determined that they would have to take the initiative to figure out what had happened. Wang quickly glanced through his desk and grabbed a separate case file. He also thought up some minor questions about it so as to seemingly have another reason to drop by the chief prosecutor's office. Upon doing so, he hoped that the chief prosecutor would by himself bring up the reason for all of his rushed review activities.<sup>250</sup>

Wang was right. When he and the line prosecutor got into the chief prosecutor's office, they saw the chief was actually reading over the documents that had been retrieved on a rush basis. The chief prosecutor told Wang and the line prosecutor that someone had lodged a complaint against Wang and the line prosecutor. Although the chief prosecutor intentionally kept the accusation subtle, Wang knew exactly what had happened. Before Wang met the chief

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248. Fieldnote no. 10, at 3 (notes on file with author).

249. Fieldnote no. 12, at 10 (notes on file with author).

250. Fieldnote no. 13, at 8 (notes on file with author).

prosecutor, he had had a quick conversation with the line prosecutor inquiring into the process about the interview with the suspect that the latter had conducted. The line prosecutor reported to Wang that he had decided not to offer a deferred prosecution based on his interpretation of the law.<sup>251</sup> Wang sensed that this was the crux of the issue as far as the chief prosecutor was concerned.<sup>252</sup>

Wang immediately expressed his apology about his unit causing any trouble and asked if the chief prosecutor could provide the *written complaint* so that he could draft a reply at once. Of course, Wang also anticipated that it was highly unlikely that any written complaint document existed because in practice, there is generally little desire to leave any trace of such "complaints." The chief prosecutor responded that he personally felt a little bit awkward, explaining to Wang and the line prosecutor that he himself thought the case was solid after having read through the files. In order to ease the tension, Wang then shifted gears by bringing up the questions on the unrelated matter that he had "prepared" for this meeting.<sup>253</sup>

After some time was used that way, and before the meeting broke up, the chief prosecutor finally came to the point and raised his true concerns: "[W]ill there be any difficulty if we offer the defendant a deferred prosecution?" Wang realized right away what the chief prosecutor was alluding to. "There was no formal complaint against my line prosecutor and me," Wang explained to me, "all we were really facing was (probably) someone of influence who had called the chief prosecutor and expressed his/her desires."<sup>254</sup> And the reason why we were having this conversation was because this person was too powerful for the chief prosecutor to turn away summarily." What was going through Wang's mind was that compromising as to the request would not only harm the integrity of his unit's case but would also leave a black mark on his personal career record as well as that of his line prosecutor. Wang did not want to face any case-rigging accusation in the future.<sup>255</sup>

Yet he also did not want the chief prosecutor to *lose face* (*Diu Lian*). So, what he did was to *play dumb* (*Zhuang Sha*). He went through all the relevant legal doctrines with the chief prosecutor and

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251. When reaching a deferred prosecution agreement, a prosecutor agrees to grant amnesty in exchange for the defendant agreeing to fulfill certain requirements. The amnesty is revocable over a determined period, however, if the defendant falls out of compliance.

252. Fieldnote no. 13, at 8 (notes on file with author).

253. Fieldnote no. 18, at 5 (notes on file with author); Fieldnote no. 19, at 2 (notes on file with author).

254. Fieldnote no. 18, at 13 (notes on file with author).

255. Fieldnote no. 19, at 18 (notes on file with author).

explained to the chief prosecutor that there was no way for prosecutors to surrender their legal mandate in the case and that they had no option but to prosecute the suspect. Wang said to me:

So, you think the chief prosecutor didn't understand the law or the relevant legal doctrines? Of course not. I was just using this discussion exercise as a way to signal to him that there was no way we could accede to a request for deferred prosecution.<sup>256</sup>

When asked about what the most challenging part of handling a case like this is, Wang told me:

It is often the backlash coming from the inside. As a head prosecutor, if you don't fend off the pressure coming from higher-ups, the line prosecutors you supervise will basically just collapse and give in . . . After our meeting with the chief, the line prosecutor who handled that case expressed her gratitude to me, saying that if I hadn't accompanied her to the meeting, she would have just presumed she had done something seriously wrong.<sup>257</sup>

At the end of our conversation, Wang expressed his mixed feelings serving in that tricky, intermediary position:

I have seen so many prosecutors who have been compromised after they became head prosecutors. They were once, I believe, *good prosecutors* who would uphold ethical principles when necessary [emphasis added] . . . Being a prosecutor in this office is, after all, like *sailing against the wind*" [emphasis added].<sup>258</sup>

#### B. THREE MECHANISMS FOR JURISDICTIONAL BATTLES

My case study of the Taiwan Office shows that cultural change stems not from an organization's ability to control individuals' behaviors or to set up new norms and procedures but from its capacity to distinguish its members and to communicate such messages effectively. To conceptualize the process of cultural change

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256. *Id.* at 27 (notes on file with author).

257. *Id.* at 33.

258. *Id.*

and to better explain the phenomena I observed from my fieldwork, I propose a processual model that depicts cultural change through the lens of a “jurisdictional battle” in which new sense makers manage to secure their legitimate status and to be recognized by other actors in a given field. Organizational culture, under this perspective, is shaped by those who have been deemed to be the legitimated arbiters of individuals’ sense—i.e., by the sense makers. The following discussion is devoted to elaborating on how certain individuals gain legitimate status as sense makers and why the introduction of new sense makers into a field tends to change existing culture.<sup>259</sup>

To begin with, the legitimacy of sense makers is socially constructed and depends on the perceptions of authority accorded by other actors in a given field.<sup>260</sup> The process of gaining legitimate status as sense makers is dynamic and conditional in nature. We should not assume that the upper echelons of an organization can always acquire that. In fact, when he first took office in 2016, Chen was well aware that some individuals disagreed as to his authority and accorded others—especially the “old timers” in the office—as possessing *de facto* authoritative status as sense makers. To change the existing culture, Chen and his administration engaged in what I have come to describe as a “jurisdictional battle” to secure their legitimate status as sense makers. The prosecutorial system is essentially a social field formed by the intersections of various cultural jurisdictions or domains. Culture is formed in a dynamic process by which different actors compete to accumulate resources, knowledge, key information, internal and external recognition, and support, as well as to acquire jurisdictional domination over certain domains. Under this theoretical construct, cultural change is manifested in a contested process. As individuals fight for jurisdictional control, they have to exert power and influence over other actors within certain professional domains and sometimes even manage to undermine the legitimacy of competing groups.<sup>261</sup>

Specifically, I conceptualize cultural change as consisting of

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259. Karl E. Weick et al., *Organizing and the Process of Sensemaking*, 16 ORGANIZATION SCIENCE 409, 420–21 (2005).

260. See generally NEIL FLIGSTEIN & DOUG MCADAM, A THEORY OF FIELDS (2012); Neil Fligstein & Doug McAdam, *Toward a General Theory of Strategic Action Fields*, 29 SOCIOLOGICAL THEORY 1 (2011); Neil Fligstein, *Social Skill and the Theory of Fields*, 19 SOCIOLOGICAL THEORY, 105 (2001).

261. See also Andrew Abbott, *Jurisdictional Conflicts A New Approach to The Development of The Legal Professions*, 11 AMERICAN BAR FOUNDATION RESEARCH JOURNAL 187, 187–224 (1986); ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988).

actions of *boundary work* that occur in professional domains.<sup>262</sup> Individuals have to redefine existing boundaries in a given field by engaging in jurisdictional battles. My contested cultural change paradigm suggests three main channels through which new sense makers may engage in such jurisdictional battles: (1) establishing new jurisdictional control by carving out new task domains; (2) delegitimizing existing sense makers by eliminating certain domains; and (3) coordinating with existing sense makers by maintaining or expanding current domains. In the context of my case study of the Taiwan Office, the dissolution of the SID in 2016 created an ideal condition for the Taiwan Office to enter the first type of jurisdictional battle: *carving out new task domains*.

To inject new domains into an existing professional field and to claim legitimate jurisdiction, individuals must change actors' relative positions within the field and their corresponding relationships to other.<sup>263</sup> By maneuvering these interrelationships, sense makers can thus develop new shared subjectivities and, eventually, new cultures. In short, introducing a prominent new sense maker into a field will often result in the "deconstruction" and "reconstruction" of the relationships among all actors, which in turn shapes field dynamics and underlying culture.<sup>264</sup>

The two systems of management discussed above can be seen as the practice of boundary work. By redrawing existing boundaries, individuals can then claim their own jurisdictions. While new domains are created or existing domains are vacated, as in the circumstances following the abolishment of the SID, sense makers must be able to include some individuals while excluding others. Sense makers' legitimate authority to "include and exclude" thus makes them extremely influential as it functions as a technique of boundary work that enables them to manage professional jurisdictions and settle potential jurisdictional conflicts. It implies discernment among prosecutors and involves the rendering of value and preference judgments. These judgments simultaneously situate the sense makers and the objects of their judgments in relative positions within a given field. These interrelationships eventually lead to the development of

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262. See generally ABBOTT, *supra* note 261, at 69–79 (discussing different consequences of boundary work).

263. Pierre Bourdieu, *Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS LAW J. 814 (1987); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIOLOGICAL REV. 147 (1983); John L. Martin, *What is Field Theory?*, 109 AM. J. SOCIO. 1 (2003).

264. See Grégoire Croidieu & Phillip H. Kim, *Labor of Love: Amateurs and Lay Expertise Legitimation in the Early U.S. Radio Field*, 63 ADMIN. SCI. Q. 1 (2018).

shared meanings and cultures.<sup>265</sup>

As I have elaborated through Wang's case, disputes around the notion of good sense often involve intense conflicts about the superiority of one judgment of sense over another as well as passionate efforts to present one notion of sense as legitimate while denigrating another. Cultural change, under my theoretical model, is the product of a highly adversarial and contested process that reshapes the field structure. Jurisdictional battles occur when actors in a field seek to displace the existing sense makers' legitimate jurisdiction over certain domains and to gain new jurisdictional control.<sup>266</sup> Cultural change will only happen when the new sense makers successfully secure their legitimate status.<sup>267</sup> In other words, the precondition for cultural change is the inception of new sense makers after the settlement of jurisdictional battles. On the other hand, if the settlement of jurisdictional battles ends in the consolidation of existing sense makers' authority, then reform efforts will not trigger structural change.

### C. TRAINING THE EYE: SENSE MAKERS AS LEGITIMATE ARBITERS

With this theoretical model in place, I want to further elaborate how Chen and his nascent administration succeeded in such jurisdictional struggles and thus became widely recognized as sense makers in a field that was previously occupied by the SID. Cultural change within prosecutors' offices is difficult, because reform efforts often create broad and ambiguous mandates that can be hard to communicate effectively, and, perhaps more importantly, because cultural change always opens up new task domains that spark jurisdictional battles between existing field actors and reformers.<sup>268</sup> For reformers to be recognized as sense makers, they must settle or outright win potential jurisdictional clashes and claim legitimate jurisdiction over certain task domains.<sup>269</sup>

The key to a successful outcome is relying on those who possess

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265. *Id.*

266. See Beth A. Bechky, *Evaluative Spillovers from Technological Change: The Effects of "DNA Envy" on Occupational Practices in Forensic Science*, 65 ADMIN. SCI. Q. 606, 610–11 (2019).

267. *Id.*

268. See generally ABBOTT, *supra* note 261, at 69–79.

269. See generally Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOCIO. 1203 (2007); KELLOGG, *supra* note 151; Stefan Timmermans, *Suicide Determination and the Professional Authority of Medical Examiners*, 70 AM. SOCIO. REV. 311 (2005).

a “good eye” (*Yan Li*).<sup>270</sup> Some individuals—such as Wang, who used to serve in the SID—have performed as bridges between the sense makers and other actors in the field: *they allow prosecutors on both sides to be aware of the concerns and interests in the other group*. These are the individuals who have gained a reputation as possessing a good eye. Although not recognized as authoritative sense makers, they perform a critical brokerage role between sense makers and other actors in the field.<sup>271</sup> They communicate ideas and issues between groups and thus gain a decisive advantage due to their ability to accommodate different actors and facilitate conflict resolution to resolve any potential confusion or disruption stemming from reform efforts.

For instance, when it comes to sorting prosecutors, many managing prosecutors I engaged with were confident that they could quickly sift through the prospective candidates who wanted to be recruited into their units. “I have done this for enough years that I can speak with a prosecutor for a couple of minutes and determine right then and there if he or she is right for my unit or not,” a unit supervisor said to me.<sup>272</sup> Experienced individuals like this know what they are looking for because their eye “says” so. Having the eye means having the ability to spot appropriate line prosecutor candidates, envision their realistic future career possibilities, and, perhaps most importantly, evaluate whether they possess the right sense.<sup>273</sup>

Like sense, having a good eye is a learned skill, a form of cultivated knowledge similar to what journalists might call a “nose for news.” The eye is shaped by individuals’ personal experiences and institutional knowledge, and it is mobilized according to the needs of whatever audience these individuals perceive. They know what the “look” (*Yang Zi*) of a good prosecutor is and they manage to communicate their judgments back to the sense makers. Oftentimes, sense makers also have to consult with these brokering individuals to make sure there is or will be a good fit between the prosecutors and their assigned tasks.

By exercising their eye, these prosecutors efficiently reproduce the acceptable attitudes and perceptions for individuals in the field,

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270. Fieldnote no. 48, at 5 (notes on file with author); Fieldnote no. 19, at 2 (notes on file with author).

271. See generally Ronald S. Burt, *Structural Holes and Good Ideas*, 110 AM. J. SOCIO. 349 (2004); Ronald S. Burt et al., *Social Network Analysis: Foundations and Frontiers on Advantage*, 64 ANN. REV. PSYCH. 527 (2013); Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOCIO. 1360 (1973); Mark S. Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOCIO. 481 (1985).

272. Interview no. 37, at 3 (transcript on file with author).

273. Judge & Cable, *supra* note 51, at 365–70.

while maintaining the notion that their decisions are instinctive and cannot really be elaborated upon. In this view, the dominant class of prosecutors reproduces and maintains the professional hierarchy in a tacit way that is in accord with their interests or advantages—not by specifying bright-line standards or imposing uniform conceptions regarding the notion of good sense to the rest of the group but by being able to apply commonsensical ways of understanding differences such that any potential antagonisms within the group can be neutralized.

In sum, in the Taiwan Office, sense makers constantly rely on those individuals who possess a good eye so that the sense makers can better exercise their authority to establish the terms under which individual prosecutors are classified, managed, and socialized. Possessing this crucial ability to classify individuals, sense makers can properly identify those colleagues who have demonstrated or have the potential to demonstrate good sense. While those without good sense may express resentment and even hostility toward the office, they are often unaware of the professional reproductive implications surrounding the practices of sense-making and the reliance on the exercise of the eye.<sup>274</sup> Through such practices, each prosecutor's sense is assigned its rightful social and communal value within a given field.<sup>275</sup>

#### D. COMMUNICATION, VOICE, AND THE MEDIA

As discussed above, individuals who possess a good eye can aid in validating the authority of the new sense makers during jurisdictional battles. However, the successful introduction of new sense makers into a field is by no means guaranteed. The process of cultural change must be characterized as always fraught with conflicts and disputes along with resistance regarding just who are the legitimate arbiters of sense.<sup>276</sup> For instance, there are individuals I met in the Taiwan Office who believed that what Chen hoped to achieve could be dangerous as it called for maximizing prosecutors' power to conduct criminal investigations. They tended to think that without proper oversight and full transparency, the chief prosecutors could abuse such power for certain politicians' or individuals'

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274. See, e.g., Neil Fligstein, *Sense Making and the Emergence of a New Form of Market Governance: The Case of the European Defense Industry*, 49 AM. BEHAV. SCIENTIST 949, 951 (2006) (during the sense-making process, individuals must come to an interpretation of the crisis and explore proper solutions or "new frame").

275. See generally *id.*

276. See generally MARTIN, *supra* note 231.

interests—the exact reason why the Taiwanese legislature decided to abolish the SID. In this section, I further elaborate on the institutional features I observed in the Taiwan Office that played a pivotal role during the cultural change process. I show that the *flexible organizational structure* and *open communication platforms* created an institutional environment that facilitates the exercise of sense-making authority.<sup>277</sup>

First off, to foster information flow and communication, the Taiwan Office deliberately makes its organizational structure flexible. It can quickly be mobilized to meet changing situations. Here, individuals with a good eye may help by processing sensitive information in everyday work. For instance, in a high-profile case against a major political figure in Taiwan, Chen, his deputy chief prosecutor, a head prosecutor, and three assigned line prosecutors arranged a daily meeting to discuss every possible strategy during the months-long criminal investigation.<sup>278</sup> According to the head prosecutor involved in the operation, this model served as a “conversational platform,” and the rationale for it was that the office could have a far more open dialogue across the organization’s hierarchy.<sup>279</sup> Being open and transparent meant limiting formal, hierarchical control. Instead of imposing top-down rules to govern prosecutors’ behaviors or having managing prosecutors supervise a subordinate prosecutor’s actions, the head prosecutor said to me, “I just want to trust that my people will use their good sense and decide for themselves . . . . To investigate complicated cases and to better train our prosecutors [who were selected into elite positions or units], there is no room for hierarchy.”<sup>280</sup> In these circumstances, Chen enjoyed substantial wiggle room to decide the level of involvement by his dedicated managerial-level prosecutors. As the importance of a case increased, members of the management—such as the deputy chief prosecutor and the head prosecutor—would become more actively involved in the investigation process.<sup>281</sup>

An interesting aspect of having a flexible organizational structure in the Taiwan Office was the *decoupling between information communication and decision-making authority*.<sup>282</sup> Managing

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277. See generally ROBERT SIMONS, *LEVERS OF CONTROL: HOW MANAGERS USE INNOVATIVE CONTROL SYSTEMS TO DRIVE STRATEGIC RENEWAL* (1995).

278. Fieldnote no. 39, at 12, 15 (notes on file with author).

279. Interview no. 80, at 2 (transcript on file with author).

280. *Id.*

281. Fieldnote no. 59, at 3 (notes on file with author).

282. My empirical data shows that prosecutors in Taiwan have successfully created a loosely coupled system in which they are capable of making visible, public commitments to satisfy external demands for reform while keeping these

prosecutors actively responded to line prosecutors' expectations for a meaningful dialogue by opening up the organization's communication channels quite dramatically. Notably, line prosecutors—those possessing good sense—still enjoyed their own decision-making authority. Deconstructing and redesigning the organizational hierarchy allowed Chen to better manage the decision-making context, not the decision-making itself. According to conventional views of the prosecutorial system, formal communication and decision-making structures have to be tightly linked in order for an office to manage its culture. But the Taiwan Office has developed an unorthodox method of structuring the two. In it, the office leverages a wide range of communication tools and platforms while almost entirely leaving the decision-making authority to individual prosecutors who are trusted to have good sense.

Individuals who serve as the eye for the sense makers perform vital brokerage functions here. They possess and communicate sensitive information across and up and down the organizational hierarchy, thus helping to create and disseminate knowledge. The control of that body of information provides sense makers with the necessary knowledge to determine what is "correct" and "proper" within a task domain.<sup>283</sup> Through such practices, sense makers have actively and effectively responded to line prosecutors' expectations for a meaningful collaboration by opening up the organization's communication channels dramatically. Yet the office still has managed to do so without disrupting its decision-making structure. To be specific, when it comes to communication, prosecutors who serve as the bridge will share with line prosecutors who are assigned important cases such sensitive office information that comes from senior leadership meetings. In return, for Chen and his top executives, being open—or more properly, being *selectively open*—made it possible for line prosecutors to be able to better cultivate and exercise their own sense.<sup>284</sup> In every group meeting I observed, top-ranking prosecutors encouraged the line prosecutors to speak up and

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commitments as just myth and ceremony. By doing so, prosecutors are able to ensure that day-to-day, behind-the-scenes, work and culture were unaffected by those pronouncements. For the practices of "decoupling" in organizations, see Turco, *supra* note 37, at 386 ("With decoupling, organizational elites make visible, public commitments to satisfy the demands of their external environment, but these commitments are often just 'myth and ceremony'; the real day-to-day, behind-the-scenes work of employees is unaffected by them . . .").

283. Abbott, *supra* note 261, at 188; Stephen R. Barley, *Technicians in the Workplace: Ethnographic Evidence for Bringing Work into Organization Studies*, 41 ADMIN. SCI. Q. 404 (1996).

284. Fieldnote no. 68, at 6 (notes on file with author).

prominently weigh in on major issues concerning their tasks.<sup>285</sup>

Beyond its flexible organizational structure, the open communication structure of the Taiwan Office allows its executives to fashion and maintain an apparently transparent environment, which provides line prosecutors a sense of dignity and autonomy. Meanwhile, it ensures that the sense makers acquire comprehensive information to make their managerial judgments and exercise their authority accordingly. From the perspective of such selected line prosecutors, there is a feeling that they have been granted some ability to really see into the organization's higher-level activities and to have their own ideas heard and seriously considered. They thus feel they can see what management sees and understand how management is thinking about cases.<sup>286</sup>

Chen's administration also made good use of modern communication technologies. Executives and line prosecutors constantly communicated through one of the most popular social media tools in Taiwan, known as the *Line*. It functioned as a real-time chat system. Users could easily formulate a "chatroom" and invite potentially hundreds of users to join the conversation. Moreover, head prosecutors supervising anti-corruption and white-collar crime units rarely closed the doors of their offices.<sup>287</sup> They sometimes sat in the open areas working with prosecutors of their units. Many line prosecutors told me that this was especially crucial to them because it conveyed a high level of transparency as well as the free-flowing communication they expected as professionals. However, such a mechanism also serves as an unobtrusive platform of acquiring information for the sense makers and those who are silently exercising their "eye."<sup>288</sup>

The Taiwan Office has also effectively made use of *non-institutional field actors* to transfer, translate, and transform information across different boundaries. The media and individual reporters play a critical role in facilitating both *internal* and *external* communication and thus act in furtherance of the construction of sense makers' legitimate jurisdiction. The easy accessibility that

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285. Fieldnote no. 55, at 13 (notes on file with author).

286. It is important to note that, based on my fieldwork, no evidence has shown that the executives did actually share *all* information with line prosecutors. However, the high level of perceived openness among line prosecutors indicates that this model functions efficiently as a tool to bring individual prosecutors in line with the office's overarching values and what sense makers determine to be good sense. This structure further explains why top executives in the Taiwan Office rarely believe information disclosure destabilizes the office's hierarchical authority.

287. Fieldnote no. 55, at 14 (notes on file with author).

288. Fieldnote no. 48, at 6 (notes on file with author).

reporters have in office spaces marks one of the most unique features of the Taiwan Office. The media is officially authorized to access prosecutors' work areas directly. According to reporters I interviewed, the office provides individual reporters with access cards that allow them to enter not only the prosecutor's office but also locked spaces in the courthouse.<sup>289</sup> Media reporters spend many of their working hours in their assigned prosecutors' offices. They pay close attention to major operations of the office and interview prosecutors about individual cases they consider interesting on a daily basis.<sup>290</sup> Whenever they have questions, they can go directly into the office of the managerial-level prosecutors and other individuals without even having to go through administrative assistants. Because they are not restricted to media space, reporters often hang around throughout the office. Their ability to access every office space means what they see, what they hear, and what they know about the office may well exceed the knowledge of individual prosecutors in the office.

The amount of intelligence that media reporters possess regarding the Taiwan Office and individual prosecutors there is simply stunning. Any reporter assigned in that office can almost certainly remember and reel off all the names of most, if not all, the prosecutors as well as numerous details, such as when prosecutors graduated from the Judicial Academy, major cases they have handled or are currently handling, and a lot of other information, including gossip and rumors.

Yet, what fascinated me most was not the sheer amount of information reporters possess but how they process and translate it. They help translate meanings across groups by enabling individuals to acknowledge and appreciate perspectives across boundaries. For the Taiwanese media, there is an internal ranking system specifying what qualifies as newsworthy. Although different media groups may have different preferences, they generally rank news regarding criminal cases currently under investigation as most newsworthy. To my surprise, all the media reporters I interviewed told me that news

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289. Interview no. 87 with Taiwan based Prosecutor (transcript on file with author; Interview no. 88 with Taiwan based Prosecutor (transcript on file with author).

290. Taiwanese media reporters are often well-trained in detecting trivial clues. For example, they will pay close attention to whether female prosecutors put on make-up or whether male prosecutors leave their suits in their offices. These clues can sometimes signal that prosecutors are planning to execute search warrants or major operations on a particular day. A reporter told me that he can tell if a head prosecutor is trying to cover something from the media by observing "where the head prosecutors park their cars or which doors they walk through into the office." Although it might be exaggerated, it certainly reflects how confident those reporters are in getting what they want.

regarding the latest prosecutorial personnel changes is also considered on top of their newsworthy lists. The reason for this is not because of their popularity among the media's general audience. Most of the Taiwanese people do not care who will be nominated as the next head of the MOJ, or, lower down the line, who will be appointed as the chief prosecutor or unit supervisor in a prosecutorial office. Nevertheless, such news items are extremely important for reporters on the prosecutorial beat. Whoever acquires the most up-to-date insider information regarding personnel changes or the accessibility to or likability of such high-profile figures will quickly gain an enhanced reputation among all prosecutors. Such a reputation is crucial for reporters because they face fierce competition for news scoops within the industry. As Cai Yi-tong, a news reporter for a major newspaper in Taiwan explained to me:

Every day we [reporters] are hanging around the office searching for good sources for media coverage. There are more than ten reporters from different newspapers and social media . . . Prosecutors can always choose who they want to talk to or to share inside information with. I was taught that if I want to get exclusive news, I need to build my reputation and show prosecutors, other lawyers, and judges that they better take me seriously.<sup>291</sup>

In this regard, many reporters believe that being able to publish reports or even just to circulate information informally within the office regarding personnel changes or gossips and rumors can help secure their reputation as insiders. If a report has valuable information that is not available to individual prosecutors, they will be more willing to interact and perhaps even share exclusive information about their cases with the reporter. Moreover, predicting a list of prosecutors who are most likely to be promoted has long been a popular practice within the Taiwanese media industry. An accurate prediction is certainly a way to enhance a reporter's reputation. Highly motivated in these ways, reporters specifically assigned to the Taiwan Office often pay extremely close, even obsessive, attention to every minute detail.<sup>292</sup> The body of information the reporters gain and

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291. Interview no. 39, at 8 (transcript on file with author).

292. For example, in 2018, when a district court pronounced a guilty verdict against a well-known politician, a reporter happened to be wandering around in the office. He later wrote a report describing the prosecutors as being "overwhelmingly excited and ecstatic" regarding the result when watching the live broadcast of the verdict announcement on TV in the chief prosecutor's office.

circulate among prosecutors then serves in turn as a highly effective mechanism for *internal* communications.<sup>293</sup>

For example, a line prosecutor was unsatisfied with his workload assigned by his supervisor. One day when he needed support from other prosecutors for the execution of a search warrant, he turned to members of another unit instead of reporting his need to his direct supervisor.<sup>294</sup> A media reporter happened to be in the office when the group of prosecutors came back from the operation. The reporter sensed something suspicious and uncovered the resentful feelings of the line prosecutor. Unsurprisingly, the “news” was quickly circulated among prosecutors and eventually entered the ear of one of the top managing prosecutors. Before the unit supervisor was even aware of the issue, she was called to Chen’s office and admonished to change her manner of leadership. In the end, the line prosecutor did not formally lodge a complaint about this supervisor. In this fashion, the harmony of the office was maintained as complaints and resolutions were successfully communicated up and down and between different levels of the management and the line. And perhaps not surprisingly, that supervisor was eventually excluded from Chen’s circle of trust due to her lack of sense concerning team management.<sup>295</sup>

Besides serving as information brokers within the office, media reporters also deliver information across institutional boundaries. Such an *external* communicative function enables sense makers to acquire useful information and secure recognition and support from external audiences during jurisdictional battles. Being able to gain early access to the information produced by media reporters’ extensive networks provides a significant advantage for aspiring sense makers. Therefore, some prosecutors in the Taiwan Office have strong incentives to make insider information available to reporters in order to build long-term relationships. In exchange, reporters can easily and quickly mobilize their existing networks across various fields, professions, and organizations throughout Taiwan to locate information for their individual prosecutorial sources. Seasoned prosecutors routinely rely on such interdependent relations with reporters to ensure their prompt access to valuable information.<sup>296</sup>

Sense makers’ advantageous position as far as information access is concerned can also be manifested in their powers to conceal, retain,

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293. See generally TURCO, *supra* note 53, at 173–82; Catherine J. Turco, *A New Era of Corporate Conversation*, 58 MIT SLOAN MGMT. REV. (2016) (suggesting that social media tools enable communication to throw across organizational hierarchy).

294. Fieldnote no. 77, at 10 (notes on file with author).

295. *Id.* at 18 (notes on file with author).

296. Fieldnote no. 44, at 6 (notes on file with author).

and maneuver such information.<sup>297</sup> Their relations with media reporters and the cross-agency networks that reporters build and cultivate have enabled the sense makers not only to influence *what* kind of information will cross the institutional boundary but also *how* and *when* such information will cross. Sense makers' power to control information flows further allows them to manage how other actors in the field perceive and react to any particular incidents, which can then be engineered to erode the legitimacy of any competing sense makers during jurisdictional battles. Recall, for instance, the drug-sweep operation case discussed above.<sup>298</sup> That case triggered serious controversy and also criticisms from the media. Due to widespread media coverage and resulting public outcry, the involved prosecutor eventually failed the highly-contested competition for promotion. What is intriguing is not only the detailed description of the news report regarding the investigative operation but also the fact that many reporters had already come to be aware of the incident long before it broke out widely in the news. In fact, the timing of the news release was quite calculated. The newspaper waited until the last minute before the MOJ entered into the final stage of reviewing those prosecutors who had been shortlisted for promotions. A head prosecutor commented to me: "[T]he reporter covering this case must be diligently doing someone a big favor by releasing the scandal at the perfect time so as to wipe out any potential competitors for his friend(s)."<sup>299</sup>

Hence, a final strategy employed by the Taiwan Office that fosters the inception of new sense makers into an existing field has to do with delegitimizing any competing sense makers. In order to gain a legitimate foothold in the field, Chen and his administration did not rely on imposing draconian rules and bright-line mandates from the top to substantiate their authority or threatening to discipline or to get rid of those individuals who challenged their legitimacy—usually by writing blogs, publishing op-ed articles, or utilizing social media platforms to express their disappointments and criticisms about the Taiwanese prosecution or the office. On the contrary, those dissenters who might be competing to be recognized as alternative sense makers were oftentimes placed in highly visible positions in the office. The ultimate goal was to create opportunities for these individuals to make mistakes and be openly humiliated by their peers. Publicity of competing sense makers' mistakes, or even just gossips and rumors about their lack of competence, served to erode their perceived

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297. Sandberg & Tsoukas, *supra* note 208, at 17.

298. See *supra* text accompanying notes 169–77.

299. Interview no. 71, at 3 (transcript on file with author).

legitimacy among other prosecutors and actors in the field.

E. DECOUPLING FROM THE HIERARCHY: THE COMMANDER AT SEA

The flexible organizational structure and open communication platforms I observed in the Taiwan Office can be seen as features of a post-bureaucratic approach to institutional management.<sup>300</sup> However, such features also enable some prosecutors to potentially “go rogue” and disregard sense makers’ authority, which can eventually erode sense makers’ legitimate status. In other words, individuals who serve as the eye for sense makers can become adversaries during the contested process for jurisdictional control.

When asked about her first-year experience leading an investigation unit, Weng Zi-xuan replied that she was astounded by the complex network of relationships between the prosecution and political actors in Taiwan. Even though she was unwilling to speculate openly with me about the ultimate integrity of the system, she could not deny the influence of politicians or powerful corporations. For example, in a case involving the investigation of high-profile corporate corruption, Weng said she had gained a valuable, new insight into robust influence.

The defendant, a millionaire entrepreneur, was in custody for pre-trial detention out of fear that the defendant would harm the integrity of the investigation by literally fabricating evidence or suborning false testimony. One day, Weng and the assigned line prosecutor were informed by defense counsels that their client intended to apply for medical parole and that they had selected a hospital for medical examination. Weng was surprised that officials from the detention center seemed to have already been aware of such an arrangement. “Something tricky was going on,” Weng explained to me, “we were not sure how many people above me might have been compromised. However, judging from the suddenness of the application for medical parole and how calculating they were in prearranging the hospital and the doctor, I think there was an underlying plan behind all this.”<sup>301</sup> Weng’s concern was that once the defendant got to the designated hospital, there would be no control over whom the defendant spoke to or what decisions the doctor would make. “The worst scenario for the prosecution team was that the doctor might decide that our defendant was no longer suitable for any further detention due to health considerations . . . . If this person

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300. Simon, *supra* note 36, at 181; TURCO, *supra* note 53, at 8–9.

301. Interview no. 61, at 3 (transcript on file with author).

were let out, all of our efforts to that point would have been for nothing,” said Weng.<sup>302</sup>

Once again, this prosecutor decided to “play dumb,” just like her colleague Wang. Without notifying any of her superiors, she and the line prosecutor went to the detention center to pick up the defendant to take to the hospital. However, as they hit the road, Weng announced to the defendant and defense counsel that she had decided to arrange another hospital for the medical examination. Weng had checked beforehand and was able to guarantee that this hospital had the same expertise and equipment for the medical examination that had been mentioned in the application. Weng also offhandedly but deliberately made another comment to the defendant: “Unless you have *any other reason* to go to the original hospital you chose” [emphasis added].<sup>303</sup> The defendant had no option but to agree to Weng’s arrangement. As a result, the defendant remained in custody throughout the investigation phase, and the case was later successfully prosecuted. More importantly, for Weng, she maintained harmony in her unit and in the office generally by avoiding any accusation that her superiors had somehow improperly intervened in or interrupted her unit’s case. “If you want to continue working in this office, being at stark odds (*Si Po Lian*) with your chief is truly the worst option,” said Weng.<sup>304</sup>

Another seasoned head prosecutor with more than 20 years of experience described his role as an “independent commander at sea.”<sup>305</sup> He told me that leading a functional investigation unit is like commanding a battleship in the middle of the ocean. As a captain, he is solely responsible for the cases under his control. In the context of Weng’s case, this analogy properly reflects the practice of head prosecutors, as ships’ captains, often casting off from their “admirals” (the chief prosecutors). Such a mindset helps explain why some of the head prosecutors I encountered tended to bristle at any intrusion in their cases from chief prosecutors, particularly regarding day-to-day command and control.

When communicating directly with their superiors, line prosecutors are inclined to be deferential to suggestions and concerns about whether something inappropriate or improper may have occurred in the prosecution of a case. Besides, many line prosecutors, possessing only limited information, worry that they may be subject to manipulation.<sup>306</sup> Many individuals I met, especially the mid-level

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302. Interview no. 77, at 5 (transcript on file with author).

303. *Id.* at 9 (transcript on file with author).

304. *Id.* at 10.

305. Interview no. 56, at 1 (transcript on file with author).

306. Fieldnote no. 42, at 11 (notes on file with author).

prosecutors who handle big cases, did consider their unit supervisors as more trustworthy, and they rely on their supervisors in terms of any communication with the chief prosecutors, other top-level superiors, and the media.<sup>307</sup> The most seasoned head prosecutors reciprocate this trust by paying close attention to different types of clues, seeking to unpack the true intentions behind each and every instruction, pronouncement, or request from the highest levels. "I am not going to buy whatever the chief has requested," said a head prosecutor to me.<sup>308</sup>

Since head prosecutors are the bridge between line prosecutors and the top management ranks, they essentially control communications among different levels of command as well as whether they want to maintain synchronous action among separate units. In this regard, head prosecutors have the ability to strategize their relationships with the upper echelon. In Weng's case, she decided *not* to report her plan to change hospitals to any of her superiors before the operation. But, on another occasion, when a more senior head prosecutor attempted to intervene in Weng's case by urging her not to subpoena a high-level governmental officer as a witness, Weng did it anyway. She also *intentionally* reported this issue to the chief prosecutor and acquired an official approval for the operation. By doing so, she was using—and playing off—the office communication channel and the words of the chief prosecutor as protection against her senior colleague. According to Weng, had there been any subsequent backlash or if the case had gone sideways, the chief prosecutor would have been the one to be held accountable.<sup>309</sup>

The tough question for individual prosecutors, though, is when to defer to such an overtly hierarchical office communication structure and when to maintain autonomy "out at sea" as an independent "captain." No matter what, those supervising prosecutors provide brokerage functions by controlling information flows between the lines and the higher ranks. Their role as information hubs thus enables them not only to control the proceedings of the criminal investigation but also to avoid open disputes and conflicts within the entire organization. More fundamentally, by putting on their hat as an "independent commander," they can obstruct sense makers' attempts to wield overarching authority and instead cultivate their own preferred sense in line prosecutors, thereby counterbalancing and smoothing out sense makers' legitimacy.

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307. Fieldnote no. 49, at 20 (notes on file with author).

308. Interview no. 27, at 6 (transcript on file with author).

309. Interview no. 77, at 11 (transcript on file with author).

## V. REIMAGINING PROSECUTORIAL ORGANIZATIONS

Since the advent of the prosecutorial reform movement, a series of progressive reformers have been elected as District Attorneys across the U.S. The 2020 election marked another milestone for the progressive prosecutor movement. A new class of reform-minded candidates again won several hotly contested local DA races. The results of the elections have delivered a clear verdict that voters across the nation are expecting changes in the U.S. criminal justice system.<sup>310</sup> As these progressive reformers have gained major platforms, one may reasonably expect that we will keep on seeing widespread reforms.

While there has been a growing number of top prosecutors at the local level who are committed to criminal justice reforms and who have vowed to bring about widespread change in the culture of the prosecution, socio-legal studies have not yet provided a comprehensive analytical framework for examining cultural change in prosecutors' offices.<sup>311</sup> The conceptual framework proposed in this Article goes beyond the conventional treatments of culture change as either a question of hiring for cultural alignment ("fit") or a matter of formal institutional control. The Article's theoretical paradigm provides six directions for policy debate and future socio-legal studies that seek to examine whether and how reform-oriented prosecutors across the United States, and in other jurisdictions, might manage to produce cultural change within their offices.<sup>312</sup>

## A. UNDERSTANDING THE CONTESTED NATURE OF CULTURAL CHANGE

First, scholars should address whether and under what conditions those reform-oriented leaders can acquire and consolidate their legitimate status as sense makers. As my example of the Taiwan Office indicates, possessing traditional *bureaucratic authority* does not automatically enable individuals to become legitimate arbiters of sense. Likewise, getting rid of old culture carriers (i.e., existing sense

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310. For an overview of progressive reforms in the San Francisco D.A.'s Office during the first several months of Boudin's new administration, see Boudin, *supra* note 9, at 27.

311. Davis, *supra* note 12, at 26–27.

312. See, e.g., Jessica Roth, *The Necessity of the Good Person Prosecutor*, 87 FORDHAM L. REV. ONLINE 30, 30–31 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1022&context=flo>; Rebecca Roiphe, *Revisiting Abbe Smith's Question, "Can a Good Person Be a Good Prosecutor?" in the Age of Krasner and Sessions*, 87 FORDHAM L. REV. ONLINE 25, 29 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1021&context=flo>.

makers) does not guarantee the transfer of sense-making authority. After all, one can easily imagine—and even find examples of—a scenario in which a reformer announces new standards/policies, and even wields sufficient institutional authority to punish employees who do not comply with those standards, but the employees nevertheless resent the reformer's new standards/policies as unwise or otherwise morally invalid and find ways around them.<sup>313</sup> It is hard, in that case, to say that the reformer has achieved any *cultural change* within the institution. The workers may comply out of fear of punishment, but their occupational culture continues to endorse a different set of standards and ideals. In other words, individuals' legitimacy as sense makers must be widely recognized by actors in the field. So, the key question becomes how reformers convince workers that their new standards not only carry institutional backing through the threat of punishment or reward but also *legitimately* represent "good" performance.

In this regard, scholars ought to distinguish traditional hierarchical authority from sense-making authority. The conventional approach for the study of prosecutorial organizations mainly focuses on the interaction between individuals who possess bureaucratic authority and those who do not.<sup>314</sup> Such a *single-dimensional approach* misses the complex social networks and power dynamics within the organization. My goal in this Article is to demonstrate that while leaders enjoy broad bureaucratic authority, they do not necessarily possess sense-making authority. Scholars ought to address whether and under what conditions reform-minded leaders can acquire and consolidate their legitimate status as sense makers—i.e., as arbiters of good sense—and effectively promulgate such standards.

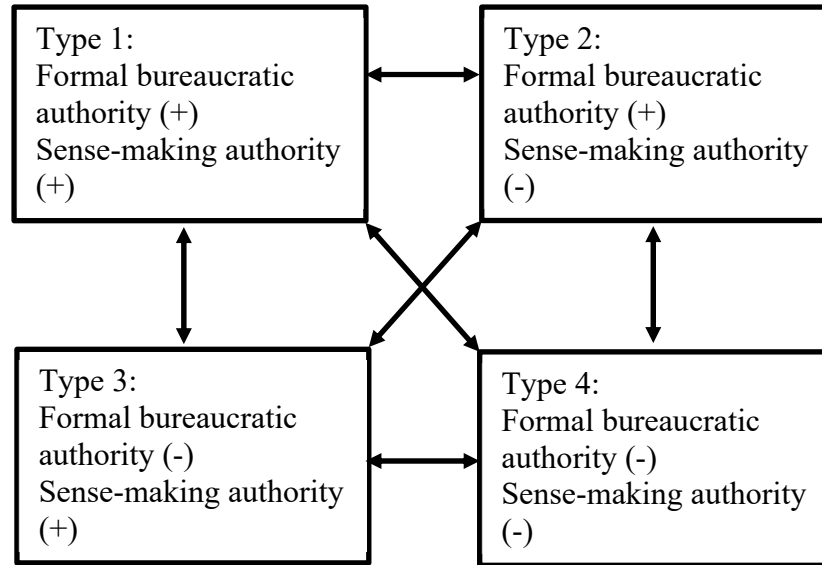
Table 1 elaborates the complex *multi-dimensional* social interactions among four different types of individuals within a prosecutorial organization:

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313. For instance, under Eric Gonzalez, the Brooklyn DA's Office issued a policy to restrain line prosecutors from requesting bail in most misdemeanor cases. However, reports from court watchers show that line prosecutors continue to find ways to routinely request bail. Zoe Azulay, *Court Watchers Hold 'Progressive' DAs Accountable*, WNYC NEWS (July 24, 2018), <https://www.wnyc.org/story/court-watchers-hold-progressive-das-accountable/>.

314. See, e.g., Levine & Wright, *supra* note 84; Wright et al., *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL'Y 27 (2014); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30–35 (2002).

**Table 1: Contested Model of Social Interactions and Cultural Change Among Prosecutor Types**



My Taiwan case study indicates that individuals' possession of traditional bureaucratic authority (e.g., Type 2 individuals) does not automatically enable them to become legitimate arbiters of sense (e.g., Type 1 individuals). Likewise, getting rid of old culture carriers (e.g., firing existing line prosecutors or managing prosecutors—Type 1 and Type 3 individuals) does not guarantee the transfer of sense-making authority. This should serve as a cautionary tale for elected D.A.s in the United States because their legitimacy as sense makers must first be widely recognized by actors in the field before they can change the culture in their offices. Nascent leaders need to possess the right dispositions and have expertise in cultivating their prosecutors' sense of good judgment.

Table 1 further indicates that, in a post-bureaucratic organization, hierarchical positions and formal institutional designs may not account for the entirety of social interactions and the complex cultural atmosphere. For instance, Type 1 individuals may choose not to exercise their formal bureaucratic authority and instead rely on their sense-making authority to influence others, in which case it will not be traceable through traditional bureaucratic mechanisms. Meanwhile, Type 3 individuals are shaping the office culture without

the need to wield institutional authority to punish employees.<sup>315</sup>

Thus, more empirical studies are needed to explore under what conditions reform-oriented prosecutors can gain legitimacy within their professional domain. Although my contested cultural change paradigm suggests three mechanisms that can be used by aspiring sense makers (i.e., Type 2 individuals) to settle jurisdictional battles—(1) carving out new task domains, (2) eliminating existing domains, and (3) maintaining or expanding current domains—this Article has focused mainly on the first type in the context of the dissolution of Taiwan's SID in 2016.<sup>316</sup>

The three mechanisms are not necessarily exhaustive. They are meant to provide a set of analytical tools for understanding the process of cultural change through the lens of jurisdictional contests between new and existing sense makers.<sup>317</sup> The complexity of this model suggests that the chances for aspiring sense makers to acquire their legitimate status may be limited. In other words, such individuals may be "rare and exceptional."<sup>318</sup>

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315. This Article identifies three mechanisms for disseminating a reformer's standards of good sense: (a) supervisors with "good eyes" who essentially enforce the reformer's ideals, (b) communicative channels within the agency, and (c) media and other non-institutional actors. All three of these mechanisms can be seen as devices for *communicating* a reformer's preferred standards. But, of course, they do not automatically legitimate those standards.

316. See KARL E. WEICK, *SENSEMAKING IN ORGANIZATIONS* 91–92 (1995) (suggesting "shocks" as the "trigger" or "occasion" for sense-making and that "[i]n the case of ambiguity, people engage in sensemaking because they are confused by too many interpretations, whereas in the case of uncertainty, they do so because they are ignorant of any interpretations").

317. The rise of data-driven prosecution and new analytical powers exercised by modern American prosecutorial organizations may have created a critical moment for new sense makers. The use of algorithmic technologies in criminal justice processes produces new forms of knowledge that coexist, absorb, and transform preexisting techniques of governing while simultaneously reinforcing preexisting structures of inequality and culture. Technologies and data-driven approaches hold great promise in advancing criminal justice system and addressing existing problems; yet the potential benefits should and must not obscure the potential perils of these technologies. It is crucial to understand how these technologies generate new forms of governance and managerial control of line prosecutors and how they raise new challenges regarding ethical prosecutorial practices, accountability, transparency, and professional culture. See generally BRAYNE, *supra* note 93; Ferguson, *supra* note 33; Brandon L. Garrett, *Big Data and Due Process*, 99 CORNELL L. REV. 207 (2014).

318. Tim Hallett, *Symbolic Power and Organizational Culture*, 21 SOCIO. THEORY 128, 146 (2003).

B. LEVERAGING NON-BUREAUCRATIC COMMUNICATION AND  
MANAGEMENT TOOLS

To secure their legitimate status as sense makers in a given field, an organization's leaders need to leverage both bureaucratic control mechanisms and other non-bureaucratic communication and management tools. Future empirical studies should broaden their focus to address the use of non-traditional communication and management mechanisms. My Taiwan case outlines a contested process that shapes the structure and outcomes of cultural change. Like many other modern organizations, today's prosecutors' offices occupy a post-bureaucratic era in which legal professionals' relations with their organizations no longer resemble the traditional image of bureaucratic control that emphasized routine, standard practices, direct control, constant supervision, and restraints on individual discretion.<sup>319</sup> My theoretical construct of sense and sense-making, along with individuals' exercise of good sense, is in fact the product of the development of modern organizational management.

Reform-oriented prosecutors across the world will be in a better position to manage their office culture if they can reimagine their toolkits. Empirical research is needed to examine how non-bureaucratic management tools are developed and used in different prosecutorial systems and places. Studies with a comparative perspective will be particularly valuable. For instance, investigators should delve into the relations between prosecutors and *institutional actors*, as well as with *non-institutional actors* (such as members of the media, as I have elaborated in my Taiwan Case), who can and do serve as information brokers. These information brokers are critical in helping sense makers to connect groups of stakeholders across hierarchical and institutional boundaries by collecting and transferring tacit information among them.<sup>320</sup> The brokers provide communication platforms across boundaries that are often difficult, if not impossible, to maintain under the traditional bureaucratic model. Meanwhile, they can also contrive against reform efforts by retaining,

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319. See generally EDWARDS, *supra* note 236; KELLOGG, *supra* note 151.

320. One possible direction for inquiry is to look into the rise and proliferation of criminal justice reform organizations like the *Fair and Just Prosecution* in the United States. Many of these public interest organizations work closely with newly elected progressive prosecutors to provide support networks and best practices for policy changes. Empirical research in this area will doubtless provide further insights into the role played by those non-institutional actors during the conflict-ridden process of jurisdictional battles and the inception of new sense makers in a field. See *Program Overview, FAIR & JUST PROSECUTION*, <https://fairandjustprosecution.org/about-fjp/summer-fellows-program/> (last visited Sept. 12, 2022).

processing, or maneuvering information to delegitimize and impinge on sense makers' authority.

C. THINKING ABOUT CULTURAL ADAPTABILITY, NOT CULTURAL "FIT"

As my model suggests, for sense makers to successfully bring about cultural change, individuals must be capable of exercising their good sense.<sup>321</sup> The cultivation of good sense is one of the key components of prosecutors' professional socialization.<sup>322</sup> Therefore, reform-oriented prosecutors' offices should consider *cultural adaptability*, instead of the conventional focus of *cultural fit*, during the hiring phase.<sup>323</sup> During the hiring phase, most offices focus primarily on whether candidates portray the desired values and attributes. Given the dynamic, nuanced, and continuously developing nature of contemporary criminal justice reforms, this Article suggests that instead of seeking to hire for cultural fit what should be pursued is the idea of cultural adaptability—the ability to learn and conform to organizational cultural norms as they change over time.

Future empirical researchers and the hiring committees within prosecutors' offices should seriously consider incorporating the notion of cultural adaptability onto the top of their agendas. After all, being able to *attract* and *recruit* individuals who can exercise good sense may later determine how successfully sense makers generate "buy-ins" from those individuals.<sup>324</sup> In today's fast-moving and volatile criminal justice system, we need more "cultural adaptors," i.e., prosecutors who are better able to assimilate to new cultural norms as they rapidly change, instead of prosecutors who merely exhibit the comfort of cultural fit when first hired. Reform-minded leaders should go beyond screening candidates who share similar values with them.<sup>325</sup> Instead, they should look for candidates who demonstrate the complementary ability to adjust to an office's changing environment. As my case study of the Taiwan Office indicates, cultural alignment is an ongoing process. A key takeaway for progressive prosecutors in the United States is that they should recruit candidates who demonstrate the ability to adapt and absorb as well as act successfully within new cultural contexts. For those are the

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321. See discussion *supra* Part III.B.

322. *Id.*

323. This proposition is, of course, dependent upon a system's design. In some prosecutorial systems, such as those in Japan and Taiwan, hiring may not be an available mechanism for management.

324. See discussion *supra* Part I.A.

325. *Id.*

individuals who will likely be better able to reach an effective balance with the *inevitable* cultural changes that will occur as the offices, and the system as a whole, navigate the increasingly challenging criminal justice environment to look for and achieve better professional and societal solutions.<sup>326</sup> In the meantime, the shift of focus during the hiring phase calls for a new type of research to study possible performance indicators with regard to cultural adaptability.<sup>327</sup>

#### D. MAKING DIVERSITY AND INCLUSION COUNT

Regarding the issue of diversity and inclusion, reform prosecutors should acknowledge that simply increasing the numbers of underrepresented groups in their offices does not automatically produce benefits if those individuals do not feel valued and respected, and more importantly, are not given a voice and means to freely engage in the conversation about and the activity of building a new culture.<sup>328</sup> Diversity and inclusion have been highly lauded recently in the legal profession.<sup>329</sup> Still, such praise is insufficient because it does not automatically reconfigure power dynamics and spur new ways of

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326. In a similar attempt to change public defender's culture, Rapping's strategy largely centers on the recruitment and development of the next generation of public defenders. The heart of the model Rapping seeks to build reflects the idea that appropriate hiring decisions can be leveraged as the ideal vehicle for bringing sustainable cultural change in public defenders' offices. He believes that recruiting and hiring consistent with the new organizational vision is the key: "[a]s waves of new staff members are brought on board and groomed to internalize the new organizational values, culture will start to shift." See RAPPING, *supra* note 30, at 86.

327. FJP/Brennan, 21 *Principles*, *supra* note 11, at 14, 29 (suggesting progressive prosecutors "hire a diverse staff across all levels of seniority" by "developing targeted recruitment to diverse groups (like bar association affinity groups); reassessing hiring criteria to address barriers to hiring people of color; and ensuring that underrepresented groups on staff are appropriately supported, considered for promotion, and involved in office hiring decisions"); see also *Technical Guide*, PROSECUTORIAL PERFORMANCE INDICATORS (Sept. 2020) <https://ppibuild.wpengine.com/wp-content/uploads/2020/09/PPI-Technical-Guide-Sept-2020.pdf> ("[P]rosecutor's offices increasingly serve diverse communities. Office leadership and line prosecutors should reflect this diversity in order to better represent local residents and understand their problems, needs, and priorities.").

328. KATHERINE J. BIES ET AL., DIVERSITY IN PROSECUTORS' OFFICES: VIEWS FROM THE FRONT LINE, STAN. CRIM. JUST. CTR. 28 (2016).

329. See generally SPENCER HEADWORTH ET AL., DIVERSITY IN PRACTICE: RACE, GENDER, AND CLASS IN LEGAL AND PROFESSIONAL CAREERS (2016); Deborah L. Rhode & Lucy Buford Ricca, *Diversity in The Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483 (2015); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011).

thinking.<sup>330</sup> Indeed, given their own unique life experiences, prosecutors with diverse backgrounds can act as valuable cultural adaptors. Reform prosecutors should build an office environment where previously unrepresented or underrepresented prosecutors can feel safe to share information and concerns without fear of consequences. Prosecutors with diverse backgrounds, experiences, and knowledge can become important allies for leaders to attract and nurture a new generation of reform-oriented line prosecutors, and more fundamentally, truly alter organizational culture for the better. Offices need to ensure that their hiring practices do not thwart their diversity efforts. Instead of mindless pursuit of the “best and brightest,” each hiring committee in the offices must develop an evidence-based strategy to attract aspiring prosecutors with different aspirations and backgrounds. It is crucial to offer programs to identify and address possible bias during the hiring phase, and then continue to foster a culture of inclusiveness. Anecdotal assumptions may suggest what the barriers that prevent diverse candidates from applying are, even when they do join the prosecution, the reasons why prosecutors of color tend to leave it.<sup>331</sup> But gathering actual data points is fundamental to any diversity and inclusion effort.

It is important for reform-minded prosecutors to recognize that barriers to entry and retention continue to exist, and a lot needs to be done to remove them. For one thing, it is necessary to ensure that law students are aware of prosecutorial career opportunities and have a comprehensive understanding of the role of line prosecutors in reform-oriented offices—and how difficult it can be to upend existing culture.<sup>332</sup> In sum, prioritizing diversity and inclusion, along with cultural adaptability, over present-day fit suggests that a major shift of the existing hiring practices and office management is needed.

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330. See, e.g., Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOCIO. 1589 (2001).

331. For concerns regarding retention, see discussion *supra* Part I.B. See also Tiana Jean Sanford, *Courageous Conversations About Race*, TEX. DIST. & CNTY. ATT'Y ASS'N (Sept.–Oct. 2020), <https://www.tdcaa.com/journal/courageous-conversations-about-race/>; Denise Hernandez, *Raising the Voices of Prosecutors of Color* (Extended Version), TEX. DIST. & CNTY. ATT'Y ASS'N (Sept.–Oct. 2020), <https://www.tdcaa.com/journal/raising-the-voices-of-prosecutors-of-color-extended-version/>.

332. See Shih-Chun Steven Chien & Stephen Daniels, *Who Wants to be a Prosecutor? And Why Care? Law Students' Career Aspirations and Reform Prosecutors' Goals*, 65 HOWARD L.J. 173 (2021) (discussing the pathway into prosecution using empirical survey data).

## E. DECODING OFFICE CULTURE

In addition, reform prosecutors need to be able to decode their own culture. Most prosecutors have no trouble elaborating on their “office culture.”<sup>333</sup> However, it is essential to accurately profile office culture with empirical data so that prosecutors do not end up relying on unrealistic ideas and intuitions that tell us more about their misconstrued visions.<sup>334</sup>

Misconception of organizational culture is unfortunate, as managing cultural change should be considered one of the main challenges for human resources in modern criminal justice agencies. Despite no shortage of “best practices” on hiring, diversity, and leadership, reform prosecutors still need empirically based guidance when designing their recruitment and selection procedures, as well as managing the taken-for-granted beliefs and values of their offices.<sup>335</sup>

In this regard, social science researchers are well-suited for this task. Reform prosecutors should encourage their offices’ members to coordinate with external social science-based inquiries of their organizational culture. Objective, well-designed analyses which crowdsource line prosecutors’ views and experiences of the office culture are a much better indicator of an office’s true culture than the aspirational narratives curated solely by office leaders. Here forensic ethnography is essential to move forward.<sup>336</sup> Prosecutors arguably should be required to hire cultural anthropologists to consult with and conduct fieldwork inside their organizations to assess the deeper cultural origins of their problems. Unless reform-minded prosecutors know in full detail what structures, values, and practices had been sustaining illegal and unethical behaviors, they cannot actually address them.

As this Article has suggested, cultural change starts with some triggering events for sense-making process, where aspiring sense

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333. For a comparative study on prosecutorial culture in Germany, see Boyne, *German Prosecutors and the Rechtsstaat*, *supra* note 219.

334. Forst, *supra* note 138, at 453 (suggesting that “most prosecutors continue to operate in a limited statistical environment, uncharacteristic of other major components of the criminal justice system and inconsistent with contemporary standards of management and public accountability.”).

335. See, e.g., Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIO. REV. 589 (2006); Frank Dobbin et al., *You Can’t Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 AM. SOCIO. REV. 386 (2011); Frank Dobbin et al., *Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity*, 80 AM. SOCIO. REV. 1014 (2015).

336. See discussion *supra* Part II.C.

makers try to unfreeze the cultural patterns that have set in deeply and so often harmfully.<sup>337</sup> Having solid empirical information about office culture that goes beyond the conventional performance metrics/indicators is crucial.<sup>338</sup> This means prosecutors need to adopt a new data-collection strategy.<sup>339</sup> Aspiring sense makers can use that gathered information to identify awakening moments for sense-making. In addition, reform prosecutors must address all issues found from consultative forensic ethnography to show genuine commitment to cultural change, including setting different institutional goals, alleviating pressure, responding to complaints and protecting complainants, taking full responsibility for structural issues, responding directly to “old sense makers,” and being authentically honest, open, and communicative about deviant behaviors.

#### F. THE PARADOX OF CULTURAL CHANGE

Finally, the cultural change process I have depicted reveals a troubling new threat for prosecutorial reforms. There is a common assumption that the most effective way to bring prosecutors’ work into alignment with external demands for accountability and professional cultural change is to establish proper “performance indicators” and allow oversight of bureaucratic structures and key performance outputs.<sup>340</sup> Once external actors have comprehensive information concerning an office’s internal management processes, data about its charging selections, guilty plea negotiations, and other dispositions before and after trial, it will supposedly be much easier to regulate prosecutors and curtail their discretion. Therefore, the use of bureaucratic devices—such as policy guidance, internal reviews of

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337. See discussion *supra* Part IV.B.

338. Long before the recent progressive prosecutor movement, there has been proposal for creating indicators to measure prosecutors’ effectiveness in reaching goals of reducing crime and achieving justice. See, e.g., AMERICAN PROSECUTORS RESEARCH INSTITUTE, PROSECUTION IN THE 21<sup>ST</sup> CENTURY: GOALS, OBJECTIVES, AND PERFORMANCE MEASURES (2004), <https://nacj.org/community-justice/community-justice> (select “Prosecution for the 21st Century (APRI 2004)” from the list of filenames) (proposing a list of “benchmarks for measuring progress and results”).

339. Phelan & Schrunk, *supra* note 33, at 260 (suggesting that “[d]ata analysis, objective research, and evaluation are clearly lacking in the field of prosecution.”).

340. See, e.g., M. Elaine Nugent-Borakove, *Performance Measures and Accountability*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR, *supra* note 5, at 91; Stemen, *supra* note 14, at 219–22, 234–37. See also FLA. INT’L UNIV. & LOYOLA UNIV. CHI, IMPLEMENTATION GUIDE FOR PROSECUTORIAL PERFORMANCE INDICATORS (2020), <https://ppibuild.wpengine.com/wp-content/uploads/2020/09/2020-PPL-Implementation-Guide-FINAL-with-links.pdf>.

decisions, routine monitoring, supervisory approval, and data collection—not only promotes consistency and commitment that permit leaders to change office culture but also preserves valuable information that helps reformers and external actors identify more precisely what prosecutors are doing improperly and why they are doing it, thus providing accountability, transparency, and integrity.

The rationale here is that data collected and produced by organizations is critical because it shapes how prosecutors' offices allocate resources and measure performance of line prosecutors.<sup>341</sup> This in turn suggests data released by prosecutors' offices will increase organizational transparency and force close alignment between bureaucratic structures and activities. Therefore, prosecutors should collect and release more data across different levels of the bureaucracy.<sup>342</sup> With such data, the public can enforce conformity through inspection, monitoring of key performance indicators, and efficiency evaluation.<sup>343</sup>

Nonetheless, as I have demonstrated, sense makers can use culture as a tool to make ceremonial presentations of the tight linkage between bureaucratic structures and work activity, thus actually hiding gaps between them. I call this "the paradox of sense makers:"

Individuals need to secure their sense-making authority to successfully change their organization's culture, but such an authority also enables them to create a loosely-coupled system in which sense makers are capable of making visible, public commitments to satisfy external demands for change while in reality keeping these commitments as just myth and ceremony.

In other words, sense makers threaten the rising demands for prosecutorial accountability and transparency because they are able

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341. See, e.g., GARRETT ET AL., *supra* note 138; M. ELAINE NUGENT-BORAKOVE ET AL., AM. PROSECUTORS RSCH. INST., PERFORMANCE MEASURES FOR PROSECUTORS: FINDINGS FROM THE APPLICATION OF PERFORMANCE MEASURES IN TWO PROSECUTORS' OFFICES, NATIONAL DISTRICT ATTORNEY'S ASSOCIATION (2009). See also PFAFF, *supra* note 7, at 158 (arguing that data "could help reformers and legislators identify more precisely what prosecutors are doing improperly and why they are doing it, and thus help them address the problems effectively"); Stemen, *supra* note 14, at 219–20 (suggesting that data can "refine the mission of an organization and to drive organizational and cultural change").

342. Ronald F. Wright & Marc L. Miller, *Prosecutorial Power: A Transnational Symposium: The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1619 (2010).

343. See generally Ferguson, *supra* note 33; Rachel Harmon, *Why Do We (Still) Lack Data on Policing*, 96 MARQ. L. REV. 1119 (2013).

to coordinate things without relying on formal rules and bureaucratic devices; what they say and do externally to gain legitimacy can be only performative, “ceremonial conformity” that does not jibe with their real day-to-day, behind-the-scenes activities.<sup>344</sup> Although there can be instances of observable coercion, sense-making authority is usually a subtle and invisible power abstracted from relations among prosecutors, not a manifestation of formal bureaucratic structure. By mobilizing their sense-making authority, some individuals will be capable of protecting organizational legitimacy by conforming just enough to external demands for change to gain public acceptance (or, more cynically, to win elections) while creating and maintaining gaps between formal bureaucratic structures and core activities. Future studies ought to explore under what conditions sense-making authority can enable individuals to escape public scrutiny and whether some self-proclaimed progressive prosecutors actually use their status as sense makers to build up ‘hidden processes’ that substantially compromise their public commitments.<sup>345</sup> The processual cultural change model I have presented here suggests that scholars and reformers relying on formal institutional design, bureaucratic management, and the data produced from such structures to *review* and *constrain* prosecutors’ power may have missed the tacit nature of sense-making as well as sense makers’ ability to mobilize what can be a troubling dual system of management.<sup>346</sup> This further raises crucial ethical questions: whether the notion of sense maker is compatible with the ideal role of prosecutors in a democratic society and whether we should really rely on prosecutors to change their own culture.<sup>347</sup>

## CONCLUSION

This Article has proposed a new conceptual paradigm for the study of cultural change and institutional management strategies in prosecutors’ offices. The current climate of prosecutorial reform movements in the United States and Taiwan has made the need for empirically studying cultural change even more important and timely than ever before. Building on my comparative, in-depth case study of a district prosecutor’s office in metropolitan Taiwan and a group of reform-oriented prosecutors’ offices in the United States, my goal has

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344. See Meyer & Rowan, *supra* note 37, at 42–43.

345. See BRAYNE, *supra* note 93, at 139–40.

346. See *supra* Part III.C., Part III.D.

347. See generally Luna & Wade, *supra* note 2; Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012).

been to dispel misconceptions surrounding conventional assumptions about the process of cultural change. The contested theoretical model outlined in the Article provides a deeper, more rounded, and persuasive approach to explain such a process. Cultural change, conceptualized as the inception of new sense makers in a field, is a dynamic process involving jurisdictional battles among competing sense makers for the recognition of their legitimate status. By interrogating the exercise of sense-making authority and the cultivation of individuals' good sense, this Article hopes to create a fuller, more nuanced picture of cultural change that can be leveraged by progressive reformers to drive internal changes in prosecutorial practices and by socio-legal scholars to establish new and more fruitful research agendas.<sup>348</sup>

To a certain degree, of course, Taiwan is a unique case for the study of prosecutors given its complex political and legal context. The findings of this Article indicate that we still know very little about this particular outpost of the legal profession, let alone many others around the world. Yet I am hopeful that with this new (and developing) empirical knowledge about prosecutors, global society will be in a better position to tame what one interviewee portrayed to me as the "prosecutorial beast" in terms of exercising the immense (and easy to abuse) prosecutorial powers.

Meanwhile, the question that likely immediately occurs to a reader here is this: why should comparative scholars care about prosecutors in Taiwan?

My answer to this question is two-fold, both practical and structural: First, as a practical matter, Taiwan is a missing piece in the global puzzle of prosecutors. Multiple studies on prosecutors have revealed new dimensions of prosecution and have opened up a theory-driven, generalizable body of knowledge.<sup>349</sup> However, attempts to build empirical literature, and sometimes a more general theory, on prosecution within the United States and cross-nationally, have failed to take East Asia into account adequately. Scholars have conducted a comparative dialogue on the prosecutorial function by looking at the European approach for similarities and contrasts. Decades of studies have explored the European criminal justice system in the hope of seeking insights and improvements for

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348. A major limitation of this Article is that it does not address how new sense makers coming into a field are recognized by actors *outside* their own offices—such as police departments, defense attorneys, judges, and other government agencies. This is a question I leave for future work.

349. See *supra* note 219.

American criminal justice system.<sup>350</sup> It was not until David Johnson published a series of writings on Japanese prosecutors that scholars began to notice the different faces of Asian prosecutorial practices.<sup>351</sup> Although Japanese prosecutors have drawn much attention from U.S. scholars, “the Japanese ways of justice” are not necessarily representative of the rest of the jurisdictions in Asia, or even just East Asia, particularly those systems that have different cultural, political, and social foundations. Therefore, including Taiwan as a new case study will help researchers to better construct the typology of prosecution in a global context.

Second, as a structural matter, the study of Taiwanese prosecutors not only enriches our understanding of prosecutorial practices but also provokes a broader dialogue; it creates a framework for the comparative study of prosecution and provides possibilities for rethinking the development of the legal profession and for proposing future reform strategies. Cross-jurisdictional studies on prosecutors must pay attention to differences in prosecutors’ socialization tactics. Depending on the legal, social, and cultural context within which a given prosecution operates, the justice system may or may not rely more on formal punishment than on shaming or other cultural/internal controls to deal with perceived deviant behaviors. A conceptual framework that enables scholars to understand deviant behaviors within the prosecution and the corresponding socialization tactics is greatly needed.<sup>352</sup>

This Article has provided possible paths for future study on the sociology of prosecution and contributed to essential debates surrounding the conditions that make prosecutorial reforms successful. Moving beyond the United States and Taiwan, I hope this Article has successfully added a comparative perspective to ongoing dialogues among legal scholars and organizational sociologists on the study of the production—and reproduction—of one of the many elite cultures in the legal profession.

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350. See, e.g., Langbein & Weinreb, *supra* note 8, at 1550.

351. See generally JOHNSON, *supra* note 219.

352. An important future question for the study of prosecutors’ socialization in a comparative context will be whether the different emphases on punitive social control and shaming/reintegrative models also reflect on the distinct nature of the socialization process of prosecutors.