Overall Research Design: Research Narrative

At its core, this book examines the decision making practices of German prosecutors. Because decision-making is not a formulaic process, I used research methods drawn from ethnographic studies. Those methods allowed me to investigate how German prosecutors both viewed and applied the law in their everyday decision-making.

Lawyers, in general, and prosecutors, in particular, can be a particular difficult group to “understand” because their facility with language and the language of law can provide one with a version of the “truth,” but not necessarily the “truth” in its full richness. For these reasons, the primary source material used in this study consists of ethnographic data—principally semi-structured interviews of German prosecutors, participant observation notes of their daily work routines, and “file reviews.”

I elected to use qualitative research methods in this project because the bulk of scholarship published on German prosecutors in English focuses on the legal structure within which prosecutors operate rather than how prosecutors interpret and apply the law. The principle shortcoming of existing research is that it focuses on the law and generalizations about practice and understates the impact that organizational and cultural factors play in shaping the implementation of the law. The key advantage which qualitative research methods offered this project is that they enabled me to understand how the process of prosecutorial decision-making is situated in and influenced by the organizational context. Even though I was familiar with the German Criminal Code and Code of Criminal Procedure before beginning my field research, I was did not appreciate the degree to which organizational factors affected the implementation of the law. By using open-ended questions, I was able to probe how prosecutors interpreted the law in particular situations. On many days, I would sit with a prosecutor as he or she opened the case files which had been sitting in their in-box and discuss with the prosecutor the actual decisions facing that prosecutor at that moment in time. By observing prosecutors in their daily routines, I began to understand the degree of discretion they enjoy. I also read
through stacks of closed files and their heavily detailed notes of the prosecutor’s actions. The utility of that practice was undercut by the fact that, typically the closed cases that I reviewed were hand chosen by a senior individual in the office.

By far, the richest source of information came from the dozens of coffee meetings that I was privileged to observe. In these small informal gatherings, prosecutors, not only discussed the latest gossip in the office, but also their “hidden knowledge” regarding how they interacted with particular judges as well as their investigation tactics. In order to protect my interview subjects, I promised every individual that I would not disclose the source of the interviews in any publication. On rare occasions, individuals asked me not to write about a particular matter, I honored those requests.

Potential Disadvantages of Ethnographic Methods

From my perspective, the major disadvantage of using qualitative methods was the time and energy consuming nature of the field work. In addition I greatly underestimated the time and energy required to transcribe tapes and type up observation notes. Although methods books attempt to answer the question of how many interviews is sufficient, the process itself was not merely a method of data collection, but an education process as well. The more interviews I conducted, the more incisive my questions became, and the more useful the data I collected. During my first year of fieldwork, I thought that I would hit the ground running because I had spent a semester in a German law school and had already interviewed a number of prosecutors. In reality, I hit the ground limping and learned to walk only after a few months of interviewing. Many of my initial interview questions reflected my own experience working in an adversarial system and were ill-suited to the probing the factors that motivate German prosecutors’ decision-making. At the same time, I learned useful information even where my questions “missed” the mark. While most German prosecutors do not view case dispositions in terms of winning and losing, the degree of agency that they attach to the case outcomes varied depending on the type of crime being prosecuted.

In my data collection procedures, I sought to address the issue of internal validity by using multiple sources of data collection at each research site. My data collection methods included semi-structured interviews, participant observation studies, file reviews, and file research. The core of my data includes 117 semi-structured interviews conducted with prosecutors, judges, and Ministry of Justice officials. I conducted another 20 or so interviews with defense attorneys, law enforcement officers, and collateral prosecutors. At least half of the interviews were recorded and transcribed. I recorded the remaining interviews in note form.

In total, I visited prosecution offices in 18 different cities. These visits ranged from a 2-day visit spent primarily with a single prosecutor in a small city to several 2-week visits in which I interviewed multiple prosecutors and viewed multiple proceedings per day. The “interviews” ranged in length from one hour to several
hours over multiple days. The number of interviews listed above does not include any incidental or unplanned conversations which occurred during my field research. Those conversations were included in my field notes and not counted as interviews. In addition, I interviewed police officers, defense attorneys, law professors, members of the ministry of finance, and members of related nonprofit associations in an effort to triangulate the information that I collected from members of the judicial service. I also interviewed officials who worked in the Ministry of Justice at both the Land and federal levels.

For better or worse, conducting qualitative interviews is a skill honed more in the field than in the classroom. In addition, despite my “research plan” sometimes I stumbled onto rich sources of information serendipitously, most often when I was lost and knocked on the wrong door or appeared at the wrong office. On the flip side, it takes a streak of stubbornness to conduct qualitative research at multiple sites in a foreign country. I experienced inevitable moments of doubt—most often on Mondays when I visited a new site research site. In addition, one must not be afraid to appear “dumb” either by design or unwittingly. Informants will often take extra time to explain a process or a technical point in richer detail when you tell them that you do not understand their initial explanation. One must also project a thick skin in those inevitable moments when you encounter a speaker with a dialect or attitude for which you were not prepared. While methods textbooks do not contain chapters that dispense advice on traits such as perseverance, at times I had to push myself not to be tempted to terminate an interview or cancel a site visit altogether when it was not proceeding smoothly.

The best methods training that I have received occurred not in the classroom, but through my training as a prosecutor and as a defense attorney. The process of interviewing witnesses, listening to their accounts, and sorting through the inconsistencies in the evidence honed my listening and inductive reasoning skills. It also taught me to listen to my intuition and common sense in developing follow-up questions and in pushing witnesses to question their own memories. It is the open-ended questioning style that I used in witness preparation, rather than the leading questions of courtroom questioning, which I emulated in my research process. In this respect, I emulated those researchers who maintain that one should trust their own personal biographies as a significant source of knowledge. My instincts as both a lawyer as well as a social scientist enriched the research process.

Since the broad object of my research was the decision-making processes of German prosecutors, I set out to interview a regionally diverse cross-section of German prosecutors. Consistent with research tradition initiated by Lipsky (1980), my primary focus was the decision-making which occurs on the front lines of a public service organization—in Lipsky’s words—“the street-level bureaucrats.” To this I conducted the majority of my interviews with public prosecutors (Staatsanwälte) and department managers (Oberstaatsanwälte) rather than with higher level supervisors, office directors, and ministry officials.

In addition to formal question and answer sessions I conducted “file reviews” with several prosecutors. During these file reviews I would ask a prosecutor if we could go through the cases currently stacked in their in box as they would process
them and discuss the current decision facing the prosecutor in the case and their
decision process. These file reviews helped me to understand the types of decisions
prosecutors in different departments make daily. Moreover, the information which I
gathered through the file review process had an advantage over interview answers.
Namely, with the file reviews, the prosecutor did not pre-select the cases which they
wished to talk about. We talked about the cases brought to his or her office that day.
Thus, in essence, the cases were selected randomly, because they were the cases
sitting in the prosecutor’s in-box that day. Towards the middle of my fieldwork, one
prosecutor surprised me by handing me a stack of case files to read and we shared
our opinion on how we would handle the cases. This process forced me to
reflexively think through the decision-making process. I later repeated that process
at another research site. This was an interesting exercise which helped me to
understand my own preferences for action as well as to talk through the process
by which particular prosecutors approached and taught case decision-making skills.

During the participant observation portion of my field work, the activities which
I observed blanketed the wide spectrum of activities in which German prosecutors
are engaged. These included appearances in court for detention hearings and main
proceedings, plea discussions, meetings with law enforcement, as well as meetings
of investigation teams. During court proceedings, I typically sat in the audience. On
some occasions, the prosecutor or judge invited me to sit at the prosecution or
expert witness’s table. Because juvenile proceedings are closed to the public, in
order to observe those proceedings I obtained the permission of all of the parties
involved in the case. To protect the privacy of the individuals involved in those
cases, I have elected not to describe specifics related to those particular
proceedings.

Despite the amount of time and effort which I invested in conducting interviews,
absent the periods of participant observation, the usefulness of those interviews
would have been limited. It was the mix of periods of participant observation with
interviews which, in combination, generated rich insights that led me to continue
refine my interview questions as well as to trust the answers I was receiving. For
example, there were frequent moments when I was in the midst of conducting an
interview and another prosecutor would enter seeking advice on how to handle a
case. These moments convinced me more than an answer to an interview question
that the prosecutors in a particular department did in fact frequently consult each
other on case decision-making and showed me in practice what types of decisions
prosecutors ruminated over. Moreover, inevitably, unplanned events would occur
such as a phone call from a superior, a visit from a representative of the Ministry of
Justice, or a call from the press which gave me the opportunity to verify my
perception of the event with the prosecutor I was visiting. Obviously a researcher’s
ability to “sense” what is happening in a research environment improves with
months spent in the field. It was in these unplanned moments where I gained the
most useful insights into the flow of decision-making and the prosecutor’s percep-
tions of the nature of their work environment. In one of my first site visits to a
prosecution office in a large city, I had difficulty finding the office of the prosecutor
with whom I was to meet. As I was walking through a hallway filled with offices
with closed doors, I mentally compared the office atmosphere with often raucous, open-door atmosphere of a prosecution office where I had worked in the United States. Immediately I began to doubt, not only that I would find the right office but also that I would be able to report any interesting information at all. Finally I knocked on the door of an adjoining office and found the prosecutor I was scheduled to interview sitting at a small table sharing coffee with a group of other prosecutors from the department. Alas, the higher authorities had scheduled my interview right in the middle of the department’s informal daily coffee break. The group of prosecutors, who were laughing and sharing stories, invited me to sit down. As the conversation continued, my fears vanished. Despite the quiet hallways in many prosecution offices, I discovered that I could learn a great deal from the stories exchanged over a cup of coffee.

In some of the adult cases which were scheduled for trial I observed closed door discussions of potential “confession agreements.” Sometimes these occurred at the start of the proceeding or midway through a proceeding. In terms of the daily office routines I observed informal coffee meetings in which cases and gossip were discussed, informal consultations between prosecutors to discuss cases, routine office work, department meetings, and office trainings. With respect to the investigation stage of proceedings I observed meetings between police and prosecutors as well as meetings of case investigation teams. I visited prison facilities with representatives of prosecution offices and in the guise of a “consultant” working with a defense attorney. I also toured the facilities and meet with individuals of other auxiliary investigation facilities including a forensic lab and the offices of the Finanzamt (fiscal and tax authorities) and a forensics lab. To get a sense of the working relationships between prosecutors and judges as well as those which exist between prosecutors and defense attorneys, I participated in social events when invited to do so including one interesting meeting of local attorneys which was held in a restored butcher’s guild.

Reliability

Since my book examines the decision-making processes of German prosecutors, I elected at the project’s start to visit a large number of research sites including sites in the former East Germany. The research sites were diverse from both a regional perspective as well as from the perspective of the size of the office itself. To gain access to interview sites, I relied on a network of contacts that I had built up during two prior visits to Germany. In the summer of 2003, I visited Germany for 2 weeks courtesy of a Scott-Kloeck-Jensen Pre-dissertation Fellowship to research Germany’s responses to terrorism. During the course of this visit, I made contacts with several law professors and federal government officials upon which I later relied.

In the spring of 2004, I was a visiting student at the Justus-Liebig-Universität in Gießen, Germany. The bulk of my contacts in prosecution offices resulted from
contacts which I made through law professors in Gießen and researchers at the Max-Planck-Institute in Freiburg. I supplemented these contacts with contacts established through my position as a Visiting Fellow in the Berlin Program for Advanced German and European Studies at the Freie Universität in Berlin. I also initiated direct contact with several prosecution offices with whom I had no “way” in. In the end, no office which I approached denied me access.

I conducted site visits in 11 of the 16 German Länder. I discovered in the course of my interviews that, in several of the interview sites which I had visited, the Land-level Ministry of Justice had approved my research visit. It is doubtful that I would have enjoyed the same level of access without the network of contacts I had established during my prior visits to Germany. The 18 research sites that I visited ranged in size from an office with 24 prosecutors to an office with over 300 prosecutors. In terms of regional variation, my site visits were distributed throughout 11 of Germany’s 16 Länder and represented geographically diverse locations. The prosecutors whom I interviewed prosecuted the full gamut of crimes. Although each the departmental configurations of prosecution offices in Germany varies, the prosecutors I interviewed were drawn from the following departments: general crimes, economic crimes, capital crimes, state security, juvenile crimes, environmental crimes, sex crimes, organized crime, and corruption.

Other Data Sources

In addition to the data described above, I also collected a sample of training materials, office organization plans, internal memos, and statistical reports. In a number of cases in which prosecutors discussed the handling of high profile cases, I researched media accounts of those cases to verify case details. While field researchers who use organizations as research sites often confront individuals who attempt to paint the organization in its best light, I feel confident that I conducted sufficient “soaking and poking” over a long enough period of time to penetrate the idealized portraits of German prosecution taught in many German universities. At the same time, in the writing process, I steered clear of the impulse to jump on interesting but anomalous examples of prosecution practice.

Notes on Reflexivity

My own experience as a prosecutor in the United States served as both an asset as well as a potential bias during my field work. By introducing myself as a former prosecutor both in my initial contacts with research sites and at the start of each interview, I helped establish my own credibility beyond that of a social science researcher. Although social scientists are held in high regard in Germany in general, the fact that I had also served as a prosecutor raised the confidence level of my
informants that I myself was familiar with the realities and challenges of prosecu-
torial practice. Without question, my own background as a prosecutor facilitated
my access to research sites. Moreover, it also established a common framework of
trust during many of my interviews. During several interviews prosecutors told me
that I must have faced similar problems as a prosecutor in America. Despite the
differences in the two systems, with many informants I sensed that we shared a
common membership in a similar professional fraternity.

In addition, my own frame of reference for prosecution practice served to starkly
highlight the differences in the two systems. For example, when I first observed
main proceedings where the prosecutor asked few questions of witnesses, it initially
troubled me. But it then led me to ask prosecutors how they observed their role in
court and ultimately helped me to sort out the differences in prosecutorial perfor-
ance which could be attributed to the structure of the German system and those
attributable to the prosecutor’s lack of effort and disinterest. With other informants
however, the combination of the portrayal of American practice in films and the
perception of the America’s lack of respect for international law, the informant
either outright stated or strongly implied that the American criminal justice system
was inferior to the German system. In one respect this attitude enhanced my
research as it increased the amount of time that informants were willing to spend
with me as some these individuals were eager to teach an American about the
German legal system. One informant even stated explicitly: “I think more highly of
America because you are here” In another sense, however, when interviewees gave
no quarter about potential weaknesses of the German system, it gave me cause for
caution in trusting the reliability of their responses in general. In many of my
interviews, my informants asked me if they could ask me questions about the
American system or my own experiences as a prosecutor. Grateful for the level
of cooperation I received in Germany for my research project, I was happy to
answer questions when I felt sufficiently qualified to do so. Often this give and take
provided me with the opportunity to ask interviewees how their experiences
compared with my own experience and gave me an entry point to more probe
areas of inquiry more deeply.

Although I devoted much time and effort to developing a list of appropriate
questions for my semi-structured interviews, the questions that I used evolved
throughout my field research. The ongoing evolution of the questions that I used
reflected not only my increasing knowledge of the subject but also the size of the
hurdle which a foreign researcher faces in trying to understand another culture as
well as another legal system. I worked with two different native speakers in
formulating my interview questions. Often we would hit roadblocks formulating
what I thought were straightforward questions. The process of translation was not a
simple exercise in converting language. With the help of a German law student, I
had to find ways to formulate questions which were intelligible not only in German,
but also in the abstract paradigm of German law. This was a time consuming
process which continued to evolve as my own knowledge grew as conducted
more and more interviews. For example, in attempting to craft interview questions
such as “What are your department’s goals for the next year?”, it became apparent
that I was viewing German prosecutors through a lens colored by my own perspective as American lawyer but also through my knowledge of management practices which I assumed to be universal. The existence of these gaps in understanding validated the selection of qualitative research methods for this project.

Protection of Confidentiality and Privacy

Prior to beginning my field research, I obtained an exemption from the University of Wisconsin’s Institutional Review Board for my field research. As I continued the project while I worked as a professor at Indiana University’s Robert H. McKinney School of Law, I obtained a second institutional review board exemption. Because the bulk of my interview subjects were both legally trained and occupied positions of power, they were in a stronger position to protect their rights than typical informants. In fact, in some offices, the tables were turned when the office research liaison or manager asked me to sign a document in which I certified that I would not publish or otherwise communicate information related to ongoing case investigations. Despite that fact, several of my interview subjects did share information with me which, if disclosed, might conceivably alter the trajectory of their careers. In those cases, I have used that information only as background material to deepen my own understandings, and elected not to use it in my book.

In order to protect the confidentiality of my interview subjects, at the start of each interview, I promised each informant that I would not use their name, nor would I use the location of their particular prosecution office in my written work. In addition, where the disclosure of the details of an event or conversation might identify the informant, I have altered details to protect the informant’s identity while preserving the import of the significance of the event. In some instances I observed meetings and phone conversations which my informants explicitly asked me not to report in my research. I have honored their request. Several of my informants requested that I send them a copy of my book. I intend to honor that request. For citation purposes, I assigned each interview subject a unique identifier based on their office location and identity. The office locations are indicated by a numerical identifier while the subject’s identity has been given a two letter designation. This system allows the reader to get a sense of the number of interviews cited in the text as well as their distribution across different cities.

For ease in reading, I have assigned a fictitious name to the location of particular prosecution offices, drawn from the German names of counties or other locations in former areas of Germany which existed before the Second World War. I chose those names to gently remind readers that we referring to Germany and not cities in the United States. The reader should not draw any conclusion from the particular names used. The particularly detail driven reader may note that, according to my coding schema, the number of cities which I reference exceeds the number of prosecution offices that I visited. The explanation for this is that, in a few cases, I
interviewed an individual such as a defense attorney or judge who was based in a city in which I did not conduct a site visit.

Reference