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Ronald F. Wright
Wake Forest University School of Law

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BEYOND PROSECUTOR ELECTIONS

*Ronald F. Wright**

I. INTRODUCTION

IN most places around the world, the idea of an elected prosecutor is downright bizarre. In the United States, it is the norm. This difference over the election of prosecutors reflects a deeper divide across legal traditions about the connection between positive law and popular opinion. In particular, the election of prosecutors in this country reflects a distinctively American distrust of the power of positive law. Prosecutor elections amount to an admission that prosecutors answer to the people—today’s creators of criminal law—more than they answer to the pre-declared rules of criminal law.

Thus, we hold high expectations for elections, treating them as a crucial device to legitimize the work of prosecutors. And these high expectations create a problem since any observer of prosecutor elections would have to conclude that they do a poor job. Elections do not give chief prosecutors enough guidance about the priorities and policies they should pursue to achieve public safety at an appropriate fiscal and human cost. Elections tell prosecutors very little about how to organize their offices, how to choose their priority cases, or—most important of all—how to select their least important cases, the ones the prosecutors will dismiss or decline to charge at all.

In this article, I consider various methods to improve prosecutor elections and strengthen the public role in setting criminal justice tradeoffs and priorities. These accountability devices focus on the period in between quadrennial elections for prosecutors. At their best, these devices go beyond elections not only in their timing, but also in the quality of information they offer. They offer prosecutors more durable and focused insight about public attitudes toward crime, punishment, and public budgets. Sustained public deliberation about criminal enforcement can correct the distorted and blunt messages that prosecutors take away from an up-or-down outcome at the ballot box.

Part II surveys the limited reach of purely legal controls on the work of prosecutors in the United States. Part III then summarizes the available

* Needham Y. Gulley Professor of Criminal Law, Wake Forest University. I am grateful for excellent research assistance from Allison Lester and Victoria Kepes. I also appreciate the insights of Rachel Barkow, Jim Jacobs, Nirej Sekhon, and Michael Tonry in connection with an early incarnation of this project. My thanks also go to Jenia Turner, Youngjae Lee, Nancy King, John Pfaff, Meghan Ryan, and Sonja Starr for comments on my conference presentation based on this material.

empirical evidence on the outcomes of state prosecutor elections. It appears that elections do not promote much turnover in office among chief prosecutors, nor do they prompt much public scrutiny for the policies and priorities that chief prosecutors choose.

Part IV explores one alternative method of promoting the accountability of prosecutors to the views of the public. The appointment of chief prosecutors by a statewide elected official (the selection method for local prosecutors in five states) could keep the policy-making prosecutor in the local office aware of changes in public priorities while avoiding some of the shortcomings of elections. I conclude that the appointment of prosecutors in the United States might produce slightly different performance and priorities than an election system. A conversion to appointed prosecutors, however, is politically infeasible.

Finally, Part V considers a second and more feasible alternative to prosecutor elections: public feedback techniques that some prosecutors' offices already pursue under the banner of "community prosecution." After a brief description of current community prosecution devices, I explore possible future directions for developing this concept. Various uses of data transparency, such as detailed reports of office performance and solicitation of public views about enforcement trends, might extend the insights of the community prosecution movement. Data transparency could make the community's views a more regular influence on the budget priorities and office policies of prosecutors. These techniques for publicizing data about prosecutor performance and collecting community feedback might promote a form of prosecutor accountability that goes beyond the blunt force of elections.

Data transparency and community prosecution feedback devices, I believe, hold some promise for "deliberative" prosecution. During this deliberation, the prosecutor promotes engagement and reaction from sectors of the public with the greatest stake in criminal justice policy. Prosecutor reports about current practice—informed by data that reveal enforcement priorities—can result in more reflection and exchange among engaged interest groups about their public safety goals.

The other half of the dialogue in deliberative prosecution involves the prosecutor's response to public input. If the control of these feedback devices rests in the hands of actors outside the prosecutor's office, the outsiders hold the power to surprise; they can change local prosecutorial policies and enforcement priorities. While elections usually reinforce business as usual in the prosecutor's office, deliberative prosecution makes possible a continuous updating of the criminal code. Rather than treating criminal justice policy as the domain of experts alone, deliberative prosecution gives to the people—voters and non-voters alike—the ability to shape continuously their own version of public safety.

II. ANEMIC LEGAL ACCOUNTABILITY

The legal controls for criminal prosecutors are relatively weak, and they do not seem to grow stronger over the long run. In this section, I review the sources of positive law and the legal institutions that promote rule of law among prosecutors.¹ Taken together, these devices for accountability to law make surprisingly little impact on prosecutors in the United States. Because legal controls on prosecutors matter less here than they do in other legal systems,² accountability for prosecutors in the United States must come from techniques other than pre-declared (and judicially enforced) rules of law.

A. CONTROL THROUGH PROSPECTIVE LEGAL RULES

The most obvious source of positive law to structure the work of criminal prosecutors comes from a comprehensive, yet targeted, criminal code. If the legislature defines crimes to cover only the conduct that causes clear-cut social harm and then sets penalties at modest levels, the code itself confines the power of the prosecutor. Less power available means less power to abuse.

While these virtues might be present in the criminal codes of other countries, they do not describe the criminal code of any state in this country. As for the federal criminal code, Luke Skywalker says it best: "If there's a bright center to the universe, you're on the planet that it's farthest from."³ It would be difficult to imagine a criminal code with broader coverage, more numerous duplicate provisions, or more opaque language.

Legislators, both state and federal, flee from hard choices.⁴ They pass open-ended criminal statutes in one year and add duplicative statutes in the following years. Legislators create prosecuting agencies, authorize the prosecutors to give more detailed meaning to the criminal laws, and appropriate their annual budgets. Instead of confining the work of prosecutors, criminal codes add to their power. The codes delegate to prosecutors many applications of broad language that raise troubling or expensive

1. Some of the material in Parts II and III of this article summarizes arguments and updates the evidence that I first developed in two previous articles. See Ronald F. Wright, *Public Defender Elections and Popular Control Over Criminal Justice*, 75 MO. L. REV. 803 (2010) [hereinafter Wright, *Public Defender Elections*]; Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. LAW 581 (2009) [hereinafter Wright, *Prosecutor Elections*]. I treat this article as the third episode in a larger story.

2. For more complete reviews of the limited strategies for control of prosecutor discretion, see ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155 (2005).

3. *STAR WARS: A NEW HOPE* (Twentieth Century Fox 1977); see also Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005); Sara Sun Beale, Essay, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641 (2002).

4. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

questions.⁵

The limits of prospective legal rules are just as obvious when we turn from criminal codes to criminal procedure laws. Constitutional and statutory rules, along with rules of court and the law of evidence, do limit what the prosecutor does and says at trial and during the pre-trial discovery process.⁶ On the other hand, such legal rules mostly steer clear of the prosecutor's charge selection and plea negotiation practices, which form the heartland of the prosecutor's work.⁷

B. CONTROL THROUGH EXTERNAL INSTITUTIONS

Just as statutory limits do not channel prosecutors within narrow limits, legal institutions outside the prosecutor's office also present only modest constraints. Judges, for instance, play only a small part in controlling the work of prosecutors. When defendants challenge prosecutor choices about the selection or pre-trial disposition of charges, judges answer these questions in the language of separation of powers doctrine. They characterize such questions as executive choices that are beyond their reach as members of the judicial branch.⁸ Judges only insist that the charges have some minimal factual support in the available evidence. They do not evaluate the prosecutor's decision to decline prosecution and say nothing at all about the relative priorities among cases that a prosecutor chooses.⁹

Granted, judges do hold the power to accept or reject guilty pleas, along with the plea agreements that the parties present to them.¹⁰ They also have the statutory authority in many jurisdictions to approve the dismissal of charges after the police or prosecutor files them.¹¹ Judges, however, use these powers sparingly within a system of mass justice. They usually defer to the parties who know more details about the alleged crime and the defendant's background.

Juries offer another potential source of accountability for prosecutors because they enforce the legal requirement of proof beyond a reasonable

5. See Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: A Reply to Comments*, in CRIMINAL LAW CONVERSATIONS (Paul Robinson, Kimberly Ferzan & Steven Garvey eds., 2009).

6. See Wayne LaFave et al., CRIMINAL PROCEDURE (5th ed. 2009).

7. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

8. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (we now operate an "administrative" criminal justice system, where the important decisions typically happen in charging and plea negotiations, before the case ever makes it to trial); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 61 (forthcoming 2014).

9. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

10. See MARC MILLER & RONALD WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 1161-86 (4th ed. 2011); Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055 (2006); Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, available at <http://ssrn.com/abstract=2405270> (2014).

11. See Miller & Wright, *supra* note 10, at 909.

doubt. Prosecutors who take charges to trial without the facts to back them up can expect to lose. This puts the jury in a position to signal to prosecutors (and to defense attorneys for purposes of plea negotiations) the crimes that hold a lower or higher priority for the community.

Nevertheless, the jury's control over prosecutor choices is remote. The trial rate for some crimes in some jurisdictions is so low that the jury's influence is a distant, distorted echo.¹² The jury normally speaks to the bipolar question of guilt or innocence without much knowledge about the range of likely punishments. Moreover, prosecutors have some power to shape the membership of juries through peremptory challenges.¹³ Thus, even if juries send a message to the prosecutor, it appears that prosecutors can listen selectively to any message from the community.

Bar licensing authorities are another potential source of limits on the choices of prosecutors. Again, however, we get limited accountability from these regulators.¹⁴ Scholars have searched for evidence that prosecutors are disciplined on a regular basis and have found few such disciplinary proceedings, all with light punishments attached.¹⁵ While there are occasional reports of more stringent responses to prosecutor misconduct from the organized bar,¹⁶ it is still too early to declare that a few episodes of prosecutor discipline from the bar amount to a trend.

C. INTERNAL CONTROLS

If these legal institutions outside the prosecutor's office do not guarantee the rule of law in prosecutor decisions, what are the prospects for internal regulation? That is, what structures and habits within a prosecutor's office, when applied with reasonable consistency across cases, encourage decisions that remain true to declared sources of law?¹⁷

12. See BRIAN A. REAVES, BUREAU OF JUST. STAT. FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES (2013) (acquittal and trial rate statistics).

13. See Shaila Dewan, *Study Finds Blacks Blocked from Southern Juries*, N.Y. TIMES (June 1, 2010), <http://www.nytimes.com/2010/06/02/us/02jury.html>; James Michael Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1 (2014); Barbara O'Brien & Catherine M. Grosso, *Beyond Batson's Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623 (2013); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013).

14. See Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 WASHBURN L.J. 1 (2012); Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59 (2012).

15. See Michael Kiefer, *Prosecutors Under Scrutiny Are Seldom Disciplined*, ARIZONA REPUBLIC (Oct. 28, 2013), <http://www.azcentral.com/news/arizona/articles/20131027/winto-ry-prosecutor-conduct-day-2.html>; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725–43 (2001).

16. See Bruce Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012).

17. See Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL'Y 21 (2013) (discussion of internal controls on administrative discretion); Jeffery T. Ulmer & John H. Kramer, *The Use and Transformation of Formal Decision-Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing*

While there is promise in the power of chief prosecutors to hold their line prosecutors accountable, this strategy only underscores the importance of knowing what drives the chief prosecutor's priorities. To some extent, we rely on the chief prosecutor's professional conscience to do the job well without any prompting from the outside.¹⁸ But in a constitutional design meant to create a "government of laws" that does not count on the angelic qualities of the people who hold power,¹⁹ the professional integrity of prosecutors as individuals is not enough. Prosecutorial integrity must be grounded in institutions, without counting on individual morality that is sometimes present and sometimes missing.²⁰

III. THE TRACK RECORD OF PROSECUTOR ELECTIONS

The American solution to the weak institutional controls on prosecutors comes from the ballot box. Chief prosecutors in state systems are typically elected. About eighty-five percent of the prosecutors in the state system are elected to four-year terms.²¹ In theory, elections can control the prosecutors' actions, keeping them consistent with public values without resorting to detailed and prospective legal rules.

Electoral control of prosecutors in this country also means local control. All but five states elect their prosecutors at the local level, and even in the five exceptional states (Alaska,²² Connecticut,²³ Rhode Island,²⁴

Strategies, 45 SOC. PROBS. 248, 262–65 (1998); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002); Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 169–73 (2012) (discussing interaction between external incentives and internal structures to shape prosecutor plea negotiation practices).

18. Cf. *Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutor "may strike hard blows" but "is not at liberty to strike foul ones").

19. See John Adams, *Novanglus Letter #7*, BOS. GAZETTE, 1774 ("A government of laws, and not of men"); The Federal No. 51 (James Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

20. Cf. Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012) (qualitative research on effects of office structure on prosecutor's professional self-image); Timothy Fry, *Prosecutorial Training Wheels: Ginsburg's Connick v. Thompson Dissent and the Training Imperative*, 102 J. CRIM. L. & CRIMINOLOGY 1275 (2012).

21. STEVEN W. PERRY, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2005, at 3 (2006).

22. The Alaska Attorney General appoints each District Attorney; see Klas Stolpe, *Juneau district attorney to take post with Legislature*, JUNEAU EMPIRE (Dec. 16, 2010), www.juneauempire.com/stories/121610/sta.757472712.shtml.

23. In Connecticut, the Criminal Justice Commission appoints all State's Attorneys. The membership of the Commission includes the Chief State's Attorney and six others (including two judges) who are nominated by the Governor. CONN. CONST. art. XXIII.

24. In Rhode Island all of the prosecutors work for the state through the Attorney General's office. Instead of prosecutors being divided by counties, prosecutors are dispersed through the statewide office for specific cases. Some prosecutors work in specialty areas, like white-collar crime or juvenile. Those teams have a head prosecutor, but that determination is based on expertise and seniority in the area. See OFFICE OF ATT'Y GEN., CRIMINAL DIVISION, www.riag.gov/criminal/.

Delaware,²⁵ and New Jersey²⁶), voters select prosecutors at one level removed. For instance, the elected state attorney general would appoint the chief prosecutors at the local level.

Among the prosecutors selected through the normal method of local elections, many answer to voters in a single county-wide district, while many others serve districts that only serve a few counties. The local prosecutor remains close to the community, where democratic accountability is thought to be strongest.²⁷

Local prosecutor elections create a radically decentralized criminal justice system. There are 2,330 separate felony prosecutor's offices in the state criminal courts of the United States.²⁸ While the budgets for state prosecutors' offices depend largely on state funds in most states,²⁹ the ultimate political responsibility for spending that budget rests with the chief prosecutor in the local district. The district attorney does not report up to any statewide hierarchy (such as the state Department of Justice) when setting priorities and practices of the office.³⁰

A. INCUMBENT ADVANTAGES IN PROSECUTOR ELECTIONS

How well do elections hold chief prosecutors accountable to local public values? There are reasons to be hopeful based on the fundamentals. Prosecutors deal with a limited range of public policy questions: those dealing with crime. Moreover, prosecutors work on questions that the voters find salient—those affecting their physical safety. Finally, prosecutors answer to small, localized constituencies. This combination of conditions—concentrated issues with salience to voters happening at the local level—creates a promising environment for real accountability to the voters.

Unfortunately, prosecutor elections fail despite these promising conditions. Elections do not assure that the public knows and approves of the basic policy priorities and enforcement strategies in the prosecutor's of-

25. In Delaware, the Chief County Prosecutor is appointed by the State Attorney General and answers to the State Prosecutor (who is head of the Criminal Division of the State DOJ and answers to the Attorney General). DEL. CODE ANN. 29 § 2505 (2006).

26. In New Jersey, the Governor appoints the County Prosecutors. N.J. Const. art. 7, § 2, ¶ 1.

27. This tight connection between the criminal prosecutor and the local voters grew out of the Jacksonian period, with its emphasis on placing the daily work of governance into the hands of citizens. See Joan E. Jacoby, *The American Prosecutor: From Appointive to Elective Status*, THE PROSECUTOR 25 (1997).

28. See DUREN BANKS & STEVEN W. PERRY, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS 2007, STATISTICAL TABLES (2011).

29. See BUREAU OF JUST. STAT., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2003 5 (2005).

30. See Marc Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, in PROSECUTORS AND POLITICS: A COMPARATIVE PERSPECTIVE 265 (Michael Tonry ed., 2012). District attorneys often have the authority to request expert assistance from the state Attorney General, or to request that the Attorney General assume control over a case when a conflict of interest arises. But the baseline remains local control over individual cases and office priorities.

fice. Neither do they reveal to the elected prosecutor the shifting priorities of the voting public when it comes to public safety tradeoffs.

One reason that elections create such a loose connection between public priorities and the daily performance of prosecutors is that elections do not pose much of a threat to the chief prosecutor's tenure. These elections produce low turnover and few challenges. The available evidence shows that incumbent prosecutors rarely face any challengers—far less often than incumbents in legislative races. Even when incumbents do run against challengers, they win most of the time. Chief prosecutors who face no opposition for re-election have little reason to expect that they will ever need to explain their choices and priorities to the voters.

Nationwide surveys of chief prosecutors tell us in general terms that turnover in office happens slowly. According to the most recent national census of state prosecutors, the average number of years in office for the chief prosecutor is nine and a half, a number that has drifted up in recent years.³¹ The typical prosecutor's office is run by a veteran, not by a person recently put into office by the voters: only 36% of offices have leaders with less than five years in office.³²

Voting data allow a more precise account of prosecutor elections than we could get from biannual survey results. On the basis of outcome data from a sample of fifteen states (one-third of the states that elect their prosecutors locally), it appears that incumbent prosecutors win re-election at an extremely high rate.³³ Incumbents win 94% of the races they enter and 70% of all races, even higher than the incumbency success rates for state legislators.³⁴ Because incumbent prosecutors have more incentive to explain themselves to voters and listen more carefully to public priorities when they face competitive election challenges, such high rates of incumbent re-election reveal a weakness in this method of holding

31. BANKS & PERRY, *supra* note 28, at tbl. 5. The average tenure from previous surveys was as follows: The median for 2007 was 7.0, while in 2001 the median tenure in office was 6.8 years. CAROL J. DEFANCES, U.S. DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 2001 3 (2002) [hereinafter DEFANCES 2001]. The median tenure in 1996 was a bit shorter, at 6.0 years. CAROL J. DEFANCES & GREG W. STEADMAN, U.S. DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 1996 3 (1998) [hereinafter DEFANCES 1996].

32. The comparable figures for 2005 were as follows: 40% of the chief prosecutors have served twelve or more years, and 72% have served five years or more. See PERRY, *supra* note 21. In 2001, 20% of the prosecutors had served 15 years or more. DEFANCES 2001, *supra* note 31.

33. These figures are based on election outcomes, as reported by the Secretary of State, in 15 states: California (1996–2012), Colorado (2000–2012), Florida (1996–2012), Georgia (2000–2012), Hawaii (2000–2008), Idaho (2000–2012), Indiana (2002–2014), Maine (2002–2012), Massachusetts (2002–2010), Minnesota (2002–2010), New Mexico (2000–2008), North Carolina (2000–2008), Oregon (1998–2008), Texas (1996–2008), and Wisconsin (2000–2008). These states post-election outcomes on internet sites, usually maintained by the Secretary of State. The database of outcomes forming the basis for Tables 1 and 2 in this article covers more states and more years than similar analyses in the two articles described in note 1.

34. For discussions of the incumbency advantage in state legislative races, see Gary W. Cox & Scott Morgenstern, *The Incumbency Advantage in Multimember Districts: Evidence from the U.S. States*, 20 LEGIS. STUD. Q. 329 (1995); Gary W. Cox & Scott Morgenstern, *The Increasing Advantage of Incumbency in the U.S. States*, 18 LEGIS. STUD. Q. 495 (1993).

prosecutors accountable to public views about the application of the criminal law.

It is not just that incumbents win their races so often; incumbent prosecutors rarely face challengers at all. As Table 1 indicates, over 80% of prosecutor incumbents run unopposed in both general elections and in primaries. State legislative incumbents, by comparison, run unopposed in only 35% of their elections.³⁵ When challengers fail to appear on the scene, the incumbents do not have to discuss or justify their office procedures or priorities to the public, and they receive little or no voter feedback in response.

TABLE 1: OPPOSITION TO INCUMBENTS IN PROSECUTOR ELECTIONS

	General Elections	Primary Elections
All Races	2345	1931
Incumbent Runs	1799 (77% of all races)	1385 (72% of all races)
Incumbent Unopposed	1436 (80% of incumbent races)	1155 (83% of incumbent races)
Incumbent Wins	1689 (94% of incumbent races)	1303 (94% of incumbent races)
Incumbent Wins when opposed	253 (70% of opposed incumbent races)	148 (64% of opposed incumbent races)

These patterns change in one meaningful way when we concentrate only on the largest jurisdictions where the prosecutors' decisions affect the largest number of people. Table 2 indicates the election outcomes in larger districts. Incumbent prosecutors in these districts ran for re-election at about the same rate as the incumbents from smaller districts (73% from the largest districts versus 75% from the districts with fewer than 100,000 votes). The difference appears in the number of challenges that the incumbents face in larger jurisdictions. The percentage of unopposed incumbents went down from 81% for all races to 55% for races when at least 100,000 votes were cast.³⁶

35. See Peverill Squire, *Uncontested Seats in State Legislative Elections*, 25 LEGIS. STUD. Q. 131, 132–33 (2000) (thirty-five percent of state legislative races were uncontested during elections from 1988 to 1996).

36. The differences between the largest districts (100,000 votes or more) and all other districts, as to the percentage of unopposed races for incumbents and the percentage of incumbents who win their races, are statistically significant, using the t-test of significance.

TABLE 2: OUTCOMES IN PROSECUTOR ELECTIONS, LARGER DISTRICTS

	Between 10,000 and 49,999 votes cast	Between 50,000 and 99,999 votes cast	Over 100,000 votes cast
All Races	1316	240	230
Incumbent Runs	1000 (76% of all races)	180 (75% of all races)	167 (73% of all races)
Incumbent Unopposed	763 (76% of all races when incumbent runs)	146 (81% of all races when incumbent runs)	91 (55% of all races when incumbent runs)
Incumbent Wins	930 (93% of all races when incumbent runs)	172 (96% of all races when incumbent runs)	151 (90% of all races when incumbent runs)
Incumbent Wins When Opposed	167 (70% of all opposed incumbent races)	26 (77% of all opposed incumbent races)	60 (79% of all opposed incumbent races)

The patterns also change somewhat depending on state election laws. For instance, Colorado places term limits on its prosecutors.³⁷ As a result, the percentage of re-election races run by incumbents in the state, at 51%, is much lower than the normal 74%. When incumbents do run in Colorado, they face no opposition in 82% of the elections, which is about the same as the national figure of 86%. Incumbents in Colorado win 48% of the overall elections and 95% of the elections that they enter.³⁸

Thus, term limit laws do reduce the number of incumbents who run and the average tenure in office of chief prosecutors. This could make chief prosecutors more attuned to current public wishes about criminal law enforcement because incumbents never have much time to settle into the insider's role. On the other hand, an incumbent who can only run for re-election one time might affirmatively choose to discount public opinion at the start of the second term in office.

Just as term limits have some impact on the incumbent advantage, state election laws that designate district attorneys as non-partisan offices—that is, the ballot contains no party affiliation for the candidates—also have such effects.³⁹ As Table 3 indicates, incumbents in non-partisan states run more often but face opposition more often (in 37% of the races

37. COLO. CONST. art. V, § 3(2); art. XVIII, § 11. In general, Colorado district attorneys may serve only two consecutive four-year terms. The state constitution, however, allows districts to exempt their district attorneys from this limit. In Denver, for example, the District Attorney may serve three consecutive terms.

38. Given the small number of Colorado elections in the outcomes database, the difference between Colorado and other states in the success rate of incumbents when they run are not statistically significant.

39. The non-partisan states in the outcomes database are Hawaii, Minnesota, Oregon and California. I thank David Fear and Jonathan Williams for the core of the data summa-

they enter, compared to 16% in partisan states) and therefore win a bit less often overall. These are not profound practical differences. They do suggest, however, that incumbents in partisan election states can signal party affiliation as a way to prevent some challengers from entering the race. Perhaps local political party infrastructure creates better campaign expertise and partisan enthusiasm for the incumbent chief prosecutor; maybe the party leadership offers alternative races or positions to potential challengers. Whatever the exact mechanism, these laws do appear to make a modest difference. Ironically, a jurisdiction that wants to encourage more robust campaign debate might enact non-partisan election laws for district attorneys.

TABLE 3: INCUMBENCY ADVANTAGE IN NON-PARTISAN AND PARTISAN ELECTIONS

	Partisan Elections	Non-Partisan Elections
All Races	3665	635
Incumbent Runs	2694 (74% of all races)	500 (79% of all races)
Incumbent Unopposed	2274 (84% of incumbent races)	317 (63% of incumbent races)
Incumbent Wins	2556 (95% of incumbent races)	442 (88% of incumbent races)
Incumbent Wins when opposed	282 (67% of opposed incumbent races)	125 (68% of opposed incumbent races)

One reason for the high rate of unopposed incumbents in prosecutor elections generally may be the difficulty of recruiting challengers. The pool of interested candidates might remain small because challengers have a great deal to lose from an unsuccessful electoral bid.⁴⁰ Based on a study of fifty-four contested general elections, more than half of the chal-

rized in Table 3, which formed the basis for their empirical project as editors of the *Wake Forest Law Review* in 2010–11.

40. The data summarized here is explained in more detail in earlier articles. See Wright, *Public Defender Elections*, *supra* note 1; Wright, *Prosecutor Elections*, *supra* note 1. Biographical features of the challengers are drawn from a random sample of fifty-four contested general elections in the states of California, Colorado, Florida, Georgia, Idaho, Indiana, Maine, Massachusetts, New Mexico, North Carolina, Texas, and Wisconsin, between 1996 and 2008. This sample constitutes roughly 25% of the contested elections in these states involving incumbents during this time frame. My research assistants and I searched (1) newspaper articles in the LexisNexis and Westlaw databases and on Google news and (2) professional directory databases on Westlaw to learn about the professional careers of challengers in prosecutor elections, both before and after the election campaign. These sources allowed us to assemble, for most challengers, the following information: gender, race, law school, year of graduation, year of admission to the bar, number of years experience, number of years of prosecutorial experience, and the types of legal employment the challenger held before and after the election.

lengers had prosecutorial experience, and about 20% of them worked in the incumbent's office at the time of the election. Most of the other challengers worked as criminal defense attorneys.

In this setting, a challenger who runs against the incumbent and loses will pay a price well beyond election day. The prosecutor who unsuccessfully tries to unseat the boss will likely have to leave the office and find new employment. Those few challengers who remain in the office are not likely to get further promotions or plum assignments. Even criminal defense attorneys face difficulty in challenging incumbents because prosecutors after the election may be less cooperative in plea negotiations and other settings. Given these costs, it is a wonder that incumbents face challengers in as many as 16% of the elections after they decide to run.

The chief prosecutor, unless there are unusual local conditions, can expect to keep the job for many years; prosecutors in smaller jurisdictions can also count on running unopposed most of the time. Overall, 95% of the incumbents who want to return to prosecutorial office are re-elected, and the number remains at 90% even for the largest and most competitive jurisdictions. The typical incumbent prosecutor will win automatic re-election and will not have to explain her performance to voters in a competitive atmosphere.

Granted, elections might affect prosecutors despite the overwhelming advantages that incumbents hold. District attorneys might perform their duties in the shadow of a future election, based on the expectation that a challenger could appear in the next election cycle. Chief prosecutors with this mindset will run the office at all times *as if* the voters will evaluate their work closely. Yet with success rates for incumbent prosecutors near 95%, one must wonder how much of a shadow the tiny number of electoral losses can cast.

B. SMALL-BORE CAMPAIGN RHETORIC

Election campaign rhetoric does not contribute to successful prosecutor accountability either. Candidates—both incumbents and challengers—tend to focus on individual qualifications rather than the performance of the entire office.⁴¹ For instance, candidates talk about the number of years in practice, with particular emphasis on the number of years spent in prosecution.

When the campaign rhetoric does turn to office performance, the claims relate to quantity of cases processed rather than the quality of results. Campaigns do not link the incumbent's choices to public values through an ideological lens. The candidates discuss a handful of recent prominent criminal trials (known in the trade as "heaters") or indicators of personal integrity, such as conflicts with office personnel. They rarely discuss any topics related to office management, such as the backlog of

41. See Wright, *Public Defender Elections*, *supra* note 1; Wright, *Prosecutor Elections*, *supra* note 1. (content analysis of news reports of candidate statements during election season).

cases awaiting disposition in court or the practices of the office related to plea bargaining or screening of cases that the local police recommend for prosecution. The forest is lost for the trees.

All told, prosecutor elections do not provide voters with meaningful information to evaluate the work of the incumbent. Unchallenged incumbents remain silent or stick to platitudes, and the few challenged incumbents avoid any substantive discussion of the future of local criminal enforcement simply by re-litigating a few prominent cases during the campaign without talking about office policies or priorities. Incumbent prosecutors might know about the values and priorities of their constituents, or they might not, but election campaigns do not deepen the incumbents' knowledge.

In short, campaign rhetoric generally gives the voters no basis for judging the competence of the incumbent, and few measures of the values or priorities of the local prosecutor's office. Considering the limited number of contested elections and the restricted range of topics that candidates typically address, elections are highly imperfect mechanisms to promote accountability in the enforcement of criminal law.

IV. THE APPOINTMENT ALTERNATIVE

If prosecutor elections deliver less accountability than we might expect, should that elicit a groan of disappointment or a sigh of relief? One might be relieved that elections have relatively little impact on the prosecutor's routine work and look for ways to keep the voter's views at arm's length whenever possible. From this perspective, voters are a source of mischief and cruelty. Voters who engage with criminal justice issues only during an election season are capable of nothing more than bloodthirsty clamor for the longest possible sentences.⁴² They add arbitrariness to criminal justice.⁴³ Voters interfere with the better judgment of the full-time professionals who might produce better results—as they do in other countries—if they could make choices based on professional expertise rather than the current political winds.⁴⁴ Better to insulate working prosecutors from the voters and to appoint them to office based on experience and proven performance, in the tradition of the Civil Service.⁴⁵

From another perspective—one that I find more congenial—elections deliver too little accountability to serve their purpose. Indeed, even a well-functioning electoral system with a more modest incumbent advantage, surrounded by vigorous policy debate during campaign season, would not be enough. Prosecutor elections only happen every four

42. See, e.g., William Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1982 (2008); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

43. See Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, in PROSECUTORS AND POLITICS: A COMPARATIVE PERSPECTIVE 1 (Michael Tonry ed., 2012).

44. See JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 49–59 (2003).

45. Cf. Rachel Barkow, *Institutional Design and the Policing-Prosecutors: Lessons From Administrative Law*, 61 STAN. L. REV. 869, 874 (2009).

years.⁴⁶ Do elections affect the routine policy choices of district attorneys when the next campaign remains years away? From this point of view, public engagement with criminal justice is essential for its long-term legitimacy. The amateurs and outsiders must understand and endorse, at least in general terms, what the expert insiders do on a daily basis.⁴⁷

For these critics of prosecutor elections, *appointment* of chief prosecutors in local offices could offer an attractive alternative to the current disappointing reality. Instead of prosecutors who win an election and then remain in office for as long as they choose—perhaps for decades at a time—prosecutors might stay more closely in line with public priorities if a statewide official, such as a state Attorney General, were to appoint the chiefs of all the local offices. In that way, turnover would happen every few years, particularly when voters in the state select new political leadership.

Which effects are most likely to flow from an appointment system: more insulation from political influence or more genuine responsiveness to large-scale changes in voter values? We have some experience with appointed chief prosecutors, enough to allow for some tentative answers. In the federal system, the President appoints the U.S. Attorneys with the advice and consent of the Senate; in five states, statewide officials appoint the chief prosecutor for each local district in the state.⁴⁸ Prosecutorial systems in other countries select chief prosecutors through a bureaucratic process, emphasizing seniority and technical expertise.⁴⁹

Do appointed prosecutors behave any differently from elected prosecutors in the United States? Federal prosecutors do behave differently from state prosecutors.⁵⁰ They dismiss fewer cases and enter plea agreements at a slightly higher rate. They also tend to obtain more severe punishments for crimes that appear nominally the same in the state and federal codes.⁵¹ Those differences in performance, however, flow from the distinctive structure of federal criminal justice. The federal system has plenty of funding; it is only supplemental for most crimes, has virtually no misdemeanor jurisdiction, and has a code with more depth of charging options than the typical state code.⁵² These background conditions are likely more important than the method of selecting chief prosecutors in the federal system.

46. See PERRY, *supra* note 21.

47. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1 (2014).

48. 28 U.S.C. § 541 (2012).

49. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010).

50. See Susan R. Klein, et al., *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006–2010*, 51 Hous. L. REV. 1381 (2014).

51. See Erik Eckholm, *Prosecutors Draw Fire For Sentences Called Harsh*, N.Y. TIMES, Dec. 6, 2013, at A19.

52. See JOHN S. BAKER, JR., *FEDERALIST SOC'Y FOR LAW & PUB. POL'Y STUD., MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION* (2007).

The more relevant comparison is between chief local prosecutors in the forty-five states where they are elected versus the chief local prosecutors in the five states where they are appointed. A complete and satisfying account of the differences among prosecutors in these two groups of states would focus in a granular way on the operations of prosecutor offices. For comparable urban and rural areas in different jurisdictions served by prosecutors' offices of comparable size, do they tend to organize their work in the same way? Do they select and decline similar cases? Do they develop the same sorts of relationships with law enforcement agencies? Do they pursue similar plea negotiation styles? Do the office cultures put value on the same views and accomplishments? Do the attorneys pursue similar career paths and develop comparable professional self-images?⁵³

These layers of comparisons are worth pursuing, but I save them for another day. For now, we can address the turnover of chief prosecutors in appointment states. It does appear that appointment states produce shorter terms in office by a modest but meaningful amount. Recall that the average tenure in office for chief prosecutors in state court is 9.5 years. As Table 4 indicates, chief prosecutors in Alaska, Connecticut, Delaware and New Jersey stay in office for an average of 7.3 years.⁵⁴ They are not replaced with each new election cycle to reflect new voter priorities, but they do move on more quickly than their elected counterparts.⁵⁵

TABLE 4: TENURE IN OFFICE FOR APPOINTED LOCAL PROSECUTORS

	Alaska	Connecticut	Delaware	New Jersey	Total
Districts	9	13	3	21	46
Chief Prosecutors	33	27	10	46	116
Years of Service	191	310	31	317	849
Average	5.8	11.5	3.1	6.9	7.3
Median	4	11	2.5	6	5.5

Just as appointment tends to produce more turnover in office, the operational similarities among prosecutors' offices are also worth exploring. While an in-depth analysis is beyond the scope of this article, a quick look reveals some intriguing possibilities. The mix of cases on the criminal docket and the method of disposition appears to be similar in appoint-

53. See Levine & Wright, *supra* note 20.

54. In Rhode Island, there is no leadership position at the local level for the State Attorney General to fill with any appointees.

55. The mean and median term of service in Connecticut is longer than the other three states because the ordinary term of office for each appointed State's Attorney is eight years.

ment and election states.⁵⁶ The incarceration rates and prison admissions, however, appear to diverge in the two groups. For instance, the average incarceration rate in elected prosecutor states in the northeast for 2010 was 271 per 100,000, while the average rate for appointed prosecutor states in the region was 325.⁵⁷

A closer study of differences among prosecutor offices might ultimately confirm this general impression: the appointed or elected status of the chief prosecutor might affect the outcomes of the office, at least to a modest degree. The size of an office and its location in a rural or urban area probably matter more.⁵⁸

Whatever the potential effects of prosecutor appointment, it is a non-starter in realistic political terms. A conversion to appointment systems would require a wave of legislation and constitutional amendments in the states. In the similar area of judicial offices, the organized bar and the judiciary have favored appointment over elections for decades. Their generations-long effort to pass legislation and to amend state constitutions has produced only modest results. The advocates for appointed versus elected judges have failed more often than they have succeeded.⁵⁹

Converting prosecutors from elected to appointed status would prove an even heavier political lift. The benefits, therefore, would have to be especially clear. In the context of American criminal justice, this political inertia leaves the prosecutor as an elected official in most places. Because of the way that prosecutor elections work on the ground, prosecutors will remain unresponsive to changes in public priorities and blind to the cost side of criminal justice.

V. THE FEEDBACK LOOP FOR PROSECUTORS AND THEIR COMMUNITIES

While a shift to appointed status would prove politically infeasible and would produce underwhelming results, other popular feedback devices hold more promise as supplements to elections. First, we consider the so-called community prosecution movement as a way to offer chief prosecu-

56. For a comparison of felony filings and processing in Delaware and Maryland, see DEL. CRIM. JUST. COUNCIL, *DELAWARE FELONY CASE PROCEEDING: AN ANALYSIS OF 2006 ADULT ARRESTS* (2011); DIST. COURT OF MD., *CRIMINAL CASE ACTIVITY REPORT* (2006).

57. See *Governing Prison Population and State Incarceration Rate Data*, GOVERNING, <http://www.governing.com/gov-data/state-prison-population-incarceration-rates.html> (last visited Sept. 4, 2014). These rates are based on 2010 populations and the rates were as follows: New York 288, New Hampshire 209, Vermont 265, Massachusetts 200, Maine 148, Pennsylvania 403, Maryland 387. The figures for appointment states were Connecticut 376, New Jersey 286, Rhode Island 197, and Delaware 443.

58. The limited experience with elected prosecutors in other countries suggests that the method of selection for the chief prosecutor has relatively little impact. Several Swiss cantons elect their prosecutors. Criminal justice outcomes in those cantons appear to be similar to those in neighboring cantons with bureaucratically appointed chief prosecutors.

59. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008); Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659 (2002).

tors guidance about the law enforcement priorities of the public. Then, I reflect on the importance of new data collection and dissemination practices to the work of criminal prosecutors.

A. COMMUNITY PROSECUTION DEVICES

Some efforts to strengthen the connection between prosecutors and the public fall under the rubric of “community prosecution.” While they take many forms in different prosecutors’ offices in the United States, all community prosecution programs aim to decentralize and democratize the work of criminal prosecutors.⁶⁰ These initiatives and programs draw on the experience and vocabulary developed in the now-mature “community policing” movement.⁶¹ Community prosecution programs offer visible clues about something subtle and deep: how the full-time criminal justice actors in a jurisdiction view the power of citizens to guide the work of the prosecutor.⁶²

Community prosecution initiatives in the United States take a remarkable number of forms. Some simply place a satellite prosecutor’s office in a prominent location away from the courthouse. The prosecutors who work in the satellite office respond to crimes with special local interest; their visible presence near the source of the perceived problem promotes a sense of public security.⁶³ From the beginning, the programs appeared in response to neighborhood leaders and other groups that believed their public safety priorities were neglected.⁶⁴ Offices might also place special emphasis on accessibility to support services for victims of crime.⁶⁵

60. See M. ELAINE NUGENT ET AL., AM. PROSECUTORS RES. INST., *THE CHANGING NATURE OF PROSECUTION: COMMUNITY PROSECUTION VS. TRADITIONAL PROSECUTION APPROACHES* (2004) (listing key elements of community prosecution as partnerships with community groups and varied enforcement methods, based on nationwide survey of 879 prosecutors’ offices); Barbara Boland, *What Is Community Prosecution?*, NAT’L INST. JUST. J. (Aug. 1996), at 35, available at <https://www.ncjrs.gov/pdffiles/nijcomm.pdf> (describing an early effort at community prosecution in Multnomah County, Oregon).

61. See Catherine M. Coles & George L. Kelling, *Prevention Through Community Prosecution*, 136 PUB. INT. 69, 77–78 (1999) (explaining that community prosecution draws on community views about priorities for criminal law enforcement to enhance the local sense of public safety); ROBERT V. WOLF & JOHN L. WORRALL, *LESSONS FROM THE FIELD: TEN COMMUNITY PROSECUTION LEADERSHIP PROFILES* (2004), available at http://www.courtinnovation.org/sites/default/files/cp_lessons_from_the_field.pdf (describing common elements of community prosecution and community policing).

62. See generally Brian Forst, *Prosecutors Discover the Community*, 84 JUDICATURE 135 (2000) (concluding that current forms of community prosecution do not reflect a meaningful improvement in making prosecutors accountable to citizens).

63. See Walter J. Dickey & Peggy A. McGarry, *The Search for Justice and Safety Through Community Engagement: Community Justice and Community Prosecution*, 42 IDAHO L. REV. 313, 315–17 (2006); Cecelia Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 981–82 (2010); WOLF & WORRALL, *supra* note 61, at xi, 30–31.

64. See Boland, *supra* note 60, at 35–36 (explaining that Portland community prosecution began in response to business community concerns based in the remote sector of the city).

65. See DIV. OF BEHAVIORAL & SOC. SCIS. & EDUC., NAT’L RESEARCH COUNCIL, *WHAT’S CHANGING IN PROSECUTION? REPORT OF A WORKSHOP 14–17* (Philip Heymann & Carol Petrie eds., 2001); Kelley Bowden Gray, *Community Prosecution: After Two Decades, Still New Frontiers*, 32 J. LEGAL PROF. 199, 200–01 (2008); Elaine Nugent & Gerard

Other community prosecution programs give prosecutors more authority to allocate police resources toward a priority issue of public safety. They cast the chief prosecutor as the community's most visible leader on public safety.⁶⁶

But community prosecution programs in the United States go beyond efforts to coordinate different agencies or to signal a law enforcement presence to the public. The signals sometimes reverse direction, moving from the public back to the prosecutors; formal efforts to solicit public opinion include polls and questionnaires.⁶⁷ The chief prosecutor can use this feedback from the public to shift enforcement priorities toward an area of persistent concern. Alternatively, the office might use this feedback to explain more effectively the practices and policies already in place.

Community prosecution allows chief prosecutors to obtain nuanced feedback from the public. While each voter in a prosecutorial election casts only one vote, participants in community prosecutor exchanges get involved at different levels to reflect their different levels of interest. One might expect to see community prosecution efforts in local jurisdictions that are the least homogenous in socioeconomic terms. These initiatives allow the chief prosecutor to reach out to communities that hold the least stake in the electoral system.

The downside to community prosecution is that it remains too much in the control of the chief prosecutor. Because career prosecutors initiate the programs, they also tend to focus on segments of the public that are most sympathetic to existing criminal enforcement patterns. Prosecutors, like the rest of us, are inclined to ask questions of people who are most likely to tell them what they want to hear.

B. DATA-BASED MEASURES OF PROSECUTOR EFFECTIVENESS

While the entire electorate might show collective disinterest, what about individuals or groups who have more immediate and practical reasons to follow the work of criminal prosecutors? This is a setting where intermediary institutions reinforce democracy.⁶⁸ As voters, we cannot be bothered about our prosecutors very often, but it is reassuring to know that we have agents watching closely for us and competing with one another to offer this service—and to receive credit for offering the service. The “data interpreter” functions of the ACLU, victim advocacy groups, and other similar groups are broadly useful for all of us.

A. Rainville, *The State of Community Prosecution: Results of a National Survey*, 13 PROSECUTOR 26, 30–31 (2001).

66. See Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1126–28 (2005); WOLF & WORRALL, *supra* note 61, at 12–14.

67. See Levine & Wright, *supra* note 20, at 1147–48; WOLF & WORRALL, *supra* note 61, at 18.

68. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 129–34 (Francis Bowen ed., Henry Reeve trans., 1863).

An administrative law strategy can encourage the work of these intermediaries who monitor prosecutors. In some areas of government, we build up legitimacy by insisting that public employees do their business in the sunshine. Administrators typically have to explain their choices and not just announce them. They also must explain some choices within a designated analytical framework (think of cost-benefit analysis).⁶⁹

Unfortunately, criminal law operates with a weakened form of administrative accountability. Open records laws usually do not apply to the police or prosecutors.⁷⁰ Although some state statutes include broadly phrased open records laws,⁷¹ most internal prosecutor records never get exposed to the sunshine, and most prosecutor meetings are not reported in the press.

If more prosecution data were more routinely accessible to the public, how could it become useful? Data interpreters would have to find ways to connect the raw data with genuine concerns of the public. Those interpretations of the raw data would need to explain something more than the outcomes of trials because we live in a plea-based world.⁷²

One relevant measure of performance for a prosecutor's office would be the "convicted as charged rate." As Marc Miller and I once described this measure:

The interesting public question should not be the "conviction rate," but rather the "as charged conviction rate." This rate could be expressed as a simple ratio. The higher the ratio of "as charged convictions" to "convictions," the more readily a prosecutor should be praised and reelected. A ratio near one—where most convictions are "as charged," whether they result from guilty pleas or trials—is the best sign of a healthy, honest, and tough system. The lower the ratio of "as charged convictions" to "convictions" (approaching zero), the more the prosecutor should be criticized for sloppiness, injustice, and obfuscation. A lower ratio might also reflect a prosecutor's undue leniency.⁷³

This measure treats plea negotiations, rather than trials, as the central activity of prosecutors. It encourages more transparent charging and plea

69. See Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741 (2008).

70. As Darryl Brown has noted, public explanations for choices and cost-benefit techniques do not reach the administrators of criminal justice. See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323 (2004). Federal law here is particularly limited. For instance, the Freedom of Information Act makes a blanket exception for criminal law enforcement matters, and the public rulemaking provisions of the Administrative Procedure Act do not apply to criminal law enforcement. See 5 U.S.C. §§ 552–53 (2012).

71. Florida is one example. See Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245 (2008).

72. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system").

73. Miller & Wright, *supra* note 9.

practices, allowing easier public scrutiny of case valuation. The as-charged rate assumes that convictions obtained through bluffing about evidence are a bad thing. This is not an assumption that everyone shares, but I believe it is the approach most respectful of the rule of law.

Another relevant data-based performance measure of health for a prosecutor's office would be changes in the acquittal rate.⁷⁴ Big changes in the acquittal rate for a jurisdiction might be good, bad, or indifferent. But such changes in rates do indicate a need to look more closely. If the acquittal rate goes down, an observer might look for indications that prosecutors are convincing more defendants to give up viable claims. Such indications might include the absence of new enforcement techniques that would improve quality of case or changes in sentencing laws that would give prosecutors a bigger club for scaring defendants into a plea. Data interpreters would use visible outcomes (changes in acquittals) as an imperfect tool to spot possible trouble with the more invisible practices of plea negotiations.

Other measures of a healthy local criminal justice system spring to mind. Local monitors might want to measure consistency within the office. For instance, data interpreters might ask whether people initially recommended for similar offenses (with similar prior records) are treated consistently. The Vera Institute's Prosecution and Racial Justice project provides an interesting example of using data as an active management tool to identify and address potential inconsistent treatment between suspects of different races.⁷⁵

When policy and opinion leaders start talking about their concerns over the excesses of "mass incarceration," our data interpreters also might get interested in punishment measures. They could estimate the prison years to be served by defendants convicted by the office during the year, with a dollar figure attached and a population-adjusted estimate of that county's "share" of the statewide system. Other punishment measures might include the number of cases sent into diversion programs or the number of community or intermediate sanctions obtained for cases charged initially with the offenses best suited to those outcomes.

If number-based evaluations of prosecutors are to shed any light for the affected public, they must amount to something more than ad hoc efforts to throw "relevant" numbers in front of voters. A watcher of prosecutors will need to develop very few overarching values based on one or more theories of sound prosecution in a democracy.

For instance, an organizing principle for choosing measurements might be transparency. Transparency matters more for some prosecutorial issues than others. The less likely that prosecutor decisions will receive

74. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

75. Miller & Wright, *supra* note 9; BESI KI KUTATELADZE, ET AL., RACE AND PROSECUTION IN MANHATTAN (2014), available at <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf>.

scrutiny through electoral, judicial, or other traditional means, the more important transparency becomes.

By this standard, one might rate a district attorney's office on whether the chief prosecutor publishes declination data (along with reasons for those declinations). A rating group could ask whether the district attorney has articulated and published declination policies for the office. It would also be productive to ask whether the chief prosecutor generates monitoring reports about the line prosecutors' work and uses those reports for management purposes.

What if a data interpreter were to combine measurements, assign weights to each component, and create an overall score? The result would be a report card with a single score (or perhaps only two or three scores, each combining a number of underlying metrics). Call it a "Prosecutor Quality Index."

An index score could produce substantial results, particularly if different groups were to get involved and declare explicitly the values that they emphasize in selecting measures and assigning weights. If, over time, several competitors generated rating systems and ultimately some small handful of ratings systems proved most accessible and popular, then the members of the public most interested in criminal law enforcement could follow and compare the different ratings. (Think of the Consumer Reports "Green Ratings" for prospective car purchasers.) Voters and engaged citizens could use the Prosecutor Quality Index, as publicized by different monitors, to inform their votes, their campaign contributions, and their participation in community prosecution surveys.

C. WHO CREATES AND DELIVERS THE RATINGS?

Who might develop such ratings systems? First, consider news reporters. Imagine that a media conglomerate—say, the McClatchy newspapers, or Time-Warner, or Rupert Murdoch's News Corporation—develops its own Prosecutor Quality Index. If the index proves popular in one location, the conglomerate might ask all its news outlets to use this system to publish periodic ratings of the local prosecutor. Perhaps a news service like Reuters could jump into the game, offering a template for news outlets to use by plugging in local numbers.

One common critique of news reporters is that they focus too much on the moment, the human-interest story, rather than stories that reveal longer trends based on aggregate statistics. But is the media market changing in ways to make us more hopeful for a broader vision, for numeracy to go along with literacy, at least in some corners of the market? Arguably, internet and television competition is pushing newspapers out of the daily news story business. Some newspaper owners and managers now believe that they will survive only if they embrace longer-term projects—something with a longer gestation period than reporting yesterday's campaign event.

Think of a few areas where this is already happening. For financial data, newspapers supplement a table of yesterday's stock prices with content about longer trends and advice for asset management. For weather, some news outlets now deliver more content about global warming and long-term trends and less about this week's heat wave.

Will the same shift to a longer news horizon happen in criminal justice reporting? There are some signs of interest among news reporters looking for a new way to understand the operation of prosecutors' offices. During the campaign leading up to a 2006 prosecutor election in Indianapolis, reporters developed an extensive analysis of court data (not based on internal prosecutor office data). Their reports did not focus on the outcomes in famous recent murder cases but looked at detailed trends in all murder cases. Along the way, the stories mentioned an "as charged conviction rate."⁷⁶ During 2008 election coverage in Houston, newspaper reporters concentrated on a puzzling set of outcomes for homicide cases involving lots of deferred adjudications as the opening bid in plea negotiations.⁷⁷ A story about the 2014 prosecutor election in Nashville noted the paucity of news coverage for these events, as compared to other local elections.⁷⁸

News outlets would likely develop and publish their own Prosecutor Quality Index to sell their coverage during the election campaign season. Once the template is in place from an election campaign, the reporters should find it easier to update the data and make marginal improvements in the questions asked. Perhaps the newspaper resorts to this form of analysis every time the legislature debates funding for a criminal justice program. It could become relevant every time the local prosecutor goes to lobby the state legislature or otherwise creates a major publicity campaign.

Looking outside the media industry, we might also imagine a foundation or other non-profit organization developing a PQI and issuing an occasional report card. The Pew Charitable Trusts specializes in these report card metrics.⁷⁹ The non-profit might encourage others to find local numbers for plugging into their index system. Non-profit contributors would play an especially important role in connecting the prosecutor with underserved communities because for-profit news services may neglect this sector.

Advocacy groups with an established record in criminal justice matters would have an advantage in building a credible index. Some professional

76. *Experience matters, but what kind?*, INDIANAPOLIS STAR (Oct. 15, 2006, 2:42 AM), <http://archive.indystar.com/article/20061015/LOCAL19/61014014/Experience-matters-what-kind->.

77. See Ronald Wright & Marc Miller, *Dead Wrong*, 2008 UTAH L. REV. 89.

78. Nashville Public Radio, *On the Ballot in Nashville: Three Vie to Replace Long-Term Prosecutor* (May 5, 2014), <http://nashvillepublicradio.org/blog/2014/05/05/ballot-nashville-three-vie-replace-long-time-prosecutor/>.

79. See PEW CHARITABLE TRUST, STATE AND CONSUMER INITIATIVES, <http://www.pewstates.org/research/analysis>.

associations for prosecutors (such as the National District Attorneys' Association and its think-tank, the American Prosecutors Research Institute, or state District Attorneys' Associations) have already embarked on efforts to create measurements for the work of line prosecutors, including some aggregate measures for office effectiveness.⁸⁰ These associations might have a pro-incumbent bias, but what makes a given incumbent look good or bad in a future election cycle is hard to predict.

What about defense lawyers? Institutional defense lawyers might be especially willing and able to look for patterns in the work of local prosecutors. National consultants such as the Spangenberg Group might happily create ratings systems, and for a reasonable fee would plug in the relevant numbers from a given jurisdiction.

Even police departments (or national professional associations of law enforcement officers) might have some incentive to produce a Prosecutor Quality Index that could be applied to guide the decision of police officer associations about whether to endorse the incumbent during election season.

Scholars could also generate measurements that others will perceive as reliable and relevant. Just as academic political scientists build models to understand political campaigns, criminologists might take a role as a public scholar to educate the public about prosecutors' offices. One model here is the involvement of criminologists in collecting and evaluating statistics related to claims of improper police stops of drivers based on race, the so-called "Driving While Black" controversy.⁸¹ Certainly scholars can set the context, guiding reporters and others through the available range of measurements and placing the local prosecutor's rating into some statewide or nationwide context.

VI. CONCLUSION

The very process of discussing and evaluating prosecutors, with interested and informed—and even biased—groups taking the lead, will deepen a community's views about prosecutors and what they expect from criminal justice. Prosecutors who are obliged by law and by custom to track and release information about office performance can start something profound. In the tradition of civic republicanism, a public conversation about criminal prosecution statistics can lead to a "deliberative prosecution."⁸² This deliberation can do the most good when prosecutors start it, but then lose control of the public conversation.

80. The 2004 "Prosecution in the 21st Century" research is designed both for internal management use, and for advocacy by prosecutors when they ask for more resources.

81. See DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2001).

82. Cf. Sekhon, *supra* note 47.

