PROSECUTORIAL REGULATION VERSUS PROSECUTORIAL ACCOUNTABILITY

Stephanos Bibas[†]

No government official has as much unreviewable power or discretion as the prosecutor. Few regulations bind or even guide prosecutorial discretion, and fewer still work well. Most commentators favor more external regulation by

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[†] Professor, University of Pennsylvania Law School. B.A., Columbia; B.A., M.A., Oxford; J.D., Yale. E-mail: stephanos *dot* bibas *at* gmail *dot* com. Thanks to Rachel Barkow, Richard Bierschbach, Paul Butler, Adam Cox, Mariano-Florentino Cuéllar, Margareth Etienne, Jeffrey Fagan, Jacob Gersen, Bernard Harcourt, Todd Henderson, Douglas Lichtman, Erik Luna, Richard McAdams, Tracey Meares, John Pfaff, Randal Picker, Eric Posner, Margaret Raymond, Jacqueline Ross, Carol Steiker, Lior Strahilevitz, Ronald Wright, and participants in the University of Chicago Criminal Justice Roundtable for their thoughts and comments and to Jordan Esbrook and Brian Raimondo for research assistance.

legislatures, judges, or bar authorities. Neither across-the-board legislation nor ex post review of individual cases has proven to be effective, however. Drawing on management literature, this article reframes the issue as a principal-agent problem and suggests corporate strategies for better serving the relevant stakeholders. Fear of voters could better check prosecutors, as could victim participation in individual cases. Scholars have largely neglected the most promising avenue of reform, namely changing the internal structure and management of prosecutors' offices. Leaders could do more to develop office cultures, norms, and ideals that value more than just maximizing conviction statistics. Hierarchical office structures and internal procedural and substantive office policies could promote deliberation, give fair notice, and increase consistency. Hiring, training, promotion, and tenure practices could better shape prosecutors and their behavior. Pay structures and feedback from judges, defense counsel, and victims could encourage good behavior. Finally, publishing more data on charges, convictions, plea bargains, and sentences could also improve accountability.

Introduction

No government official in America has as much unreviewable power and discretion as the prosecutor. Legislators are checked by other legislators, the executive's veto, judicial review, and voters. Governors and the President are limited by legislation, legislative funding decisions, judicial review, and voters. Judges face appellate review by multiple layers of courts, and some also face re-election. Administrative agencies are constrained by judicial review and laws such as the Administrative Procedure Act[1] and Government in the Sunshine Act.[2]

Few of these forces meaningfully constrain prosecutors. They follow no Administrative Procedure Act, nor do they operate in the sunshine of public disclosure. While in theory the separation of powers should check prosecutors, in practice it does not.[3] Legislatures keep giving prosecutors more power, not

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[1] 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

[2] Id. § 552(b).

[3] See Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 **Stan. L. Rev.** 989, 993 (2006)("[T]he government faces

less, by expanding overlapping criminal statutes and giving prosecutors more plea-bargaining tools.[4] Judges largely avoid interfering with prosecutorial decisions. They reason that juries will ultimately check charges, even though few cases make it to jury trials in a world of guilty pleas. Governors and presidents exercise little or no control over line prosecutors' decisions.

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almost no institutional checks when it proceeds in criminal matters.").

[4] William Stuntz has explored this theme in many of his works. See, e.g., William J. Stuntz, The Pathological Politics of Criminal Law, 100 **Mich. L. Rev.** 505, 529-57 (2001); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Substance, 107 **Yale L.J.** 1, 55-59 (1997)(noting that legislatures get around problems of proving crimes by creating new crimes that apply more broadly and are easier to prove).

In theory, prosecutors are beholden to the public interest or justice. These concepts, however, are so diffuse and elastic that they do not constrain prosecutors much, certainly not in the way that an identifiable client would. As I have argued elsewhere, prosecution is a low-visibility process about which the public has poor information and little right to participate.[5] District attorneys' electoral contests are rarely measured assessments of a prosecutor's overall performance. At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal. The advantages of incumbency and name recognition are also huge. Moreover, a district attorney's subordinates are unelected and often operate with remarkably little oversight.

The resulting dangers can be enormous. While prosecutorial discretion is "at the heart of the State's criminal justice system," prosecutors' "'power to be lenient [also] is the power to discriminate.'"[6] Prosecutors have great leeway to abuse their

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[5] Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 **N.Y.U. L. Rev.** 911, 923-31 (2006).

[6] McCleskey v. Kemp, 481 U.S. 279, 297, 312 (1987) (quoting **Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry** 170 (1969)).

powers and indulge their self-interests, biases, or arbitrariness. As I have argued elsewhere, prosecutors have personal and sometimes financial incentives to lighten their own workloads.[7] They are tempted to try a few strong or high-profile cases to gain marketable experience, while striking hurried plea bargains in most other cases. They may be extremely risk-averse to protect their win-loss records, which further their employment prospects and political ambitions.[8] Thus, they may press their own agendas at the expense of victims and the public.[9]

The potential for abuse of discretion calls for more effective mechanisms to oversee and regulate prosecutors'

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[7] Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 **Harv. L. Rev.** 2463, 2471 (2004)

[8] Id. at 2470-72.

[9] There certainly may be other problems with the criminal justice system, such as many observers' sense that it is too harsh across the board. Because this harshness is primarily a matter of legislative policy, rather than prosecutorial discretion in apportioning punishment among cases, I will not focus on it here.

conduct. Many if not most other government actors enjoy less power yet are subject to far more regulation than prosecutors are. The comparison suggests that prosecutors are the outliers and that some new regulatory mechanisms are likely to be worth the cost.[10]

While many scholars discuss prosecutorial discretion as a problem, most favor external regulation of prosecutors by other institutions. One strand of this scholarship, by James Vorenberg for example, favors legislation to restrict prosecutorial discretion ex ante.[11] Another strand endorses ex post review by judges and bar authorities of individual cases of

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[10] For more extended treatments of the problem of unregulated prosecutorial discretion, see **Davis**, supra note 6, at 166-72; Bibas, supra note 5; James Vorenberg, Decent Restraint of Prosecutorial Power, 94 **Harv. L. Rev.** 1521, 1545-60 (1981).

[11] Vorenberg, supra note 10, at 1567; see also Arnold I. Burns et al., Curbing Prosecutorial Excess: A Job for the Courts & Congress, **The Champion**, July 1998, at 12, 63 (discussing legislation to increase oversight of prosecutors).

prosecutorial misconduct.[12] Unfortunately, these external, institutional controls have proven to be ineffective. Legislation is too crude, and ex post review of individual cases is too narrow, to attack the deeper, systemic problems with patterns of prosecutorial discretion.

Instead of looking to external solutions, we should reconceptualize the problem. Prosecutors are agents who imperfectly serve their principals (the public) and other stakeholders (such as victims and defendants).[13] This agency-

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[12] **Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor** 180-83 (2007) (emphasizing need for stronger bar disciplinary processes); **Davis**, supra note 6, at 209-12 (suggesting judicial review of prosecutors' decisions to charge or not to charge in individual cases); Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 **N.C. L. Rev.** 693, 733-42 (1987) (proposing substantive and procedural changes to bar disciplinary proceedings); Vorenberg, supra note 10, at 1568-72 (endorsing broader judicial review of prosecutors' charging and plea-bargaining decisions in individual cases).

[13] These categories simplify messy realities. One can treat the public at large, the voting public, or subsets such as

cost problem resembles corporate employees' temptation to shirk or serve their self-interests at the expense of shareholders, customers, competitors, and other stakeholders. This lens suggests alternatives to external, institutional solutions. Some involve giving voters, victims, and defendants more direct influence and providing them with the information that they need to monitor prosecutors' decisions. Another group of solutions draws on management literature to suggest ways to transform an office's structure, incentives, and culture from the inside. In short, institutional design is more promising than rigid legal regulation. Simply commanding ethical, consistent behavior is

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particular communities or neighborhoods as principals. Likewise, other stakeholders include not only direct victims of crimes and defendants, but also their families and friends, bystanders, and other locals affected by or fearful of particular crimes. While the interests of these groups doubtless vary, they also have much in common. For the sake of simplicity and analytical clarity, I will focus on the categories of victims, defendants, and the public, without further differentiating ways in which subunits of these categories may vary in their interests and perspectives. See infra note 83 and accompanying text.

far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency.

I have previously analyzed how opacity and insularity allow prosecutors to avoid serving victims and the public faithfully.[14] This Article discusses possible solutions to that problem, exploring checks that do or could regulate prosecutors or hold them accountable. Part I begins with external rules. Many commentators have argued that legislatures, judges, or bar authorities can and should regulate prosecutors more vigorously. Neither across-the-board legislation nor case-by-case review ex post, however, is well suited to address systemic concerns about prosecutorial discretion.

The remainder of the Article reframes the issue as a principal-agent problem that requires a two-step solution. The first step is to use pressure from principals to align the interests of the top agents (head prosecutors) with principals' own interests. Thus, Part II turns to external control by stakeholders. It holds out moderately more hope for giving voters, victims, and defendants better information and greater rights to participate. While these remedies are not panaceas,

[14] Bibas, supra note 5, at 933-46.

they are moderately promising ways to influence head prosecutors.

The second step is for top agents to align their sub-agents' interests with those of the principals, much as corporate managers motivate subordinates to serve customers and shareholders. In this vein, Part III considers internal structures, cultures, and incentives that prosecutors' offices could use to regulate themselves and finds them most promising. Leadership by head prosecutors could do more to create and shape office culture, values, norms, and ideals. Hierarchical office structure can promote internal consistency and make possible more procedural and substantive oversight. Prosecutors' offices should promulgate and publish more procedural guidelines to structure their internal review of cases. Internal substantive guidelines could harmonize prosecutors' substantive results. Office structure, recruitment, hiring, training, promotion, and tenure policies could do more to shape an office's culture. Pay structures and incentives could induce prosecutors to pursue goods other than just their own win-loss records. Finally, prosecutors could garner and use feedback from other prosecutors, judges, defense counsel, jurors, victims, and maybe the public. This Article concludes that voters, victims,

defendants, and head prosecutors should do far more to encourage good behavior, guide prosecutorial discretion, and make it more transparent and consistent.

I. **Institutional Regulation of Prosecutors**

The few scholars who have focused on prosecutorial discretion as a problem have largely favored external, institutional regulation of prosecutors' offices. As this Part argues, that strategy is unlikely to work well. Other scholars have previously noted isolated difficulties with implementing legislative, judicial, or bar regulation of prosecutors. Hardly any, however, have drawn broader conclusions about the merits of external versus internal controls.[15] The moral of the story is that institutionalized regulations are inherently blunt weapons, too crude and too sporadic to police prosecutors.

Section A critiques proposals for legislation to rein in prosecutors. Legislators collude to maximize prosecutorial bargaining freedom and are not about to rein it in. Legislative

[15] One notable exception is Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 **Stan. L. Rev.** 29, 53 & n.84 (2002), though that brief discussion asserted that external controls do not work without really explaining why.

oversight hearings, however, are perhaps more promising. Section B turns to judicial review and finds it ineffective in shaping prosecutors' behavior. Judges are complicit in prosecutors' plea bargaining. Moreover, their case-by-case review is poorly suited to policing broader, systemic concerns such as equality across cases, prosecutors, and jurisdictions. For similar reasons, Section C contends that bar authorities do not and cannot check prosecutors effectively. Simply calling for tougher enforcement of ethics rules will not help, as ex post, case-by-case review is not adapted to harmonize and change ingrained patterns of discretion.

A. Legislatures' Responses

The most natural response to a problem may be to exclaim that there ought to be a law against it. In that vein, legislation sometimes tries to cabin and constrain prosecutorial discretion. Albert Alschuler and Stephen Schulhofer, for example, recommend legislation to abolish plea bargaining or specify fixed plea discounts.[16] Several jurisdictions have

[16] See, e.g., Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 **U. Chi. L. Rev.** 50, 52, 105-12 (1968) (arguing that plea bargaining should be abolished, in part because prosecutors are poor guardians of the public interest and have

heeded this call, enacting laws that ban plea bargaining or limit its scope or discounts.[17] James Vorenberg, and more recently Daniel Richman and William Stuntz, call for legislatures to revise criminal codes to narrow offense definitions. Richman and Stuntz emphasize that code reform would foster oversight by voters and legislators, while

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strong temptations to serve their self-interest); Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 **Yale L.J.** 1979, 2003-08 (1992) (proposing abolition of plea bargaining or at least fixed plea discounts in order to increase deterrence and avoid unfairness to defendants and harm to innocent defendants); Vorenberg, supra note 10, at 1560-61 (proposing that, if legislatures cannot abolish plea bargaining, they should at least peg discounts at 10% or 20%).

[17] See, e.g., **Cal. Penal Code** § 1192.7 (West 2004) (banning plea bargaining in all cases where indictment or information charges specified serious crimes); **N.Y. Crim. Proc. Law** § 220.10 (McKinney Supp. 2008) (greatly restricting prosecutors' ability to plea bargain around mandatory drug sentences); see also **U.S. Sentencing Guidelines Manual** § 3E1.1 (2005) (specifying fixed sentencing reductions of two to three offense levels as reward for acceptance of responsibility).

Vorenberg stresses that better definitions of crimes and punishments would reduce prosecutorial power over sentencing.[18] Vorenberg also advocates that prosecutors report annually on their discretionary decisions to legislative committees, in order to foster oversight.[19]

As Stuntz's other work shows, however, hoping for legislatures to rein in prosecutorial discretion is a pipe dream. Legislatures have strong incentives to give prosecutors freedom and tools to maximize convictions and minimize costs. For example, they broaden criminal liability, pass overlapping statutes, and raise punishments to give prosecutors extra plea-bargaining chips. By doing so, they drive down the cost and increase the certainty and expected value of each conviction.

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[18] Daniel C. Richman & William J. Stuntz, Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 **Colum. L. Rev**. 583, 630-31 (2005) (suggesting that criminal code reform would help voters and legislators to assess prosecutors' performance); Vorenberg, supra note 10, at 1567-68 (arguing that criminal code revision could reduce prosecutorial discretion by specifying punishments more precisely).

[19] Vorenberg, supra note 10, at 1567.

Prosecutors can thus convict more defendants and procure longer sentences for the same amount of time and money. This increase in efficiency serves legislators' interest in being tough on crime and prosecutors' interest in maximizing convictions while minimizing workloads.[20] In other words, legislatures and prosecutors' interests are fundamentally aligned most of the time. Once in a while prosecutors may be too zealous for legislatures' tastes, but in those cases legislatures can shift blame to prosecutors.[21] Legislatures occasionally tighten procedural rules in response to infamous prosecutorial abuses, particularly when the target of the abuse was a legislator.[22] By

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[20] Stuntz, The Pathological Politics of Criminal Law, supra note 4, at 528-39, 552.

[21] See id. at 548-49 (citing the example of Kenneth Starr's investigation of President Clinton, which made the public angry at Starr but not at Congress).

[22] See Craig S. Lerner, Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants, 2004 **U. Ill. L. Rev.** 599. For example, after the FBI's Abscam sting operation targeted several United States Senators and Representatives, legislation required special approval before the FBI could use informants in public-

and large, however, legislatures broaden prosecutorial power to burnish their tough-on-crime credentials. They lack incentives to regulate prosecutors systematically.

For much the same reasons, legislatures are far more prone to wreck criminal codes than to improve them by recodifying them. Legislators gain political credit for responding to the crime du jour with a new crime or an increased penalty, even if the new crime is redundant.[23] And, as already mentioned, doing so gives prosecutors more bargaining chips and leverage. Thus, the deterioration of criminal codes is accelerating, as amendments encrust codes like barnacles deforming a streamlined

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corruption cases or wiretap members of Congress. Id. at 636-40. After another FBI investigation failed to secure the conviction of Representative Joseph McDade for public corruption, McDade successfully sponsored a bill to apply state ethics rules to federal prosecutors. Id. at 650-56.

[23] See, e.g., Paul H. Robinson & Michael T. Cahill, The Accelerating Degradation of American Criminal Codes, 56 **Hastings L.J.** 633, 644-45 (2005); Paul H. Robinson & Michael T. Cahill, Can a Model Penal Code Second Save the States from Themselves?, 1 **Ohio St. J. Crim. L.** 169, 170-72 (2003).

ship's hull.[24] While legislatures have the power to rationalize criminal codes, they do not want to be accused of reducing the number of crimes on the books. As a result, criminal code reform has stalled at the federal level.[25] Some states have reformed their codes in recent decades. By and large, however, legislatures and prosecutors resist narrowing crimes, eliminating redundant ones, and so destroying prosecutors' plea-bargaining chips.[26]

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[24] Robinson & Cahill, Can a Model Penal Code Second Save the States from Themselves?, supra note 23, at 172-73 (citing Illinois as an example, where in the 1990s the criminal code was amended twice as many times as it had been in the previous two decades).

[25] See Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 **Buff. Crim. L. Rev.** 45, 111-52 (1998) (discussing past efforts to reform federal criminal code and how they became mired in political battles, and also discussing formidable barriers of inertia and self-interest to any comprehensive reform).

[26] While the Model Penal Code was the impetus to initial codification four decades ago, "most legislatures no longer use

In short, legislative drafters posture to the public to seem tough on crime, yet they leave prosecutors the flexibility they desire to strike bargains.[27] More generally, as I have

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their criminal law codification power to promote broad and useful change, but have become 'offense factories' churning out more and more narrow, unnecessary, and often counterproductive new offenses[, b]ecause no elected legislative member can afford to appear 'soft on crime'. . . ." Robinson & Cahill, The Accelerating Degradation of American Criminal Codes, supra note 23, at 634-35. But see Darryl K. Brown, Democracy and Decriminalization, 86 **Tex. L. Rev.** 223, 234-40, 243-44 (2007) (noting that many states have abolished morals offenses and decriminalized some traffic violations and that some have reduced drug sentences).

[27] See Bibas, supra note 5, at 939-40 (citing as an example mandatory minimum sentencing laws, which legislatures pass to satisfy the public while, in effect, giving prosecutors more charging and plea-bargaining tools). The incentives discussed above explain the fate of legislation that would appear to regulate prosecutors. For example, in 1981 a California Senate bill would have banned plea bargaining in cases where the complaint, indictment, or information charged specified serious

argued elsewhere, prosecutors usually find ways to exploit ambiguities or loopholes in constraining legislation, invoke it selectively, or flout it outright.[28] Ex ante laws are simply too crude, and too sporadically supervised and enforced by legislatures, to bind myriad secret prosecutorial decisions.

Perhaps, as Vorenberg suggests, legislatures could hold aggressive oversight hearings to monitor prosecutorial behavior

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crimes. The California District Attorneys Association actively opposed the bill, which apparently contributed to its defeat. When the proposed ban resurfaced as a ballot initiative the next year, the drafters appeased prosecutors by dropping any reference to complaints. **Candace McCoy, Politics and Plea Bargaining: Victims' Rights in California** 30-31, 38 (1993). As a result, though the public thought that the initiative would ban plea bargaining, it simply accelerated plea bargaining. Prosecutors bargained over complaints filed in Municipal Court before filing indictments or informations in Superior Court. Id. at 37-38, 90-94, 118-24.

[28] Bibas, supra note 5, at 937-39, 943-45.

and require annual summary reports.[29] As a mechanism, oversight hearings are finer regulatory tools than legislation, and their ongoing or periodic nature is better designed to ensure compliance. Committee staffers can depose witnesses, subpoena documents, and collect statistics on prosecutorial decisions.[30] Staffs, however, do not have many investigators or others equipped to engage in extensive field research. Legislators can bring information to light through hearings. Oversight of criminal prosecutions is problematic, however, because grand jury secrecy and other rules may restrict disclosures to

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[29] Vorenberg, supra note 10, at 1567; see also Theodora Galacatos, Note, The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intrabranch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion, 64 **Fordham L. Rev.** 587, 658-59 (1995) (endorsing congressional monitoring of environmental-crimes prosecution to guard against "undue partisan pressures").

[30] See **John C. Grabow, Congressional Investigations: Law and Practice** 79-86, 176-82 (1988); **Morton Rosenberg, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry** 7-10, 29-35 (1995).

legislators.[31] Legislators could still demand and review aggregate statistical reports and question supervisory prosecutors about their policies. And in a few high-profile areas, from corporate crime to defrauding the government, legislatures have probed crimes themselves.[32]

Without full access to the underlying data, however, it is unclear how probing oversight of prosecutors can be. Also,

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[31] See **Grabow**, supra note 30, at 182-87; **Rosenberg**, supra note 30, at 26-37.

[32] See, e.g., Philip Shenon, As New 'Cop on the Beat,' Congressman Starts Patrol, **N.Y. Times**, Feb. 6, 2007, at A18 (reporting that Chairman of the House Oversight and Government Reform Committee planned to investigate government contracting fraud in Iraq and the cleanup after Hurricane Katrina); Enron's Many Strands: Excerpts from the Senate Committee Hearing on the Collapse of Enron, **N.Y. Times**, Feb. 13, 2002, at C8 (reporting senators' expressions of anger directed at Kenneth Lay, former CEO of Enron). Note, however, that these oversight hearings have tended to focus on the crimes and criminals themselves, rather than on prosecutors' patterns of investigation and prosecution.

there are few meaningful standards to which legislatures could hold prosecutors. More fundamentally, for the reasons just set forth, legislatures lack the interest and incentive to check prosecutors vigorously. They would rather be seen as prosecutors' allies in the fight on crime. Though a prosecutorial scandal could conceivably change this dynamic, legislatures probably will not oversee prosecutors vigorously any time soon. At most, oversight might serve as a backstop or a piece of the solution, to ensure prosecutorial consistency with rules generated elsewhere.[33] We do not know enough to be sure about this. Further research would help to identify what circumstances prod legislatures to hold hearings and what lasting influence, if any, hearings can have on executive

[33] See Ellen S. Podgor, Department of Justice Guidelines: Balancing "Discretionary Justice", 13 **Cornell J.L. & Pub. Pol'y** 167, 198-200 (2004) (noting that the U.S. Senate Judiciary Committee has reviewed the Department of Justice (DOJ)'s failure to adhere to its own clemency guidelines; that the Office of Inspector General for the DOJ has reviewed the DOJ's treatment of terrorism detainees; and that the General Accounting Office has reviewed the DOJ's implementation of False Claims Act guidance).

discretion. My hunch, however, is that legislatures are unlikely to drive or catalyze change on their own.

B. Judges' Review of Criminal Cases

Ex ante regulation by distant, politicized legislatures is too crude and easy to evade. Perhaps, then, we need ex post supervision by apolitical judges who are already familiar with prosecutors and their cases. Many scholars have endorsed this approach. For example, Vorenberg calls for more aggressive review of charges (at preliminary hearings) and plea bargains.[34] Davis advocates meaningful judicial review of prosecutors' decisions to prosecute or not to prosecute.[35] Other scholars have advocated more searching judicial review to promote equality and prevent discrimination and arbitrariness.[36]

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[34] Vorenberg, supra note 10, at 1568-72 (proposing that prosecutors should have to announce charging and plea-bargaining guidelines and that judges should review their compliance with these guidelines in individual cases).

[35] **Davis**, supra note 6, at 207-14 (arguing that "[t]he reasons for a judicial check of prosecutors' discretion are stronger than for such a check of other administrative discretion that is

In theory, courts review prosecutors' charging decisions at preliminary hearings and on motions to dismiss or for motions

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now traditionally reviewable," but recognizing that his proposal "is contrary to the settled judicial tradition").

[36] See, e.g., Donald G. Gifford, Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal, 49 **Geo. Wash. L. Rev.** 659, 685-717 (1981) (suggesting greater judicial inquiry into prosecutors' motives in deciding to bring or not to bring charges); Anne Bowen Poulin, Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong, 34 **Am. Crim. L. Rev.** 1071, 1106-19 (1996) (proposing greater judicial discretion to order discovery about prosecutorial charging practices, suggesting other sources of evidence that judges could weigh, and recommending clearer judicial definition of selective prosecution); Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 **U. Pa. L. Rev.** 1365, 1365-66, 1476-77 (1987) (advocating judicial review of prosecutorial decisions based more on objective standards and less on prosecutors' intent; also taking for granted that "[t]he courts are the most important, and in many instances the only, check on prosecutorial misbehavior").

for acquittal. In practice, however, they have been loath to interfere. Courts nominally forbid selective prosecution based on race. No race-based claim has succeeded for more than a century, however.[37] Courts refuse even to allow discovery of prosecutors' policies and decisions unless the claimant already has "some evidence that similarly situated defendants of other races could have been prosecuted, but were not."[38] This high hurdle creates a chicken-and-egg problem. Claimants cannot get discovery unless they already have "some evidence," but usually discovery is the only possible source of evidence. Courts are hesitant to review decisions about whether to prosecute because they are less competent to weigh all the relevant factors.[39]

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[37] The last successful claim of racially selective prosecution appears to have been Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)(holding that city officials violated equal protection by enforcing fire safety ordinances almost exclusively against Chinese immigrants).

[38] United States v. Armstrong, 517 U.S. 456, 469 (1996).

[39] Wayte v. United States, 470 U.S. 598, 607 (1985)("Such factors as the strength of a case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are

They also fear intruding upon the executive's province, because revealing prosecutorial information could "chill law enforcement . . . [and] undermine prosecutorial effectiveness . . . ."[40]

Courts are even more reluctant to scrutinize decision criteria that do not fall within constitutionally protected classes. The separation of powers, courts hold, forbids judicial interference with prosecutorial discretion to decline to file charges.[41] Preliminary hearings ask simply whether there

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not readily susceptible to the kind of analysis the courts are competent to undertake.").

[40] Id.

[41] Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379-83 (2d Cir. 1973) (holding that courts lack capacity to review prosecutors' decisions not to prosecute prison officials); United States v. Cox, 342 F.2d 167, 172 (5th Cir. 1965) (reversing contempt citation imposed on prosecutor who refused to sign grand jury indictment charging perjury); Powell v. Katzenbach, 359 F.2d 234, 234-35 (D.C. Cir. 1965) (per curiam) (affirming dismissal of complaint that sought mandamus to require the U.S. Attorney General to prosecute bank for conspiracy); **Marc L. Miller & Ronald F. Wright, Criminal**

is probable cause, which the police officer must have had to arrest in the first place.[42] Assuming that the prosecutor can clear this very low threshold, judges do not interfere with discretionary decisions about which charge to select or whether and how to plea bargain.[43] Courts find no problem even when

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Procedures 908 (3d ed. 2007) ("Judges might overturn a prosecutor's decision to file charges or not to file charges, but only in rare circumstances"; even in a "strong minority of states" that explicitly authorize judicial review, judges are "very deferential").

[42] See, e.g., **Fed. R. Crim. P.** 5.1(e) (requiring magistrate to find probable cause that crime has been committed and defendant committed it to bind defendant over for further proceedings); United States v. Watson, 423 U.S. 411, 415-17 (1976) (noting that police officers may arrest if they have probable cause).

[43] See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). Judges in a few jurisdictions do take more aggressive roles, but they appear to be outliers. See **Miller &**

prosecutors use coercive sentencing differentials as plea-bargaining leverage.[44]

Traditionally, indeterminate sentencing has given judges some power at sentencing to check or counterbalance prosecutorial charging and bargaining decisions. Mandatory minimum penalties and sentencing guidelines, however, along with the multiplication and fragmentation of the criminal code, have steadily eroded this power. Even in the majority of states that retain indeterminate sentencing, statutory mandatory penalties

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Wright, supra note 41, at 1185 (reporting that the federal system and a majority of state systems forbid judicial participation in plea negotiations and another group of states discourages it; more than a dozen states do not discourage or even authorize judicial participation, though this participation may be limited to responding to parties' invitations to participate or commenting on the parties' proposals).

[44] See Bordenkircher, 434 U.S. at 365 (upholding imposition of a life sentence after trial upon a defendant who refused to accept a five-year plea bargain).

and menus of overlapping crimes give prosecutors the dominant role in setting sentences.[45]

Moreover, for judges to serve as meaningful checks, they would have to thwart bargains struck by prosecutors and defense lawyers. Doing so is extremely hard in an adversarial system. First, the parties are the main source of sentencing

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[45] I have written about these topics at length elsewhere. Stephanos Bibas, The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain, 94 **J. Crim. L. & Criminology** 295 (2004)(describing how changes to the Sentencing Guidelines increased prosecutorial leverage and limited judicial oversight); Stephanos Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 **Yale L.J.** 1097, 1151-70 (2001)(discussing how Apprendi v. New Jersey, 530 U.S. 466 (2000), may perversely have increased prosecutors' powers to plea bargain in some cases). George Fisher and William Stuntz have elaborated on these problems as well. **George Fisher, Plea Bargaining's Triumph** 208-29 (2003) (discussing mandatory minima and sentencing guidelines); Stuntz, The Pathological Politics of Criminal Law, supra note 4, at 512-23 (discussing how criminal codes' breadth and depth transfer power from courts to prosecutors and police).

information, and they are not forthcoming about any facts that would undermine the sentence that they have agreed upon.[46] Probation officers' supposedly independent pre-sentence investigations are only a modest check on the parties' collusion.[47] Judges would find it hard and costly to monitor disclosure of all relevant information, and most judges do not

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[46] See Probation Officers Advisory Group, Probation Officers' Survey, 8 **Fed. Sentencing Rep.** 303, 305-06, 310-11 (1996) (reporting that, according to federal probation officers' survey, parties frequently withhold or misstate facts that would contradict plea agreements).

[47] See id. at 306, 311-13 (reporting that when a probation officer's version of facts and calculations differs from the parties' version, many judges defer to the parties' version instead of investigating and relying on a more accurate version); cf. Nancy J. King, Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment, 58 **Stan. L. Rev.** 293, 304-06 (2005) (suggesting better funding and standards for pre-sentence investigations, as well as pre-plea review of sentencing information).

view it as their job to intervene actively in plea bargaining.[48] Second, to vary from the parties' recommendation, the judge would have to disregard his own strong self-interest in encouraging pleas. If a judge fails to defer consistently, the parties will be less willing to bargain and so will burden that judge's courtroom with more trials.[49]

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[48] See United States v. Yeje-Cabrera, 430 F.3d 1, 28 (1st Cir. 2005)("[T]he costs of monitoring compliance with such a mandatory compliance system are high, and many of the efficiences created by plea bargaining would be lost. . . . [Also,] the federal rules prohibit involvement of a trial judge in plea bargaining."). Nevertheless, academics continue to recommend more vigorous judicial oversight. See, e.g., Oren Gazal-Ayal, Partial Ban on Plea Bargains, 27 **Cardozo L. Rev.** 2295 (2006) (recommending that judges reject plea bargains that result in large sentencing reductions).

[49] See **Fisher**, supra note 45, at 131-33 (explaining that in Massachusetts a century ago, parties made a point of pleading before those judges who habitually followed parties' sentencing recommendations).

Judges may have some tools with which to check prosecutorial discretion in individual cases, but these tools miss deeper problems. The most important problems of prosecutorial discretion are systemic ones. For example, one prosecutor grants leniency in case A but not as much in case B. Neither the judge nor the defense attorney in case A is about to complain about the prosecutor's leniency, particularly if the judge shares the commonplace view that many penalties are already too high.[50] And in case B, so long as the facts fit the statute that prescribes the higher penalty, the defense attorney is in a poor position to challenge the prosecutor's charging decision. He may not even know of case A, let alone enough of its specifics to analogize it to case B. If he is a repeat player who does know this past history, he is much more likely to be getting the more generous type-A bargains by using other cases as informal precedents in negotiations. The real problem

[50] See, e.g., Frank O. Bowman, III & Michael E. Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 **Iowa L. Rev.** 1043, 1131-33 (2001) (marshalling evidence that many judges view federal drug penalties as too harsh and are happy to go along with plea bargains that subvert them).

afflicts bad, unconnected, or inexperienced defense counsel, who are much more likely to get type-B bargains.

Nor can the judge do much about type-B bargains. The prosecutor has followed the words of the statute, the legislature has authorized the higher-penalty option, and there is almost never enough evidence of unconstitutional bias.[51] Individual trial judges are limited by the confines of particular cases and controversies. They are not well-suited to take the synoptic, bird's-eye view needed to police systemic concerns about equality, arbitrariness, leniency, and overcharging. They lack statistical training and expertise, as well as detailed information from prosecutors' files. Their choices ex post are often crude and binary, requiring them either to find statistical disparities unconstitutional or to

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[51] See supra text accompanying notes 37-38 (discussing the impossibly high threshold for even gaining discovery on selective-prosecution claims); see also, McCleskey v. Kemp, 481 U.S. 279, 287, 292 (1987) (rejecting constitutional challenges to Georgia's capital-sentencing system despite massive statistical evidence of race-of-victim disparities, because petitioner lacked direct evidence of discriminatory purpose in his particular case).

put their imprimatur on them.[52] At most, judges see their job as ferreting out purposeful discrimination case by case. They trust elected legislatures to weigh statistics and fashion flexible, workable systemic remedies.[53] Judicially enforceable models of equality are poorly suited to balance the myriad practical and policy considerations that prosecutors legitimately take into account. Yet, as Kenneth Culp Davis argued, official inaction and arbitrary leniency are deeper, more systematic problems than the illegal actions that judges are used to reviewing.[54]

The most that one could expect from judges is some review of a prosecutor's stated reasons for a charging or sentencing differential. Unfortunately, experience teaches that this kind of review is not promising. A prosecutor can almost always come up with a facially plausible reason for differentiating two

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[52] See McCleskey, 481 U.S. at 279.

[53] Id. at 319.

[54] **Davis**, supra note 6, at 14, 170-72 (noting "[t]hat illegal inaction is much easier than illegal action" and that leniency in enforcement makes possible injustice and discrimination).

prospective jurors.[55] The same is probably true of charging decisions, especially when judges limit themselves to the criteria that they are most comfortable policing, such as race and sex. The justifications for punishment are so conflicting and indeterminate that, on a case-by-case basis, a clever prosecutor can make the case for almost any disposition within a very broad ballpark. If judicial oversight is to mean anything, it will have to be coupled with some other measure to generate more concrete rules that judges can enforce.

For similar reasons, private causes of action against prosecutors are unworkable. Prosecutors enjoy absolute immunity from damage suits for actions they take in their official capacity, to preserve their independence and prevent

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[55] See Michael J. Raphael & Edward J. Ungvarsky, Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky, 27 **U. Mich. J.L. Reform** 229, 266 (1993) (concluding, based on an empirical survey of post-Batson cases, "that Batson's neutral explanation requirement is, regrettably, a relatively simple hurdle for a prosecutor to clear. Even a prosecutor who has dismissed jurors for racial reasons can concoct a neutral explanation for his actions that the courts will accept as proof that his strikes were not racially motivated").

harassment.[56] One could abrogate this immunity by statute or case law, as some writers suggest.[57] It is hard, however, to see judges and juries having much appetite for awarding damages against prosecutors except in the most egregious cases. And, as already argued, the root problem is not so much individual injustices as it is inequitable, inconsistent patterns of discretion that emerge from myriad cases. Damage suits are not tailored to address systemic shortcomings, nor can I see how judges could enter structural-reform injunctions that could do that well. (How would judges generate the prosecutorial rules,

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[56] See Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976) (articulating common-law immunity and extending it to civil-rights suits brought under 42 U.S.C. § 1983).

[57] See, e.g., Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 **BYU L. Rev.** 53, 55-57 (arguing that qualified prosecutorial immunity would be sufficient to preserve the benefits of absolute immunity while making it easier to combat misconduct); Lesley E. Williams, Note, The Civil Regulation of Prosecutors, 67 **Fordham L. Rev.** 3441, 3479-80 (1999)(concluding that qualified immunity would strike a better balance than absolute immunity between protecting well-meaning prosecutors and holding willful wrongdoers liable).

priorities, and criteria that they would enjoin prosecutors to follow? How would these injunctions mesh with keeping prosecutors elected and democratically accountable?) The same problems prevent the threat of criminal charges from regulating prosecutors effectively.[58] Much as doctors hesitate to testify in medical-malpractice cases, one prosecutor may be reluctant to prosecute another except in cases of outright corruption.

In short, traditional judicial regulation is about as unpromising as legislative regulation. Judicial oversight, like legislative oversight, could perhaps shore up an otherwise sound regulatory system, but it cannot do much by itself.

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[58] But cf. Imbler, 424 U.S. at 429 (suggesting, without support, that criminal prosecution could punish and deter prosecutorial misconduct effectively). Prosecutors are prosecuted once in a great while, though prosecutions are probably too rare to influence prosecutors' behavior. See, e.g., Eric Lichtblau, Ex-Prosecutor in Terror Inquiry Is Indicted, **N.Y. Times**, Mar. 30, 2006, at A18 (noting indictment of prosecutor whose presentation of false evidence and concealment of damaging evidence led to the collapse of a high-profile terrorism prosecution).

C. Bar Authorities' Rules and Discipline

In declining to regulate prosecutors through damage actions, the Supreme Court expressed hope that bar authorities would fulfill an equivalent role. As the Court put it, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."[59] Indeed, the Model Code of Professional Responsibility (Model Code) and the Model Rules of Professional Conduct (Model Rules) regulate prosecutors as well as other lawyers.[60] Every

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[59] Imbler, 424 U.S. at 429.

[60] See Rosen, supra note 12, at 708-14 (discussing ethical limits on prosecutors' use of false evidence or withholding exculpatory evidence, including provisions of the Model Code and the Model Rules); Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 **N.C. L. Rev.** 721, 739 tbl.IV (2001) (cataloguing thirty provisions of the Model Rules of which prosecutors are likely to run afoul); cf. **Angela J. Davis**, supra note 12, at 161 (suggesting separate disciplinary rules and processes tailored to prosecutors' special role).

state has adopted lawyer disciplinary rules based to some extent on either the Model Code or the Model Rules.[61] Among other prohibitions, these rules prohibit fraud, deceit, and presenting false testimony, and most specifically forbid suppressing exculpatory evidence.[62] Provisions in both the Model Code and the Model Rules specifically forbid filing criminal charges without probable cause.[63] The McDade Amendment, which bound federal prosecutors to follow the same ethical restrictions as other lawyers, reflects some political willingness to empower bar authorities.[64] And, in a handful of cases, bar authorities

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[61] See Rosen, supra note 12, at 715 ("All of the states have based their disciplinary codes to some degree on either the Model Code or Model Rules.").

[62] See id. (noting that every state has forbidden fraud, deceit, and presenting false testimony, but that only the "vast majority" of them have enacted rules specifically forbidding prosecutors to suppress exculpatory evidence).

[63] **Model Rules of Prof'l Conduct** R. 3.8(a) (2003); **Model Code of Prof'l Responsibility** DR 7-103(A) (1980).

[64] 28 U.S.C. § 530B(a) (2006)(subjecting government attorneys to the state rules and laws and local rules of federal court of

have reprimanded or even disbarred prosecutors in the wake of flagrant, publicized prosecutorial misconduct.[65]

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each state where they practice). For a fascinating explanation of how the McDade Amendment was a backlash against the unsuccessful prosecution of Representative Joseph McDade, see Lerner, supra note 22, at 641-42, 650-56.

[65] See Robert P. Mosteller, Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery, 15 **Geo. Mason L. Rev.** 257, 257, 266-70, 276-84, 302-06 (2008) (discussing two special prosecutors who were reprimanded by bar authorities for unintentionally failing to turn over Brady material, two prosecutors who were never pursued by bar authorities because statutes of limitations protected them from discipline, and the notorious prosecutor of the Duke lacrosse players, who was disbarred after extensive publicity surrounding a deeply flawed prosecution). Note, however, that the prosecutor of the Duke lacrosse players was flayed in the media and removed from the case once suppressed exculpatory material came to light. His later disbarment piggybacked on the information that had already come to light; it was a backstop, rather than the principal check, on his misconduct.

By and large, however, bar authorities have proven to be ineffectual. One empirical survey found that state bar authorities had reviewed only fourteen cases in six years in which prosecutors had suppressed exculpatory or impeachment evidence. Much of the misconduct was egregious, involving, for example, suborning perjury, altering evidence, and lying to the court. Nevertheless, bar authorities dismissed six of the cases, reprimanded, censured, or cautioned six prosecutors, suspended one, and disbarred only one.[66]

A second study focused on suppression of exculpatory evidence or knowing use of false evidence in homicide cases. The nationwide survey examined the rulings of bar disciplinary authorities as well as courts between 1963 and 1999. Though courts reversed at least 381 homicide convictions on these grounds, not a single prosecutor was convicted of a crime or disbarred as a result. Indeed, many of these prosecutors went

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[66] See Rosen, supra note 12, at 718-31 (reporting the results of an empirical survey of reported cases and survey forms returned by forty-one out of fifty state disciplinary boards; also noting that the one disbarment was pending on appeal as of the completion of the study).

on to enjoy successful careers as district attorneys or judges. One was elected to Congress.[67]

A third survey found that courts and bar authorities disciplined prosecutors more than 100 times over at least 113

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[67] See Ken Armstrong & Maurice Possley, Break Rules, Be Promoted, **Chi. Trib.**, Jan. 14, 1999, at 1 (noting that many prosecutors who commit misconduct are nevertheless promoted); Ken Armstrong & Maurice Possley, The Verdict: Dishonor, **Chi. Trib.**, Jan. 10, 1999, at 1 (reporting that even though 381 homicide convictions had been reversed since 1963 because prosecutors had withheld exculpatory evidence or knowingly used false evidence, not a single one of the prosecutors responsible received significant punishment). Another newspaper study reviewed 1500 allegations of prosecutorial misconduct over a ten-year period. Though the study turned up hundreds of discovery violations involving exculpatory or impeachment evidence, "[p]rosecutors who violated discovery rules were seldom punished. Many violated discovery rules over and over again." Bill Moushey, Hiding the Facts: Discovery Violations Have Made Evidence-Gathering a Shell Game, **Pitt. Post-Gazette**, Nov. 24, 1998, at A1.

years for all kinds of professional misconduct.[68] Many of the cases involved prosecutors who committed crimes, such as bribery, extortion, embezzlement, and conversion. Many others involved presenting false evidence, withholding exculpatory evidence, or lying to or deceiving the court. The only other significant categories of cases involved criticizing judges, neglecting duty, fixing traffic tickets, contacting represented defendants ex parte, and having conflicts of interest as a part-time prosecutor.[69] In short, "prosecutors are disciplined rarely, both in the abstract and relative to private lawyers."[70] And when they are disciplined, they usually have committed multiple violations,[71] at least one of which falls within the serious categories listed above.

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[68] See Zacharias, supra note 60, at 743, 744 & n.83, 745 & n.86, 746-50 (searching reported cases as old as 1886 up through about 1999).

[69] See id. at 745-48.

[70] Id. at 755.

[71] Id. ("Violation of a single rule rarely suffices to produce bar action.").

Because sanctions are rare, and usually amount to a censure or other slap on the wrist, their deterrent value is minimal.[72] It may be that bar authorities have bigger fish to fry, such as blatant financial pilfering by civil lawyers. Because prosecutors lack ordinary clients, there is no one who needs bar authorities' leverage to gain restitution, nor anyone with enough incentive to file grievances.[73] Separation of powers

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[72] In theory, the paucity of cases brought could mean that the sanctions are working and deterring most prosecutorial misconduct. As the studies discussed above show, however, serious misconduct still occurs and is sanctioned too lightly to deter effectively. See also Stephanos Bibas, Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?, in **Criminal Procedure Stories** 129, 144-46 (Carol Steiker ed. 2006) (reporting an empirical study of 210 Brady and Giglio cases decided in 2004, and of 448 Brady and Giglio claims that succeeded or were remanded between 1959 and August 2004) **ED: source hasn't been checked – ILL AU (SB): I HAVE THIS SOURCE; YOU MAY BORROW IT TO CHECK IT**.

[73] See Zacharias, supra note 60, at 757-59 (noting that self-serving intentional misconduct by lawyers tarnishes the reputation of the bar the most; also explaining that bar

concerns can also make bar authorities hesitate to intrude upon prosecutors' province.[74]

While all of these reasons carry some weight, I think the larger problem is the same one that hobbles judicial review. The root problem is not gross misconduct in individual cases, though misconduct does occur. If that were the issue, then beefing up enforcement resources or sanctions, or creating a new prosecutorial review commission, might perhaps help.[75] The

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authorities discount grievances filed by defendants and their counsel, lest bar proceedings degenerate into collateral litigation used to secure tactical advantage in criminal cases).

[74] See id. at 761 (suggesting that since bar authorities in most jurisdictions are controlled by the judicial branch, whereas prosecutors are functionaries of the executive, disciplinary agencies may shrink from investigating prosecutors on separation-of-powers grounds).

[75] See Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 **Iowa L. Rev.** 393, 463-64 (2001) (proposing the creation of Prosecution Review Boards to review prosecutorial decisions at random); Lyn M. Morton, Note, Seeking the Elusive Remedy for Prosecutorial Misconduct:

deeper problem is that systemic patterns of charging and plea bargaining, influenced by self-interest, bias, and other considerations, may undercut equality and equity. Ex post, case-by-case review is no answer, particularly review by outsiders without access to confidential police and prosecutor files. Bar disciplinary rules understandably limit themselves to clear, gross, and discrete misconduct, such as lying, withholding evidence, fraud, and embezzlement. Bar rules cannot capture the myriad complex factors that rightly or wrongly influence patterns of prosecutorial discretion across cases. Writing and policing rules from the outside will not work any better for bar authorities than it has for courts, so bar authorities have not even tried to do so.

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By and large, traditional external regulation has shown itself to be ineffectual, at least as a source of rules and

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Suppression, Dismissal, or Discipline?, 7 **Geo. J. Legal Ethics** 1083, 1114-15 (1994) (proposing a prosecutorial conduct commission to investigate misconduct by prosecutors).

priorities. Ex ante rules generated by outsiders, such as legislatures, are too crude to address and adapt to the myriad changing circumstances, resource limitations, and crime patterns prosecutors face. Moreover, legislatures have strong incentives to err on the side of overbroad statutes, rather than risk hobbling prosecutors and letting criminals escape through loopholes. Ex post policing by outsiders, such as legislatures, judges, and bar authorities, may weed out a few egregious cases but not attack systemic patterns or arbitrariness. Outsiders lack the information, the sustained oversight, and the policy expertise to craft and police prosecutorial guidelines. Scrutiny by outsiders is sporadic, prosecutorial files are sensitive and detailed, and prosecutors can concoct ex post rationalizations, ad hoc. Prosecutors may even resist external rules as illegitimate intrusions upon their traditional policy discretion. Legislatures, judges, and bar authorities may all play constructive roles, but only as backstops, as enforcers of rules and standards that originate from within prosecutors' offices. We need to look for other ways to motivate prosecutors to write and apply their own rules to themselves.

II. **External Pressure by Stakeholders**

Traditional external regulation has failed to regulate prosecutorial discretion. Instead, we should attack the problem as one of agency costs. Many authors have noted that prosecution involves a classic principal-agent problem. Some, such as Frank Easterbrook, simply dismiss this agency-cost problem as "true but trivial," without seriously considering reforms.[76] Others, such as Stephen Schulhofer and Albert Alschuler, view the agency costs as so serious that they would abolish plea bargaining entirely.[77] The abolitionists, however,

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[76] Frank H. Easterbrook, Criminal Procedure as a Market System, 12 **J. Legal Stud.** 289, 309 (1983) (discussing flaws in the plea bargaining process); see also id. at 294-95, 300-01, 314-15 & tbls. 1-4 (using economic analysis to illustrate problems with the state's ability to inflict harsh punishment, prosecutorial regulation, and plea bargaining); Frank H. Easterbrook, Plea Bargaining as Compromise, 101 **Yale L.J.** 1969, 1975-77 (1992) (belittling agency costs and criticizing "the lure of regulation" in the context of plea bargaining).

[77] See, e.g., Schulhofer, supra note 16, at 1986-88 (noting that there are two sets of agency problems in plea bargaining: one involving the public and the District Attorney and one involving the District Attorney and her assistants, who may likewise have

do not discuss lesser, more workable restrictions on prosecutorial discretion. Nor do they explore other prosecutorial issues, such as selective prosecution and decisions not to charge.[78] There is remarkably little exploration of the middle ground between these extremes.[79]

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interests that diverge from those of their superior); Alschuler, supra note 16, at 50, 52, 105-11 (making the same point about the failure of prosecutors to act in the public interest when conducting plea bargaining, without using agency-cost terminology).

[78] Schulhofer, for example, devotes only a single sentence to judicial and supervisory review of decisions to charge or not to charge. Stephen J. Schulhofer, Criminal Justice Discretion as a Regulatory System, 17 **J. Legal Stud.** 43, 52 (1988)(acknowledging that the current system of judicial and supervisory review of decisions to charge or not to charge maximizes deterrence at minimum cost).

[79] There are a handful of exceptions, though each one touches on only a corner of the problem. See, e.g., Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 **Fordham L. Rev.** 851, 865, 873-75 (1995) (suggesting the use of monetary rewards to

The agency-cost perspective suggests a regulatory strategy modeled on corporate governance, which has long dealt with similar issues. Shareholders or stakeholders in corporations are the principals, and they need information and tools to align their agents' incentives with their own. Top managers are most accountable to these stakeholders, so they feel external pressures most directly. Managers then translate these external pressures into internal rules and incentives to induce lower-level employees to serve their principals.

The concept of stakeholders is malleable and fuzzy. Classically, corporate scholars have modeled shareholders as the principals and corporate employees as the agents. This approach views the sole duty of corporate management as maximizing shareholder wealth.[80] It gives corporate management a simple,

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minimize tactical overcharging and charge bargaining); Daniel Richman, Institutional Coordination and Sentencing Reform, 84 **Tex. L. Rev.** 2055, 2063-64, 2072-74 (2006) (suggesting that sentencing reform can empower sentencing judges and head prosecutors to regulate line prosecutors' plea bargaining).

[80] For classic statements of this position, see, for example, Adolf A. Berle, Corporate Powers as Powers in Trust, 44 **Harv. L. Rev.** 1049, 1049 (1931)("[A]ll powers granted to a corporation or

clear direction and metric––maximize share prices––at the cost of omitting other values and interests. Revisionist corporate scholarship argues for broadening management's responsibilities beyond shareholders to include stakeholders. Stakeholders could include employees, retired employees, bondholders, suppliers, contractors, and the local community.[81] The stakeholder approach

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the management of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."); Milton Friedman, A Friedman Doctrine--The Social Responsibility of Business Is to Increase Its Profits, **N.Y. Times**, Sept. 13, 1970, § 6 (Magazine), at 32 (likening the doctrine of "social responsibility" of business to socialism).

[81] The leading recent critic of the shareholder-primacy thesis is Lynn Stout. See, e.g., Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 **Va. L. Rev.** 247, 250-55, 276-81 (1999) (arguing that employees, managers, creditors, and others cannot specify all of their interests in detailed contracts ex ante, and so prefer instead to trust that directors will accord them fair consideration in the distribution of profits); Lynn A. Stout, Bad and Not-So-Bad Arguments for Shareholder Primacy, 75 **S. Cal. L. Rev.** 1189,

serves a richer array of ends, but makes it harder to specify metrics of success and how to weight each one.

Likewise, one could focus exclusively on head prosecutors' responsibilities to voters, who in a democracy are the closest analogue to shareholders. Shareholders, like voters, can vote corporate executives out of office or vote with their feet by selling shares. A crude directive might be to maximize convictions and sentences of factually guilty defendants, particularly violent felons. This approach is analytically clean and measurable, but it leaves out many of the broader responsibilities we often attribute to prosecutors. For instance, sometimes doing justice entails going easy on a sympathetic defendant or devoting extra time to hearing out a

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1190-99, 1208 (2002)(identifying three common arguments for shareholder primacy and explaining flaws in them); Lynn A. Stout, New Thinking on "Shareholder Primacy" 17, 28 (Jan. 10, 2005) (unpublished manuscript, available at http://www.law.ucla.edu/docs/bus.sloan-stout.pdf)(noting that several scholars have recently argued that, contrary to conventional shareholder primacy theory, "shareholders themselves might prefer more stakeholder-friendly director primacy rules").

wounded victim. A richer though fuzzier approach would treat head prosecutors as beholden to a variety of stakeholders as well as voters. These stakeholders might include line prosecutors, judges, private and public defenders, defendants and their families, potential victims, and local residents. For the sake of simplicity, I will focus on the three groups most directly affected--voters, victims, and defendants--even though each group is itself broad and varied. Victims are analogous to customers. The analogy does not work as well for defendants, who in some ways resemble customers and in others resemble competing firms. Even as prosecutors pursue defendants, or corporations compete, each bears legal and moral obligations to compete fairly, without striking low blows.[82] Unlike

[82] The Supreme Court famously declared that a prosecutor "may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). For example, prosecutors may not withhold exculpatory evidence, misrepresent facts, or discriminate on morally irrelevant criteria.

shareholders and customers, victims and defendants lack many tools to influence prosecutors.[83]

This corporate model may seem incongruous. After all, we expect prosecutors to pursue justice, not just raw preferences or convictions or years in prison. But if prosecutors are not simply to foist their own priorities upon everybody, they must

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[83] One could break down these categories into sub-categories. The general public is not quite the same as the voting public; most felons and aliens, for example, cannot vote. One could look at the public nationwide or focus on how particular locales and communities view crime. Likewise, one could look not only at direct victims, but also at their family and friends, crime bystanders, and other locals who are indirectly affected by a crime. Subclasses of defendants vary based on their race, class, locale, and prior records, and defendants' families and defense lawyers' perspectives vary from those of defendants themselves. The interests, knowledge, and relative power of each of these sub-groups vary slightly. For the sake of analytical simplicity, however, Section II.A aggregates the different segments of the public, while Section II.B aggregates the different victim-related groups and Section II.C aggregates the different defendant-related groups.

heed and aggregate the sense of justice of various groups whom they supposedly serve. These groups seem to have irreconcilable interests, but prosecutors must somehow aggregate their views and interests under any system. Moreover, Paul Robinson and Robert Kurzban have found surprising empirical consensus on ranking different offenders' just deserts. There is indeed core agreement on ranking which offenders deserve the most punishment, both across Americans and around the world.[84] Heeding this community conception of justice is crucial to maintain the criminal law's compliance, efficacy, and legitimacy in the public's eyes.[85] Likewise, the public shares a sense of

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[84] See Paul H. Robinson & Robert Kurzban, Concordance and Conflict in Intuitions of Justice, 91 **Minn. L. Rev.** 1829, 1846-92 (2007) (finding, based on empirical studies, remarkable agreement across groups and cultures on relative seriousness of violent, property, and deception crimes, and lesser but still significant agreement about drug and sex offenses).

[85] See **Tom R. Tyler, Why People Obey the Law** 68 (1990) (noting that the sense that the law accords with one's sense of justice is the most important influence on people's decision to follow the law); Paul H. Robinson & John M. Darley, The Utility of Desert, 91 **Nw. U. L. Rev.** 453, 468-71 (1997).

procedural justice, of how the legal system should treat them fairly and respectfully, regardless of the substantive outcome it reaches. Procedural justice is critical to maintaining the legal system's legitimacy and the public's willingness to comply with it.[86]

Of course punishment serves multiple functions, which sometimes conflict. A mentally ill offender may simultaneously seem less blameworthy but more dangerous. Some prosecutors and some citizens emphasize retribution, while others may care more about deterrence, incapacitation, or rehabilitation. But aggregating and reconciling these competing purposes has to begin somewhere, and Robinson's empirical evidence suggests that survey respondents consistently focus and agree on offenders' just deserts. The aggregation of stakeholders' views will never be an elegant equation, whether it occurs in prosecutors' heads or in stakeholders' aggregated votes. Either way, the alternatives are to leave prosecutors to their idiosyncratic preferences or discipline them so that they at least roughly track those of citizens, victims, and defendants.

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[86] See **E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice** 76-81, 106, 208, 215 (1988); **Tyler**, supra note 85, at 94-108, 125-34, 146-47, 161-70, 178.

This Part considers the first prong of my two-prong strategy: external pressure by stakeholders upon prosecutors, particularly head prosecutors. Section II.A considers how to give the public more information and influence over prosecutors, by for example improving prosecutorial elections.[87] Section II.B then turns to victims and reviews ways to give them greater information and influence over prosecutorial decisions. Section II.C considers how defendants could play appropriate roles in monitoring prosecutors and providing feedback, without giving them license to let themselves off the hook.

A. Informing and Empowering the General Public

[87] In theory, democratic legislatures should already be policing prosecutors on the voters' behalf, but structural democratic deficits keep this mechanism from working well. See Bibas, supra note 5, at 920-31 (arguing that structural changes to the criminal justice system beginning in the eighteenth century have created a system largely shielded from public scrutiny); Stuntz, The Pathological Politics of Criminal Law, supra note 4, at 528-39, 552 (discussing the incentives facing the prosecutors, legislatures, and the courts); infra Section II.A. We need new efforts to make prosecutors more responsive to their principals.

Though in theory prosecutors serve the public interest, the public cannot monitor and supervise whether they are in fact serving the public well. Voter turnout is low, especially in local elections. Members of the public have sparse and unreliable information about how well prosecutors perform. Most public information about criminal justice comes from crime dramas or novels, reality television shows, or sensational, unrepresentative news stories.[88] As a result, the public suffers from chronic misperceptions about how the criminal justice system actually works.[89] The public also has very little power to influence criminal justice. Grand juries act as rubber stamps for prosecutors, and prosecutors circumvent petit juries by plea bargaining in most cases.[90]

The one remaining check on prosecutors is a political one. While federal prosecutors are appointed, most chief prosecutors are elected at the county, judicial circuit, or district level.[91]

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[88] See Bibas, supra note 5, at 924-26.

[89] See id. at 927-28.

[90] See id. at 929-30.

[91] See Carol J. DeFrances, Prosecutors in State Courts, 2001, **Bureau Just. Stat. Bull.**, May 2002, at 11 app. (reporting that

Assuming that head prosecutors want to win re-election and move on to higher office, they should tailor their behavior to serve voters' interests and opinions.[92]

Unfortunately, this political check is not working. Voters, swayed by the availability heuristic, are focusing on memorable but unrepresentative stories. Many news stories and campaign ads emphasize a head prosecutor's success or failure in a few high-profile criminal cases. For example, Los Angeles District Attorney Gil Garcetti won office by attacking his predecessor's record of acquittals in the Rodney King-beating case and the McMartin preschool child-molestation cases. In turn, Garcetti's 1996 challenger hammered him for failing to

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every state except for Alaska, Connecticut, the District of Columbia, and New Jersey elects its chief prosecutors, that thirty of the states have head prosecutors for each county, and that sixteen states have head prosecutors for each judicial circuit or district).

[92] See Sanford C. Gordon & Gregory A. Huber, Citizen Oversight and the Electoral Incentives of Criminal Prosecutors, 46 **Am. J. Pol. Sci.** 334, 349 (2002) (concluding, based on formal modeling, that electoral incentives encourage prosecutors to pursue justice).

convict Snoop Doggy Dog, Lyle and Erik Menendez, and O.J. Simpson of murder.[93] The acquittal of O.J. Simpson probably contributed to Garcetti's eventual defeat in the 2000 election.[94] To take another example, much news coverage blamed Colorado prosecutor Mark Hurlbert for bringing rape charges against basketball star Kobe Bryant only to drop them. The high-profile loss encouraged an opponent to challenge Hurlbert at the next election, and as a result he nearly lost his job.[95]

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[93] See William Claiborne, L.A. District Attorney Garcetti Haunted by Case that Won't Go Away, **Wash. Post**, Apr. 4, 1996, at A3 (writing Garcetti's epitaph as "The Man Who Lost the O.J. Simpson Murder Case" and quoting "an exasperated Garcetti" as saying "'My God, am I going to be defined by this case forever?'").

[94] Mitchell Landsberg, Garcetti's Chances Were Slim, Analysts Say, **L.A. Times**, Nov. 12, 2000, at B1.

[95] **ED: None of the sources (except NY Times) in this footnote have been checked – waiting on ILLs** See Charlie Brennan, Hard Road for Hurlbert; Eagle County DA Must Now Face an Uphill Run for Office, **Rocky Mtn News**, Sept. 3, 2004, at 39A; Kirk Johnson, Colorado Election Keeps Bryant Debate Bubbling, **N.Y. Times**, Sept. 21, 2004, at A18; Steve Lipsher, Bryant Case Dogs DA

Other news stories focus on scandals in prosecutors' offices. Though bar authorities rarely sanction prosecutorial misconduct, newspapers and voters do. Prosecutors who coach witnesses or prosecute innocent defendants based on fabricated, planted evidence are liable to lose their jobs as a result.[96]

Facing First Election, **Denver Post**, Oct. 28, 2004, at B5; Steve Lipsher, Bryant Prosecutor Relieved After Close Call, **Denver Post**, Nov. 4, 2004, at B4; Steve Lipsher, Hurlbert: No Apologies After Dismissal: The Eagle County DA Responds to Critics, Saying His Only Regret Is that the Case Did Not Go to Trial, **Denver Post**, Sept. 3, 2004, at A27.

[96] E.g., Ryan Kim, Incumbent D.A. Tossed Out in Sonoma County, **S.F. Chron.**, Mar. 6, 2002, at A24 (attributing challengers' success to collapse of murder case after videotape showed prosecutors coaching key witness) **ED: Hasn't been checked**; Neil A. Lewis, U.S. Lawyer in Terror Case Is Put on Leave, **N.Y. Times**, Mar. 17, 2006, at A20 (noting that the government forced the lawyer who improperly coached witnesses and so endangered capital prosecution of Zacarias Moussaoui to take a leave of absence); see also Gromer Jeffers Jr. & Holly Becka, Republicans Begin Hunt for DA Candidate, **Dallas Morning News**, Nov. 12, 2005, at 13A (noting that district attorney declined to run for re-

Other scandals, even those unrelated to particular prosecutions, garner unwelcome news coverage and can doom a district attorney's re-election prospects.[97]

A third type of news coverage addresses prosecutors' systemic policies and performance. Most typically, incumbent prosecutors boast about or are attacked for their conviction rates.[98] Challengers attack incumbents for declining to charge

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election because voters would likely have blamed him for scandal in which paid police informants planted fake drugs on innocent people).

[97] See, e.g., Amber Hunt Martin, Viviano Relies on Kin, Flowers in Campaign, **Detroit Free Press**, Aug. 6, 2004, at 2B (noting that county prosecutor did not run for re-election because he faced federal corruption charges) **ED: Hasn't been checked**; Albert Savato, National Briefing Rockies: Ohio: Prosecutor Declines to Run Again, **N.Y. Times**, Sept. 14, 2004, at A18 (noting that the county prosecutor withdrew from the re-election race amid scandal over an affair with an assistant prosecutor).

[98] **ED: Sources (except NY Times) haven't been checked** See, e.g., Rick Brand, Democrats Bank on Anti-Catterson Theme, **Newsday**, June 5, 1997, at A34 (reporting that high conviction rate gave incumbent prosecutor huge advantage); Dana Hedgepeth, States

or plea bargaining too many cases.[99] News coverage also emphasizes crime rates, for which incumbents take credit or

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Attorney Race in Dead Heat, **Baltimore Sun**, Nov. 4, 1998, at 9D (reporting that challenger appeared to have barely upset "heavily favored" incumbent by hammering away at "'an embarrassingly low'" trial conviction rate); Jonathan P. Hicks, Staten Island Prosecutor Faces Lawyer in Bid for Re-Election, **N.Y. Times**, July 5, 1999, at B4 (reporting that a challenger attacked the incumbent for having lowest conviction rate in New York City); Vivian S. Toy, Top Prosecutor in Queens Plans to Run Again, **N.Y. Times**, May 21, 1999, at B8 (comparing the Queens District Attorney's conviction rate with that of other New York City boroughs); Bill Wallace, San Francisco Ranks Last in Convictions; State Figures Show Relatively Low Rate for D.A.'s Office, **S.F. Chron.**, Oct. 17, 2003, at A1 (noting that low conviction rate had become an issue in the incumbent's campaign for re-election); Editorial, Re-elect Pfingst; Dumanis' Dismaying Role in Anti-Semitic Slur, **San Diego Union-Tribune**, Oct. 17, 2002, at B16 (noting that the incumbent's office had the highest conviction rate in state).

[99] See, e.g., Wright & Miller, supra note 15, at 61-62, 115 (reporting attacks on plea bargaining and declinations to charge

blame.[100] Prosecutors also capture news attention by touting toughness on crime in general or on particularly fearsome

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in races for New Orleans District Attorney); Hicks, supra note 98, at B4 (noting challenger's campaign theme that incumbent declines to prosecute too many crimes); **Hasn't been checked** Amy Smith, John Wayne v. Atticus Finch: Dueling D.A. Candidates Differ on Punishment and Prevention, **Austin Chron.**, Oct. 18, 1996, at ___ (reporting challenger's criticism of routine plea bargains and low jury-trial rate).

[100] See, e.g., Brand, supra note 98, at A34 (reporting that incumbent took credit for drop in violent crime); **Hasn't been checked** Kelly Brewington, States Attorney Announces Her Re-election Bid at Fundraiser, **Baltimore Sun**, Aug. 1, 2005, at 1B (noting that incumbent received blame for high crime rate); Leslie Eaton, Morgenthau Runs on His Record, **N.Y. Times**, Aug. 17, 2005, at B7 (reporting television ad in which Manhattan D.A. took credit for Manhattan's record-low crime rate); see also Richman & Stuntz, supra note 18, at 602-04 (suggesting that voters will hold district attorneys accountable for rates of FBI index crimes, because they are visible: murder, manslaughter, rape, arson, kidnapping, aggravated assault, robbery, burglary, and auto theft).

categories of crime.[101] Sometimes, the reverse happens, and a candidate gains fame for emphasizing crime prevention or less punitive approaches to juvenile and drug crimes.[102]

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[101] See, e.g., Eaton, supra note 100, at 137 (reporting television ad in which Manhattan D.A. emphasized initiatives against guns, gangs, drugs, rapes, child abuse, identity theft, and "Internet predators"); Hicks, supra note 98, at B4 (reporting challenger's pledge to be tougher on domestic violence and crimes against children); **Hasn't been checked** Ryan Kim, This Time, Mullins Has a Challenger, **S.F. Chron.**, Feb. 22, 2002, at 4 (reporting incumbent's boasts of toughness on gang violence, domestic violence, and other violent crime).

[102] See, e.g., Jennifer Gonnerman, The People's Prosecutor: In an Albany Primary, a Candidate for D.A. Attacks the Rockefeller Drug Laws--and Wins, **Village Voice**, Sept. 28, 2004, at 40 (reporting that an obscure challenger upset an incumbent in a primary by attacking tough drug laws and the incumbent's aggressive prosecution of drug cases); Smith, supra note 99 (noting incumbent Travis County District Attorney's emphasis on juvenile diversion and crime prevention). Of course, it did not hurt that the Albany challenger was well-financed.

Like a smoky fire, these news stories and ads often cast more heat than light on voters' decisions. Particular high-profile cases or scandals are often unrepresentative of an office's overall performance and beyond a head prosecutor's control. Yet voters, relying on the availability heuristic, overgeneralize from these memorable, salient anecdotes.[103] Thus, scandals are one of the few factors that demonstrably affect election outcomes.[104] The statistics to which voters have

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[103] See Bibas, supra note 5, at 925-26, 956 (describing how people are drawn to and remember sensational but atypical criminal trials and news stories, while giving little weight to policies or statistics); Shelley E. Taylor, The Availability Bias in Social Perception and Interaction, in **Judgment Under Uncertainty: Heuristics and Biases** 190, 192 (Daniel Kahneman et al. eds., 1982) (noting that because of "salience bias," people find distinctive stimuli more available and so rely on them disproportionately in making judgments).

[104] An empirical study confirms that media coverage of prosecutorial scandals is one of the few factors that significantly reduces a prosecutor's chances of reelection. While there is also suggestive evidence that not losing a major case increases an incumbent's vote share, that finding was not

access, primarily conviction statistics, are mediocre proxies for an office's performance. Crime rates are often driven by exogenous factors, such as the crack cocaine boom or hiring more police,[105] for which prosecutors deserve little credit or blame. Prosecutors can inflate conviction statistics by plea bargaining away many cases, especially difficult cases that they would otherwise have lost at trial.[106] Conviction statistics ignore other important outcomes, such as declinations, sentences, and

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large enough to be statistically significant. **Source hasn't been checked** Gerard A. Rainville, Differing Incentives of Appointed and Elected Prosecutors and the Relationship Between Prosecutor Policy and Votes in Local Elections 91-92 tbl. 13 (2002) (unpublished Ph.D. dissertation, American University, School of Public affairs) (on file with American University Library).

[105] Steven D. Levitt, Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not, 18 **J. Econ. Persp.** 163, 163-64 (2004).

[106] See Bibas, supra note 7, at 2472-73 (noting that prosecutors may offer irresistible plea deals to dispose of cases that they are unlikely to win at trial).

victim satisfaction. Nevertheless, these statistics are better proxies for aggregate performance than isolated anecdotes are. Though they are a staple of campaign rhetoric, conviction statistics have no demonstrable effect on electoral outcomes.[107] Because elections are not driven by accurate general assessments of incumbents' performance, they do not monitor the principal-agent problem well.

Why are prosecutorial elections driven by unreliable anecdotes and scandals rather than by more meaningful statistics and policies? Part of the problem, as just suggested, is that juicy, salient anecdotes are more memorable and powerful than dry numbers. Part of the answer may be that voters lack clear, comprehensive, meaningful statistics about arrests, charges, pleas, and sentences.[108] If, for example, statistics revealed racial charging and sentencing disparities, the public might clamor for more equality or at least explanations. Recent controversies over racial profiling and death penalty

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[107] Rainville, supra note 104, at 92 tbl.13, 94.

[108] See Bibas, supra note 5, at 955-56 (proposing to compile these statistics to dispel common misconceptions about the criminal justice system).

disparities have shown the public's interest in these topics once they came to light.[109]

Some of the blame rests with uncreative candidates. Enterprising candidates succeed in turning elections into referenda on substantive enforcement policies instead of particular anecdotes. For example, long-time New Orleans District Attorney Harry Connick, Sr. won and retained his office by promising to clamp down on plea bargaining. He successfully justified his office's high declination rate as the price of restricting bargains.[110] And in Albany, an obscure challenger upset the incumbent by turning the election into a referendum on

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[109] See, e.g., Francis X. Clines, Death Penalty Is Suspended in Maryland: Governor Waits for Study on Inequality, **N.Y. Times**, May 10, 2002, at A20 (reporting Maryland governor's moratorium on executions pending study of racial disparities in capital punishment); David Kocieniewski, Whitman and State Police: One Answer, Many Questions, **N.Y. Times**, Mar. 7, 1999, at NJ2 (reporting that political furor that erupted in New Jersey over racial profiling led governor to fire state police superintendent).

[110] Wright & Miller, supra note 15, at 61-62, 115.

his opponent's harsh enforcement of the drug laws.[111] It is not easy to focus voters on the broad issues, but it can be done.

Some of the blame, though, rests with the electoral process. Nationwide and statewide races may drown out county elections in the media. District attorneys enjoy access to press conferences[112] and name recognition. Little-known challengers find it difficult to raise money and get the public's attention.[113] Incumbent district attorneys thus enjoy huge advantages. In New York City, for example, no challenger has unseated an elected incumbent in any of the five boroughs in

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[111] Gonnerman, supra note 102 (describing David Soares' campaign success as based on the sole message that his opponent did not support reform of harsh drug laws).

[112] Jonathan P. Hicks, Steady Work, If You Can Get It: District Attorneys Hold Surest Elective Post in City, **N.Y. Times**, Apr. 17, 2005, § 1, at 33 (explaining that no New York City district attorney has lost a reelection battle in the last 50 years, in part because district attorneys enjoy many opportunities to stage dramatic press conferences announcing arrests or indictments).

[113] See id.

the last fifty years.[114] The few challengers who succeed often have enough personal wealth or outside backing to get their messages across.[115] Having said all of that, we still do not understand district attorney elections well; further research might help.

Various strategies might overcome these electoral flaws. Local newspapers and television stations could air live and print debates to showcase the candidates. Term limits and campaign-finance reform, such as public financing, could make races more competitive.[116] Synchronizing prosecutorial elections

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[114] Id.

[115] See Roy B. Flemming, The Political Styles and Organizational Strategies of American Prosecutors: Examples from Nine Courthouse Communities, 12 **Law & Pol'y** 25, 28 (1990) (noting an example of a challenger who won a narrow victory at considerable personal expense); Gonnerman, supra note 102 (reporting that money from billionaire George Soros's drug-legalization group funded challenger's successful campaign).

[116] The empirical evidence is inconclusive as to how well these measures work in other contexts. One study, for example, found that state legislative term limits decreased state legislatures' professionalism, institutional memory, and innovation, in part

with presidential elections would increase voter turnout, at the risk of drowning out local races with national ones.

Better information might also help voters to monitor their agents.[117] Case-processing statistics alone might not matter much, for the reasons suggested above. One could also solicit, compile, and publish regular performance evaluations of head prosecutors. Fellow prosecutors, judges, defense counsel,

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because their legislative sessions and time horizons may be too short. **Thad Kousser, Term Limits and the Dismantling of State Legislative Professionalism** 203-13 (2005). Lengthening each electoral term could mitigate these problems. Another study finds that contribution limits reduce incumbents' margins of victory and increase the chances that they will decide not to run for reelection and leave their seats open. Thomas Stratmann & Francisco J. Aparicio-Castillo, Competition Policy for Elections: Do Campaign Contribution Limits Matter?, 127 **Pub. Choice** 177, 194, 199 (2006).

[117] Laws modeled on the Freedom of Information Act, 5 U.S.C. § 552 (2002), or the Government in the Sunshine Act, 5 U.S.C. § 552(b) (1976), could increase public scrutiny. Such laws might not do much, however, as prosecutors would have to redact much to protect witnesses and mask private details.

defendants, victims, and jurors could routinely submit anonymous numerical and qualitative feedback on head and line prosecutors' performance. These questionnaires would solicit both broad narrative commentary and structured, focused ratings of prosecutors' behavior. Topics could include thoroughness of legal and factual investigation and preparation, diligence, promptness, candor, information and participation accorded to victims, and willingness to listen to opposing arguments and evidence. Publishing these data annually would give media and challengers concrete benchmarks by which to critique an office's performance, as well as constructive guidance on how to improve it. The feedback loop would also remedy the extreme narrowness of conviction statistics, by broadening evaluations to reflect the input of all participants. Victim satisfaction, for example, is nearly invisible to voters today, but these surveys could make it a salient campaign issue. If most of the evaluations were positive, voters would discount the grumbling of a few defendants and defense lawyers as par for the adversarial course. (A computer algorithm could do the same thing, weeding out outlier comments and those from sources who themselves have poor reputations in surveys.[118]) If, however,

[118] eBay successfully uses such an algorithm to weight

the evaluations flagged persistent problems, district attorneys would face visible pressure to respond to criticisms or else lose their jobs at the next election. They would be responsible for improving their subordinates' performance, much as corporate managers take credit or blame for their firms' productivity and

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reputational feedback left by buyers and sellers. For literature that discusses the value of on-line feedback and ways to counteract unfair and discriminatory ratings, see, for example, Chrysanthos Dellarocas, Building Trust Online: The Design of Robust Reputation Reporting Mechanisms for Online Trading Communities, in **Social and Economic Transformation in the Digital Era** 95 (Georgios Doukidis et al. eds., 2004); Chrysanthos Dellarocas, The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms, 49 **Mgmt. Sci.** 1407 (2003) Chrysanthos Dellarocas, Immunizing Online Reputation Reporting Systems Against Unfair Ratings and Discriminatory Behavior, 2 **ACM Conf. on Elec. Com.** 150 (2000); Chrysanthos Dellarocas, Reputation Mechanism Design in Online Trading Environments with Pure Moral Hazard, 16 **Info. Sys. Res.** 209 (2005); Cynthia G. McDonald & V. Carlos Slawson, Jr., Reputation in an Internet Auction Market, 40 **Econ. Inquiry** 633 (2002).

share prices. These pressures would better align district attorneys' interests with their constituents' desires, leading them to maximize the range of goods desired by voters.[119]

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[119] One might fear that democratizing and opening up the process to public scrutiny and influence would make it worse. On this view, voters do not care enough about fairness to or the rights of defendants, so giving them more information would increase pressure to undermine these rights. See Note, Prosecutor Indiscretion: A Result of Political Influence, 34 **Ind. L.J.** 477, 483-85 (1959)(noting that the average voter demands that criminal laws be enforced while neglecting to consider the rights of the accused). As I have argued elsewhere, voters are not reflexively and unalterably punitive. See Bibas, supra note 5, at 927-28 (noting that voters clamor for higher punishments in the abstract partly because they underestimate average penalties, but that when they are given concrete cases, voters favor sentences equal to or lower than judges' average sentences). They behave that way today only because they have poor and misleading information about crimes and punishments. Better information might solve this problem. As the racial profiling and death penalty moratorium debates suggest, voters care about fairness and equality as well as crime control. See,

More radical changes would give the public greater participatory rights in criminal justice beyond simple voting. As I have suggested elsewhere, citizens could serve for a few weeks at a time as citizen advocates within prosecutors' offices.[120] In that capacity, prosecutors would have to consult with them about charging and disposing of cases, though they would have no veto. This idea might be too costly and time-consuming to replicate on any large scale. Nevertheless, some form of consultation could inject community views into the most important prosecutorial policy decisions. Doing so would also build community trust and rapport, much as sharing information and soliciting input from neighborhood groups helps police to gain neighborhood trust and cooperation.[121] Though these changes

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e.g., Clines, supra note 109; Kocieniewski, supra note 109. Moreover, in a democracy voters have a right to be informed, participate, and hold prosecutors accountable, regardless of whether policy elites might share voters' preferences.

[120] See Bibas, supra note 5, at 959-60 (discussing potential benefits and limits of using citizen advocates as a way to include the public in criminal-justice decisions).

[121] See id. In this respect, we could do far better than the much-ballyhooed community prosecution movement, which seeks to

might not be workable, if they were they would help to keep prosecutors in line with the public's concerns.

One might fear that the last thing our criminal justice system needs is more populism. Voters often seem to be reflexively punitive, and more democracy might seem to lead to more over-punishment. While understandable, this concern is overblown. First, the public is not always as punitive as one might think. In recent years drug courts and similar criminal-justice alternatives have flourished, reflecting the public's willingness to soften enforcement. Political branches have fought discrimination in police stops and capital punishment, reflecting voters' willingness to scrutinize unfairness in law

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work more closely with local police and public and private organizations to prevent crime and serve other community needs. In practice, community prosecution has not made prosecutors more accountable to ordinary citizens nor aligned prosecutors' interests with the community's interest. See Brian Forst, Prosecutors Discover the Community, 84 **Judicature** 135, 135-36, 141 (2000)(discussing how community prosecution programs have failed to improve prosecution or advance the public interest by making prosecutors more connected and sensitive to the cultures and needs of the community).

enforcement.[122] Some locales, such as the Bronx and San Francisco, even support district attorneys who openly oppose the death penalty.[123] Second, sensational, unrepresentative media

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[122] See, e.g., Clines, supra note 109; David Kocienewsky, Amid Pomp, McGreevey Signs Racial-Profiling Bill, **N.Y. Times**, Mar. 15, 2003, at B5 (reporting that the New Jersey governor signed into law a bill prohibiting racial profiling in response to public outcry after state troopers wounded three unarmed black and Hispanic men during a traffic stop).

[123] Jan Hoffman, Prosecutor in Bronx, Under Fire, Softens Stand Against Executions, **N.Y. Times**, Mar. 20, 1996, at A1 (noting that voters had reelected Bronx district attorney despite his proclaimed opposition to the death penalty and that he remained generally opposed to it despite public criticism); Dean E. Murphy, Killing of Officer Stirs Death Penalty Debate, **N.Y. Times**, June 12, 2004, at A7 ("Opinion polls show that San Franciscans overwhelmingly oppose the death penalty, and in her winning campaign for district attorney last fall, Kamala D. Harris made no secret of her strong opposition as well"; despite furor over the killing of a San Francisco police officer, 70% of poll respondents supported her refusal to seek the death penalty in that case).

coverage at least exacerbates the public's punitiveness. Better information might soften this harshness. The public calls for raising sentences because it systematically underestimates average penalties; if it understood penalties better, it would think them high enough.[124] Third, as noted earlier, enterprising candidates have succeeded in selling the public on priorities beyond maximizing convictions, such as restricting plea bargaining or softening drug enforcement.[125] Finally, in a democracy, voters are prosecutors' principals. They have the right to influence prosecutorial policy in their locale, even if their preferences deviate from prosecutors' or yours or mine.

B. Informing Victims and Letting Them Participate

Though victims are loosely analogous to a corporation's customers, they have almost none of the power that customers do. Prosecutors have a monopoly on criminal prosecution, and they receive a fixed amount of funding and salary from the state. Victims have no monetary leverage. Nor do victims have much

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[124] Bibas, supra note 5, at 927-29 (describing the results of studies which found that, when given concrete scenarios, laymen prefer sentences as low as or lower than those prescribed by statute or imposed by judges).

[125] See supra text accompanying notes 110-111 .

information. Prosecutors may tell them little about the evidence in their cases, for telling them too much might amount to witness coaching and compromise victims' usefulness at trial. Most victims cannot watch investigations, discovery, secret grand-jury proceedings, plea negotiations, or most trial preparation.[126] Even those court proceedings that are in theory open to the public are in practice poorly publicized. While many laws give victims the right to notice of upcoming court proceedings, victims often do not receive notice or attend.[127] When they do attend, they have little or no right to participate. At most, they read victim-impact statements at

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[126] Bibas, supra note 5, at 923-24.

[127] See **Peggy M. Tobolowsky, Crime Victim Rights and Remedies** 36-39 (2001)(surveying various statistical studies of victim notification); Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 **Yale L.J.** 85, 136-37 (2004)(noting that while many victims report wanting more information about their cases, many never have the opportunity to discuss their case with prosecutors or receive information about their rights).

sentencing or submit them ahead of time.[128] Because victims are poorly informed and powerless, they are in no position to check or influence prosecutors.

Victims could influence prosecutors much more effectively, keeping their agents in line. They already have knowledge about and incentives to invest in their own cases, so they will not automatically defer to prosecutors.[129] Thus, individual victims are well positioned to discipline prosecutors in particular cases. They could have rights to be heard and to consult with prosecutors about charging, plea bargaining, and sentencing decisions.[130] They need not have vetoes to be effective. Prosecutors, dealing with victims face to face, will heed their reasonable suggestions both out of empathy[131] and out of concern for their reputations and re-election prospects.

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[128] Bibas, supra note 5, at 930; Bibas & Bierschbach, supra note 127, at 99-100.

[129] For development of these points at greater length, see Bibas, supra note 5, at 963.

[130] Id. at 954-55.

[131] Cf. **Jeannine Bell, Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime** 128-29 (2002)(describing how "seeing

Victims' rights are controversial, however. One common fear is that victims will be bloodthirsty and vengeful, demanding harsher punishments in every case. This popular stereotype, however, is not accurate. On the whole, victims are not primarily concerned about maximizing punishments. What most victims want is information about their cases, a participatory role, fair and respectful treatment, emotional healing, apologies, and restitution.[132] Currently, prosecutors view their jobs as maximizing convictions, not delivering these other goods to victims.

A more substantial fear is that prosecutors give more weight to victims who are white, female, attractive,

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victims' pain in its entirety . . . . conver[ted police officers in hate-crimes unit and] changed the officers' worldview" to one of empathy with victims and how office culture fostered conversion).

[132] See Bibas & Bierschbach, supra note 127, at 136-39 (collecting empirical evidence); Edna Erez, Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings, **Crim. L. Bull.**, Sept.-Oct. 2004, at 483, 483(same).

intelligent, articulate, educated, and well-to-do.[133] In part, prosecutors may be biased or may reflect the anticipated biases

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[133] See, e.g., **David C. Baldus et al., Equal Justice and the Death Penalty** 149-58 (1990) (reporting that victim's race, sex, and socioeconomic status all significantly affect likelihood that defendant will be sentenced to death, but positing that victim's sex is proxy for women's greater physical vulnerability); **Randall Kennedy, Race, Crime, and the Law** 70-75 (1991)(discussing how criminal justice under-protects black victims); David C. Baldus et al., Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 **Neb. L. Rev.** 486, 608-23 & n.279 (2002) (finding statistically significant effect of victim's socioeconomic status on imposition of death penalty in Nebraska and attributing this effect to victims' families' ability to lobby prosecutors and deliver articulate victim-impact statements); David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia, 83 **Cornell L. Rev.** 1638, 1658-60, 1715 & n.144 (1998) (surveying evidence that killers of white victims are more likely to be charged with

of judges and juries. In part, educated, prosperous victims and communities may lobby prosecutors harder, and hold more political clout, than poor residents of slums. Criminal justice may already underprotect minorities and the poor, and too much of a role for victims might exacerbate the problem. While these

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capital crimes and sentenced to death, and reporting evidence from Philadelphia that killers of low-socioeconomic status victims are significantly less likely to receive the death penalty as a result of both prosecutorial and jury decisions); Norbert L. Kerr, Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Jurors' Verdicts, 4 **Personality & Soc. Psychol. Bull.** 479, 480-81 (1978)(finding that mock jurors were more likely to convict defendants whose victims are attractive). But see Ronald Mazzella & Alan Feingold, The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis, 24 **J. Applied Soc. Psychol**. 1315 , 1325, 1327, 1330 tbl. 5 (1994)(meta-analyzing previous research and finding that victims' physical attractiveness and socioeconomic status do not significantly affect jurors' judgments, though victims' sex does and victims' race has a small effect on punishment).

concerns are legitimate, an awareness of them might help prosecutors to guard against these biases. Moreover, rich, articulate victims already find ways to exercise this influence informally in the status quo. Creating formal avenues for participation might level the playing field, empowering otherwise disempowered victims, helping them to heal, and equalizing outcomes.[134]

Giving victims a greater role, as stakeholders, would also shift prosecutors' priorities away from so-called victimless crimes towards classic violent and property crimes. This shift would not be costless, as so-called victimless crimes often spread diffuse, but noticeable, harms across a neighborhood. Neighborhood residents face a collective-action problem, making it harder for them to organize and influence prosecutors than for a few victims who have suffered grave harm. Nonetheless, this enforcement shift might be welcome. As a matter of distributive justice, it is more important to focus on palpably wronged victims of violent and property crime. Having suffered most acutely, they need healing most.

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[134] See Bibas & Bierschbach, supra note 127, at 138 (collecting empirical evidence that victims'-rights laws have this effect).

Victims exert influence case by case, so they are not as able to weigh or influence broad policy as voters are. Nevertheless, victims play an important role that legislatures, courts, and bar authorities cannot. The latter bodies review prosecutorial action or harshness but are virtually powerless in the face of inaction or leniency. Victims can fill this gap, scrutinizing prosecutorial declinations and concessions and forcing prosecutors to provide reasons for their actions. In addition, unlike legislatures, courts, and bar authorities, victims are independently familiar with their own cases, so they are best able to keep prosecutors honest. As stakeholders, victims have an essential role to play in keeping their agents in line.

C. Giving Defendants Appropriate Voice

It may sound odd to treat defendants as stakeholders who should influence prosecutors' decisions. After all, we think of prosecutors and defendants as locked in adversarial combat, pursuing diametrically opposed goals. Most defendants want to avoid conviction and punishment, yet we do not expect prosecutors to honor that self-serving desire.

Yet prosecutors are not mere partisan advocates, but officers of the court. They are sworn to pursue justice, not

just to maximize convictions and sentences. Pursuing justice includes considering defendants as human beings who deserve fair, respectful treatment and sometimes mercy.

Right now, most defendants' voices are inaudible. Most are poor, uneducated, and politically powerless. Most cannot afford high-priced private counsel, but must instead content themselves with overworked appointed counsel. And our system systematically silences criminal defendants, minimizing and scripting their own speaking roles and instead having defense counsel speak for them.[135] Head prosecutors and the public have no way to learn of defendants' views, let alone to sift out feedback that might reflect on prosecutors' performance.

If defendants are to have a voice in the system, we need ways to separate their reflections on the quality of prosecutorial behavior from their raw desires for leniency. Likewise, defense counsels' views are relevant to the extent

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[135] See Alexandra Natapoff, Speechless: The Silencing of Criminal Defendants, 80 **N.Y.U. L. Rev.** 1449, 1451 (2005)(discussing the "silencing phenomenon" and its "systematic implications for the integrity of the justice process.").

that they reflect on how a prosecutor does his job and not simply his toughness.

Fortunately, when defendants and defense counsel praise or blame prosecutors, they already draw these distinctions. Defendants and defense lawyers do not seem to blame prosecutors for doing their jobs. Indeed, they may speak admiringly of prosecutors as tough but fair.[136] What they will blame

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[136] See, e.g., Ian Berry, Waltz Prosecutor Called Tough, But Fair, **Chattanooga Times Free Press** (Tenn.), Sept. 19, 2005, at B1; Dan Eggen, Second-in-Command at Justice to Depart; Comey Led Drives on Terrorism, Fraud, **Wash. Post**, Apr. 21, 2005, at A21 ("[Deputy Attorney General] Comey earned frequent praise from colleagues, and even some foes, as a tough but fair prosecutor."); Steve Inskeep, Senate Panel Sets Deadline on Corruption Case, **Nat'l Pub. Radio**, Apr. 13, 2007 (Morning Edition), available at https://www.npr.org/templates/story/story/ph?storyid=9564617 (noting the reputation of Milwaukee U.S. Attorney Steve Biskupic as tough but fair); Kirk Makin, Morin Informant Named Dangerous Offender, **Globe & Mail** (Canada), Oct. 4, 2007, at A7 (describing a Crown counsel "respected by the defence for being tough, but fair."; Shannon McCaffrey, New No. 2 at Justice a 'Class Act' Known for

prosecutors for is bias, arbitrariness, or procedural injustices such as rudeness, misrepresentation, or unethical conduct. This observation accords with Tom Tyler's findings that litigants care not only about substantive outcomes, but also whether they feel the system has treated them fairly.[137]

The reputational surveys and feedback suggested earlier would give defendants and defense counsel such a voice. Defendants and defense counsel are valuable sources of information about prosecutorial behavior, ones that we have not tapped well. Computer algorithms could compare the specific complaints leveled against one prosecutor with those leveled against others, discarding outlier survey responses and flagging

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Apolitical, Aggressive Style, **Knight Ridder/Tribune News Serv.**, Dec. 12, 2003, at K1794 (noting that not only did defense lawyers praise James Comey "as a tough but fair prosecutor's prosecutor," but even a mob assassin whom he was trying to imprison slipped him a note at trial that read "'You're a class act . . . . No one deserves that [lawyer-of-the-year] award more than you do'").

[137] See **Lind & Tyler**, supra note 86, at 76-81, 106, 208, 215; **Tyler**, supra note 85, at 94-108.

outlier prosecutors. Head prosecutors and voters would dismiss the occasional griping of a defendant or defense lawyer who felt he deserved a lighter sentence. A pattern of specific, corroborated complaints could push head prosecutors to watch, train, discipline, or fire outlier prosecutors and push voters to punish head prosecutors who failed to do so. Knowing that they are being watched and evaluated, line prosecutors might rein in their excesses and take greater pains to administer consistent, impartial justice fairly and respectfully.

III. Internal Governance Mechanisms

Pressure from voters and victims can influence prosecutors, particularly head prosecutors who care about winning re-election. These pressures align head prosecutors' interests and values with those of their principals, the stakeholders. In other words, head prosecutors need to change, and stakeholders can help to change them. Head prosecutors must then work to translate stakeholders' interests and values into practice. Sometimes, empathy with victims may be enough to influence line prosecutors without further prodding from above. Line prosecutors, however, also serve their own strong self-interests in racking up marketable win-loss records, making names for themselves, and lightening their own workloads.[138] Head prosecutors do not share these interests to the same extent.[139] They also care more about broader, systemic values such as equal treatment and general deterrence. Thus, head prosecutors must

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[138] See Bibas, supra note 7, at 2470-76 (detailing the agency costs of prosecutors' incentives and pressures); see also **James Eisenstein & Herbert Jacob, Felony Justice: An Organizational Analysis of Criminal Courts** 154 (1991) (reporting that trial prosecutors in three jurisdictions studied were motivated not to lose cases, particularly jury trials).

[139] See Bibas, supra note 7, at 2541-42.

do more to check line prosecutors' self-interests and bring them into line with stakeholders' values and interests.

Head prosecutors have many different tools that they can use for this task. This Part draws on management literature to explore the different tools head prosecutors could use to shape their offices' work. Section A begins by discussing the importance of office culture, ideals, and norms. Section B considers the importance of the structure of prosecutors' offices. Section C examines how internal substantive and procedural office policies make line prosecutors more consistent and accountable. Section D addresses how hiring, firing, promotion, and training shape a prosecutorial office. Section E discusses how data gathering, performance evaluations, feedback, and incentives could improve performance. One theme throughout is that prosecutors, like many government agencies, have been too slow to use information technology that could help to make their offices more transparent, consistent, and accountable.

A. Prosecutorial Office Culture

Perhaps the most potent regulatory force is one that is easy to overlook: the ethos or professional culture of a prosecutor's office. Maybe we should ask not why a minority of prosecutors commit misconduct, but why the majority are relatively clean, at least as far as the public can tell. Maybe the question is not so much why prosecutors shirk and create inequities by indulging their self-interests, but why they do not indulge these temptations completely. How is it that prosecutors' internal mores, shared values, and socialization guide and constrain them to serve stakeholders?

The process may begin in law school or earlier, as law students learn that the job of the prosecutor is to do justice, not just to convict. While budding litigators are socialized into an adversarial system that exalts combat and client loyalty, one hopes that they continue to value justice, fairness, and diligence as well. Judicial opinions, legislative enactments, and ethical canons can transmit and reinforce norms, particularly if they are well-publicized.

Prosecutors' offices must continue to inculcate and reinforce these values, much as successful corporations do. Successful firms stress the need to adapt continually to serve customers, stockholders, and employees fairly and with

integrity.[140] The same logic applies to prosecutors' serving their own stakeholders.

Head and supervisory prosecutors play important roles in shaping and communicating office culture and socializing line prosecutors into that culture. As the management literature reports, managers in successful, adaptive firms deeply value stockholders, customers, and employees.[141] They are expected to

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[140] **John P. Kotter & James L. Heskett, Corporate Culture and Performance** 32-33 ex.3.1, 47-55 ex.4.2 (1992) (reporting empirical evidence that twelve higher-performing firms consistently valued customers, stockholders, and employees more than ten comparable lower-performing firms in matching industries; also reporting causal evidence that managers who value leadership and care greatly about serving stakeholders lead their firms to adapt to changing needs); see also **Tom Peters & Robert H. Waterman, Jr., In Search of Excellence: Lessons from America's Best-Run Companies** 156-99, 319 (1982) (stressing that strong focus on serving customers makes firms adapt to serve their needs).

[141] **Kotter & Heskett**, supra note 140, at 51 ex.4.3.

lead initiatives designed to serve these stakeholders' needs.[142] Conversely, firms whose leadership does not value stakeholders' interests ignore important information and feedback and fail to adapt.[143]

Culture is deeply embedded in existing organizations. Because there is so much inertia to overcome, cultural change must start from the top down, not the bottom up.[144] To change these silent assumptions and values, managers must bring them to the surface and analyze or challenge them, much as cognitive therapists do in therapy.[145] Sometimes change happens through

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[142] Id. at 50 (italicizing this point for emphasis).

[143] Id. at 70-73 & ex. 6.3. AU (SB): Please check this citation—I had the textual sentence about valuing leadership and stakeholders, but you've rewritten the text to be about leadership that values stakeholders' interests. Is that a correct rewrite?

[144] Id. at 92-93.

[145] See **Ralph H. Kilmann, Managing Beyond the Quick Fix: A Completely Integrated Program for Creating and Maintaining Organizational Success** 49-72 (1989); **Edgar H. Schein,**

evolution, but more mature organizations may need a sense of crisis to motivate revolutionary change.[146] Particularly in the latter case, strong leadership is necessary to guide firms through risky, often painful, anxiety-provoking changes.[147]

Leaders who have climbed the organizational ladder may be too steeped in an organization's existing culture to critique and improve it. Thus, leaders recruited from outside or who have outsiders' perspectives are better able to reform mature firms' cultures.[148] Change takes time, from four years at

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Organizational Culture and Leadership: A Dynamic View 278-79, 306-07 (1985).

[146] **Schein**, supra note 145, at 281-82.

[147] Id. at 323-24.

[148] Id. at 321. One empirical study found that of eleven corporate heads who successfully led major cultural change at high-performing corporations, five were recruited directly from outside. Two had come from outside the firm earlier in their careers after substantial careers elsewhere. The remaining four had unconventional inside career paths. Not one was a traditional insider. **Kotter & Heskett**, supra note 140, at 89-92 (noting, however, that complete outsiders may lack "credibility,

medium-sized firms to ten years at huge firms, so short leadership terms may thwart change.[149] The same observations hold true of prosecutors' offices. Short-term prosecutors have little hope of changing the local courthouse culture and way of doing things.[150] District attorneys who win office as insurgent outsiders enjoy powerful mandates and are more successful at implementing changes. They are particularly successful if they have campaigned on platforms promising specific reforms.[151]

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relationships, and [the] power base" needed to turn around extremely large companies).

[149] **Kotter & Heskett**, supra note 140, at 104-05, 110.

[150] See **Peter F. Nardulli et al., The Tenor of Justice: Criminal Courts and the Guilty Plea Process** 128 (1988) (explaining that courthouse culture and values are so deeply embedded that "[t]ransient interlopers ensconced in powerful positions for short period of time . . . are normally little more than blips in a court community's history.").

[151] See Flemming, supra note , at 28-33 (describing three examples in which electoral challengers succeeded in enacting reforms); cf. id. at 38 (noting that incumbent's electoral power

Prosecutorial elections could incorporate these lessons. They could select for outsiders by imposing term limits, disqualifying current employees of the particular prosecutors' office, or requiring some years' experience in criminal defense, another prosecutor's office, or private practice.[152] They could also guarantee sufficient time for change by lengthening district attorneys' terms to six to eight years.

Successful managers often begin by instilling a sense of crisis, gathering the data necessary to show the need to improve. Marshalling information lays the foundation for needed

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and political clout play large roles in inducing underlings to follow their leader).

[152] Politicians could take these same lessons to heart in appointive systems, making a point of hiring outsiders to clean house. See, e.g., John Kass, U.S. Attorney's Independence Pays Dividends, **Chi. Trib.**, Dec. 21, 2003, at C2 (reporting that an Illinois senator made a point of selecting an outsider as U.S. Attorney, Patrick Fitzgerald, whose lack of political ties to anyone in Illinois freed him to pursue public-corruption cases).

reforms.[153] These leaders communicate their vision and values through repeated words and deeds, engaging in frequent dialogue with subordinates and practicing what they preach.[154] For example, subordinates notice what their leaders consistently observe, ask about, measure, control, and reward.[155] They watch how their leaders react to crises.[156] They learn by listening as their superiors teach, coach, and serve as role models.[157] They are shaped by hiring, firing, pay, and promotion policies, both

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[153] **John P. Kotter & Dan S. Cohen, The Heart of Change: Real-Life Stories of How People Change Their Organizations** 15-36 (2002); **Kotter & Heskett,** supra note 140, at 94-96.

[154] **Kotter & Heskett,** supra note 140, at 94-96.

[155] **Schein**, supra note 145, at 224-30.

[156] Id. at 230-32.

[157] Id. at 232-33. See also, **Jack Welch with John A. Byrne, Jack: Straight from the Gut** 393 (2001) (stressing the importance of CEO's constant cheerleading and reiterating ideas and initiatives endlessly to persuade and lead subordinates); **Alfred P. Sloan, Jr., My Years with General Motors** 433 (John McDonald & Catharine Stevens eds., 1964) (emphasizing the need to sell major proposals to the affected parts of a company).

because leaders select suitable people and because employees conform to these expectations to get ahead.[158] Secondarily, employees are also influenced by an organization's structure, procedures, physical layout, folklore, and mission statement.[159]

I will have more to say about the tangible measures listed above in the following Sections. For now, I want to note how less tangible leadership can define prosecutors' mission as service to stakeholders. Culture is not easy to gauge from the outside, let alone regulate, but charismatic leadership can lead change. District attorneys who have enough outside perspective to avoid complacency can communicate a sense of crisis and spur improvement. District attorneys who repeatedly mention voters' and victims' concerns, and discourage bragging about win-loss records, can communicate these priorities to their subordinates. They can likewise send messages by using computers to track and publish crime rates, citizen complaints, and defense feedback, not just conviction statistics. District attorneys who award high status and a big office to the office ethics maven and funnel queries to him underscore the importance of ethical

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[158] **Schein**, supra note 145, at 233-37.

[159] Id. at 237-42.

conduct. District attorneys who teach, cheerlead, and regale underlings with war stories and mission statements inculcate their priorities. Young attorneys, impressionable and eager to emulate their superiors, take their cues from this rhetorical leadership. In short, rhetoric from the top matters.

B. The Structure of Prosecutors' Offices

Prosecutorial office structure greatly influences how much head prosecutors can supervise, oversee, and control their subordinates. As noted earlier, most district attorneys are locally elected at the county, district, or circuit level.[160] In Alaska, Delaware, and Rhode Island, the state attorney general has primary responsibility for prosecutions throughout the state.[161] In Connecticut, the attorney general appoints state's attorneys, while in New Jersey, the governor appoints county

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[160] See discussion supra at note 115 and accompanying text.

[161] DeFrances, supra note 91, at 11 App.; Robert L. Misner, Recasting Prosecutorial Discretion, 86 **J. Crim. L. & Criminology** 717, 732 n.91 (1996)(citing statutes from Alaska, Connecticut, Rhode Island, and Delaware).

prosecutors.[162] The statewide hierarchies enabled Alaska's attorney general to ban plea bargaining for a time and New Jersey's attorney general to regulate charging decisions. As Dan Richman suggests, these unusual structures can create direct control and political accountability, promoting consistent enforcement of statewide laws.[163] The Department of Justice plays the same role in regulating federal prosecutors across the country.[164] Intuitively, hierarchical structures are appealing

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[162] **N.J. Stat. Ann.** § 2A:158-1 (West 2008); DeFrances, supra note 91 , at 11 App.; Misner, supra note 161, at 732 n.91.

[163] Richman, supra note 79, at 2062-64 (noting, however, that later attorneys general of Alaska allowed local discretion to increase to the point that the plea-bargaining ban decayed and line attorneys complained of "[in]sufficient policy guidance from above").

[164] See Memorandum from John Ashcroft, U.S. Att'y Gen., to All Fed. Prosecutors, Department Policy Concerning Charging of Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (establishing uniform substantive and procedural standards limiting federal prosecutors' plea bargaining). It is unclear, however, how

ways to ensure consistency and service to stakeholders, but further research is needed into how well they work in practice. Perhaps large states cannot replicate these smaller states' centralization, but they could at least head in that direction.

Even within a local office, structure matters. Many prosecutors' offices drift along without centralized leadership or a hierarchical structure, which impedes monitoring of subordinates. Line prosecutors in these offices remain free to do what they wish and ignore office policies[165] and stakeholders' interests. In contrast, centralized leadership, hierarchy, and monitoring aid consistency in all but the smallest prosecutors' offices. Supervisors help to implement district attorneys' policies. Head prosecutors who want to increase sentences can

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effective this memorandum has been. See G. Jack King, NACDL News: NACDL Survey: USAOS Deny Ashcroft Memo Affecting Plea Bargaining, 27 **Champion** 6, 6 (2003)(reporting, based on telephone survey of United States Attorney's Offices, that Ashcroft Memorandum had not changed local practices).

[165] E.g., **Eisenstein & Jacob,** supra note 138, at 86; Flemming, supra note 115, at 39, 40 tbl. 1, 45-46.

centralize review and approval of plea bargains.[166] Those who want to increase efficiency or prevent later charge reductions can aggressively screen out weak cases.[167] Centralized charging units, staffed by prosecutors who will not try the cases themselves, eliminate prosecutors' self-interest in overcharging weak cases so that they can later charge-bargain them away.[168]

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[166] E.g., **Eisenstein & Jacob,** supra note 138, at 151; Flemming, supra note 115, at 41-42, 44.

[167] E.g., Flemming, supra note 115, at 44; Wright & Miller, supra note 15, at 61-82.

[168] See, e.g., Wright & Miller, supra note 15, at 61-82 (presenting empirical evidence that centralized screening units greatly reduced charge bargaining in New Orleans). This model of dividing up cases by stage is sometimes called horizontal prosecution, as opposed to vertical prosecution, in which the same prosecutor handles a case from intake through sentencing and appeal. See, e.g., **Nardulli et al.**, supra note 150, at 190 (explaining that a system of vertical prosecution enabled line prosecutors to grant concessions and bargain away cases with almost no supervision). Rachel Barkow makes the same point, analogizing this prosecutorial structure to the separation of functions within administrative agencies. Rachel Barkow,

Computer tracking and frequent statistical reports can reinforce oversight and implementation of district attorneys' priorities.[169]

In this respect, my recommendations seem to run counter to the management literature. Much management literature bemoans excessive corporate hierarchies and praises the recent trend

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Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 **Stan. L. Rev.** (forthcoming 2009) (advocating that charging, plea acceptance, and substantial-assistance determinations be made by separate prosecutors or panels of prosecutors).

[169] See, e.g., Marc L. Miller & Ronald F. Wright, "The Wisdom We Have Lost": Sentencing Information and Its Uses, 58 **Stan. L. Rev.** 361, 362-63 (2005) (noting that collecting and disseminating sentencing data can democratize the process, facilitating input from a broader array of actors and so improving policy); Wright & Miller, supra note 15, at 65-66 (noting District Attorney Connick's maxim "If you can't measure it, you can't manage it" and that data both facilitate supervision and keep line prosecutors mindful that supervisors monitor their actions).

toward flattening and slimming layers of bureaucracy.[170] But organizations need centralized coordination as well as decentralization.[171] General Electric, for example, became leaner and more flexible by slimming down from twenty-nine to six levels.[172] Sizable corporations retain some hierarchy,

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[170] See, e.g., **Peter F. Drucker, The Practice of Management** 203 (1954) (stressing "that the organization structure [should] contain the least possible number of management levels, and forge the shortest possible chain of command"); **Kotter & Heskett**, supra note 140, at 99 (reporting that decentralization and cutting bureaucracy were important elements in ten cases of successful cultural change); **Welch & Byrne**, supra note 157, at 383-84 (noting that "[b]ureaucracy strangles. Informality liberates" and encourages information and ideas to flow freely to the top).

[171] **Sloan**, supra note , at 428-35; see **Peter F. Drucker, Concept of the Corporation** 41-71 (rev. ed. 1972) (holding up General Motors as a model of decentralization blended with central oversight).

[172] See **Janet C. Lowe, Jack Welch Speaks: Wisdom from the World's Greatest Business Leader** 119-22 (1998).

because lower-level agents need supervision by top agents to make sure everyone is serving shareholders and customers.[173] In contrast, prosecutors' offices have nowhere near six levels of review. Many prosecutors' offices are at the other extreme of the spectrum, with virtually no effective oversight in most cases. Rather than being regulated to death, even line prosecutors express frustration with the lack of coordination.[174] Because the problem is the opposite one, the solution is as well.

C. Prosecutors' Internal Office Policies

Section I.B suggested that judges have neither the expertise nor the inclination nor the ability to write rules for prosecutors. Some observers jump from this problem to conclude

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[173] See Elliott Jaques, In Praise of Hierarchy, in **Managing People and Organizations** 382, 385-92 (John J. Gabarro ed., 1992) (explaining that hierarchical management adds value, promotes accountability, and reflects broader perspective of those with longer time horizons who confront more complex problems; also reporting that for all but the largest corporations, seven levels of hierarchy is enough).

[174] See, e.g., Flemming, supra note 115, at 46.

that writing rules to constrain prosecutors is hopeless.[175] In a series of works, however, Ronald Wright and Marc Miller argue

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[175] See David Boerner & Roxanne Lieb, Sentencing Reform in the Other Washington, 28 **Crime & Just.** 71, 122 (2001)(rejecting prosecutorial guidelines and explaining that "the myriad factors that influence a judgment related to likely conviction of a particular crime or crimes, to say nothing of their relative weights, involves polycentric decision making not readily susceptible to judicial review. There is no meaningful external standard against which to measure the subjective discretionary decision."); see also **Lief H. Carter**, **The Limits of Order** 11-14, 113-50 (1974)(suggesting that achieving consistency via internal rules and procedures is impossible, based on both theoretical literature and case studies of specific kinds of organizations, including the Vario County (CA) prosecutor's office); **Arthur Rosett & Donald R. Cressey**, **Justice by Consent: Plea Bargains in the American Courthouse** 161-72 (1976) (arguing that discretion is inevitable and cannot be confined by judicial procedural rules); Stanley Z. Fisher, In Search of the Virtuous Prosecutor: A Conceptual Framework, 15 **Am. K. Crim. L.** 197, 255 (endorsing Carter's argument "that prosecutorial decision making is inherently uncontrollable by preordained rules and

powerfully that prosecutorial self-regulation can and does work well. In other words, head prosecutors can align their subordinates' actions with principals' interests by writing down and enforcing procedural and substantive office policies. Indeed, more transparency will lead voters and victims to clamor for these kinds of rules, and head prosecutors can respond and implement them effectively. For example, at the direction of the New Jersey Supreme Court, the State Attorney General promulgated statewide charging guidelines for enhanced drug penalties.[176] Prosecutors must explain why they are or are not seeking enhanced sentences, and trial judges review these reasons to police compliance with the guidelines.[177] After

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guidelines."); Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 **BYU L. Rev.** 669, 674-75 (arguing that there is a category of factors on which prosecutors must rely that do not "lend themselves to . . . . systematization" and that "this type of [case-specific] discretion is not only inevitable, but also desirable.").

[176] Ronald F. Wright, Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation, 105 **Colum. L. Rev.** 1010, 1031 (2005) [hereinafter Wright, Prosecutorial Self-Regulation].

[177] Id. at 1031-31.

receiving feedback from courts, the guidelines developed into something like sentencing guidelines, with offense and offender criteria for higher and lower plea offers and guidance on departures.[178] New Jersey courts have likewise prompted prosecutors to draft guidelines regulating pretrial diversion and the filing of capital charges.[179] The state legislature has

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[178] See id. at 1031-2 (describing the guidelines drafters' use of judicial sentencing guidelines as a model in order to develop guidelines that would be more consistent across counties, as the court directed). See also Ronald F. Wright, Prosecutorial Guidelines and the New Terrain in New Jersey, 109 **Penn. St. L. Rev.** 1087, 1093-97 (2005) [hereinafter Wright, Prosecutorial Guidelines](tracking the escalating demands of the New Jersey courts for more strict prosecutorial guidelines and pointing out the New Jersey Supreme Court's decree that legal restrictions on the sentencing discretion of judges should apply equally to prosecutors).

[179] See Wright, Prosecutorial Self-Regulation, supra note 176, at 1034 (documenting the gradual expansion of prosecutorial guidelines to cover more subjects); Wright, Prosecutorial Guidelines, supra note 178, at 1090-92(pointing out the New

directed the Attorney General to draft guidelines structuring prosecutors' decisions to proceed in juvenile or adult court.[180] And the Attorney General, on his own initiative, has drafted guidelines to harmonize decisions about when to seek collateral sanctions.[181]

Other states' prosecutors have regulated themselves as well. The New Orleans District Attorney's Office used centralized screening, close supervisory review, and information technology to restrict overcharging and plea bargaining. By doing so, District Attorney Harry Connick fulfilled his campaign pledge to crack down on plea bargaining.[182] In Florida, state

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Jersey courts' role in creating a pretrial intervention program).

[180]Wright, Prosecutorial Self-Regulation, supra note 176, at 1034. See also Wright, Prosecutorial Guidelines, supra note 178, at 1098 (noting that the legislature "took the hint from the [S]upreme [C]ourt").

[181]Wright, Prosecutorial Self-Regulation, supra note 176, at 1034; Wright, Prosecutorial Guidelines, supra note 178, at 1097.

[182] See **Wright & Miller**, supra note 15, at 61-66 (chronicling the steps that Connick took to direct more resources and expertise

legislators complained that prosecutors were being arbitrary and discriminating in deciding which habitual offenders deserved habitual-offender charges. To head off legislative restrictions, Florida's State Attorneys banded together to promulgate guidelines and criteria for filing these charges.[183] Other authors have noted that Alaska's attorney general succeeded in more or less banning plea bargaining for a decade or more.[184] In addition, the U.S. Department of Justice enforces various internal policies, such as the Petite policy barring successive prosecutions and limits on criminal RICO charges.[185]

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to reducing the use of plea bargains and to closely monitoring the reduction).

[183] See **Miller & Wright**, supra note 41 at 937-38 (setting forth non-binding criteria to guide State Attorneys in enforcing Florida's habitual offender laws).

[184] See Teresa White Carns & John Kruse, A Re-Evaluation of Alaska's Plea Bargaining Ban, 8 **Alaska L. Rev.** 27, 32-40 (1991)(observing the profound impact of the Alaska Attorney General's 1975 ban on plea bargaining).

[185] Cf. Norman Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 **UCLA L. Rev.** 1, 14 (1971)(noting "a

Notice the subtle interplay of judicial, legislative, and voter pressure in New Jersey, New Orleans, and Florida. These institutions may not be able to draft subtle rules themselves. They can, nevertheless, prompt prosecutors to self-regulate and justify their own policy choices, and then police compliance with prosecutors' own rules.

These rules can develop in a variety of ways. Kenneth Culp Davis and others suggest that prosecutors use Administrative Procedure Act-type rulemaking to develop enforcement policies,[186]

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number of well-known instances" where prosecutors seemed to adopt non-prosecution policies). See generally Ellen S. Podgor, Department of Justice Guidelines: Balancing "Discretionary Justice", 13 **Cornell J.L. & Pub. Pol'y** 167 (2004) (explaining internal policies, violations of these policies, and efforts to improve compliance).

[186] See **Davis**, supra note 6, at 65-68, 202 (applauding the fairness, transparency, and efficiency of administrative rulemaking). Cf. Charles P. Bubany & Frank F. Skillern, Taming the Dragon: An Administrative Law For Prosecutorial Decision Making, 13 **Am. Crim. L. Rev.** 473, 490-91, 496-99 (1976)(recommending that prosecutors' offices adopt rules and

but this approach is too rigid.[187] Often, a series of prosecutorial decisions develop into a recognizable pattern that over time becomes an unwritten rule or presumption. Richard Frase's empirical study of one office, for example, found that writing down reasons for decisions in individual cases is an important first step toward developing rules.[188] Even without specified rules or criteria, these written reasons begin to converge. Prosecutors may, for example, develop a shared sense that thefts of less than $500 usually do not merit federal

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guidelines that turn on objective criteria to guide discretionary decisions).

[187]See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 **Duke L.J.** 1385, 1396-1436 (1992) (discussing how even supposedly informal, notice-and-comment rulemaking has become cumbersome, discouraging agencies from promulgating new rules and revisiting old rules).

[188] See Richard S. Frase, The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion, 47 **U. Chi. L. Rev.** 246, 291-96 (1980)(discussing the virtues and drawbacks of prosecutorial guidelines that require prosecutors to offer written reasons subject to review for their discretionary decisions to charge).

prosecution, absent certain aggravating factors. "[E]ven if the policy-formulation process has not progressed to the stage of articulated factors, they may emerge from the process of reason giving; thus, reasons evolve into factors, and factors evolve into rules."[189] In some areas mandatory or at least presumptive rules are feasible, Frase's study shows, while in others guidelines or factors are more workable.[190]

Dan Richman rightly suggests that hierarchy and centralization improve consistent, accountable application of rules.[191] Recall that line prosecutors try to minimize their workloads and gain marketable experience, whereas head prosecutors are more concerned with stakeholders' interests and preferences and with consistency. Thus, substantive policies should go hand in hand with procedural ones that ensure

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[189] Id. at 294.

[190] See id. at 298 ("it is important . . . to recognize that there are several different types of rules, which differ in their utility as guiding and structuring mechanisms.").

[191] See Richman, supra note 79, at 2062-73 (pointing to Alaska and New Jersey as successful examples and to the federal system as a possibly less successful example).

supervision. Requiring prosecutors to justify major decisions in writing, as Frase suggests, is the first step. Simply having to explain and justify one's decisions disciplines prosecutors, much as writing reasoned decisions disciplines judges. Furthermore, written documentation and recordkeeping enable supervisors to review or at least spot-check their subordinates' consistency with office policy, leading subordinates to self-police. Documentation also makes possible a system of informal appeals, allowing defense counsel to take their cases to supervisory prosecutors. Well-connected defense lawyers already informally influence prosecutors' decisions this way; procedural policies could regularize this avenue and guarantee less-connected defense counsel equal access.[192]

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[192] See Gerard F. Lynch, Our Administrative System of Criminal Justice, **66 Fordham L. Rev.** 2117, 2125-29, 2148-49 (1998) (describing how experienced defense lawyers already exert informal influences, at least in white-collar criminal cases, and proposing more formal review processes); cf. **Model Code of Pre-Arraignment Procedure** §§ 320.1, 350.3 (1975) (proposing that prosecutors take part in pre-charge screening conferences with appeal processes and promulgate plea bargaining guidelines and

For the most important decisions, such as whether to seek the death penalty, elaborate procedures, adversarial submissions, and review by a specialized panel can promote equality.[193] Significant but less momentous decisions may require review by the head prosecutor or a designated supervisor or committee. For example, U.S. Attorney's offices have policies that require review or approval for striking cooperation agreements and notifying courts of cooperation. Most U.S. Attorney's offices have written policies requiring approval by the U.S. Attorney, a supervisory assistant, a review committee, or some combination of these. Paper policies are not enough, however, if leaders do not expect and demand compliance. In practice, fewer than half of U.S. Attorney's offices comply fully with their own policies, and at least a dozen do not

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regulations "designed to afford similarly situated defendants equal opportunities for plea discussions and plea agreements").

[193] See Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 **Fordham Urb. L.J.** 347, 440-502 (1999)(describing workings of the U.S. Department of Justice's centralized Capital Case Review Committee and its internal procedures for authorizing federal prosecutors to seek death penalty).

comply at all.[194] Leaders must formulate clear policies, follow them consistently, ferret out and penalize violations, and reward compliance.[195] Though government audits can verify compliance, the pressure to comply must come from leaders who feel accountable to stakeholders.

Though centralized prosecutorial hierarchies may be better able and have more incentives to self-regulate, less centralized prosecutorial systems, such as New Orleans and Florida, have succeeded in self-regulation. And while judges can review

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[194] See **Linda Drazga Maxfield & John H. Kramer**, **U.S. Sentencing Comm'n, Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice** 7-8, 24 ex.2, 25 ex.3 (1998)(finding, in a mail survey, that 44.4 percent of districts reported that they consistently followed their policies, while 33.3 percent showed no consistency).

[195] See **Carter**, supra note 175, at 119-23 (describing widespread noncompliance with 150-page office manual in one county, in part because many policies were unclear, in part because superiors did not listen to and learn from subordinates, and in part because superiors did not do much to detect and penalize violations).

compliance with regulations, as Wright suggests, other pressures can work as well. Notably, the Florida example shows that publicizing enforcement policies and patterns can generate political pressure for internal consistency and reform. Legislative oversight and direct public pressure can spur improvement. Transparency, in other words, can help stakeholders to monitor prosecutors' performance and to push for more concrete policies. One could even go so far as to publish policy outlines and have candidates for district attorney compete on their enforcement priorities given fixed budgets and resources. Voters, not judges, would be the ultimate critics of prosecutors' priorities.[196] The New Orleans experience confirms that prosecutors' policies can become viable campaign issues, giving voters a clear choice.

D. Personnel Actions: Hiring, Firing, Promotion, Training

[196] See Misner, supra note 161, at 767-69 (recommending that prosecutors create a detailed local plan outlining their enforcement strategy, thus empowering voters to review and compare the prosecutorial strategies of the competing candidates).

Another institutional factor that has received almost no discussion in this context is personnel policy. Recruiting, hiring, training, retaining, and promoting the right people matter greatly, and successful organizations devote much thought and effort to these tasks.[197] If one hires tough, independent people, for example, a firm will develop a tough, independent culture.[198] This culture may be a mixed blessing; employees may be very self-directed but resistant to management and coordination. Replacing old managers with new ones from the healthiest, most successful units assists in changing cultures.[199] Empirical management literature emphasizes the need

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[197] See **Welch & Byrne**, supra note 157, at 383 ("Getting the right people in the right jobs is a lot more important than developing a strategy.").

[198] **Schein**, supra note 145, at 235.

[199] **Kotter & Heskett**, supra note 140, at 99 (reporting the importance of replacing managers and changing selection criteria in ten case studies of successful cultural change).

to hire and train employees who will embody and embrace the desired culture.[200]

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[200] The empirical management and organizational literature on person-organization fit is vast. See, e.g., Geoffrey N. Abbott et al., Linking Values and Organizational Commitment: A Correlational and Experimental Investigation in Two Organizations, 78 **J. Occupational & Organizational Psychol.** 531, 545, 549 (2005) (noting that employees whose values align with their employer's perceived values feel a greater commitment to the organization, which is particularly likely if the organization is courteous, cooperative, creative, and open); David E. Bowen et al., Hiring for the Organization, Not the Job, 5 **Acad. Mgmt. Exec.** 35, 36, 45-46 (1991)(emphasizing the importance of hiring the right employees and the benefits of hiring employees who fit the characteristics of a particular organization, which include better employee attitudes, performance, and organizational culture); Min-Ping Huang et al., Fitting in Organizational Values: The Mediating Role of Person-Organization Fit Between CEO Charismatic Leadership and Employee Outcomes, 26 **Int'l J. Manpower** 35, 44-46 (2005)(finding that both charismatic leadership and "person-organization values fit" improve work effort, satisfaction with leaders, and

The same steps work in prosecutors' offices. Some prosecutors' offices do nothing systematic to recruit, hire, or train particular kinds of talents.[201] Other offices, however, succeed in doing so. New district attorneys may consciously select assistants with particular traits in order to achieve certain goals. Some seek out aggressive assistants and move

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organizational commitment); Charles A. O'Reilly III et al., People and Organizational Culture: A Profile Comparison Approach to Assessing Person-Organization Fit, 34 **Acad. Mgmt. J.** 487, 509-12 (1991) (reporting that person-organization fit predicts job satisfaction, organizational commitment, and job turnover); Charles D. Stevens & Ronald A. Ash, Selecting Employees for Fit: Personality and Preferred Managerial Style, 13 **J. Managerial Issues** 500, 510-11 (2001) (showing that employee's agreeableness and openness to experience correlate with amenability to participatory management).

[201]See, e.g., **Carter,** supra note 175, at 135-38 (describing in detail a district attorney's office which had little clear hiring criteria apart from winnowing out bearded and physically repulsive candidates and which had no real training program).

away from part-time prosecutors.[202] Others make a point of hiring younger, more malleable assistants who are amenable to being trained and following office policy.[203] A district attorney who plans to delegate much power may hire independent-minded assistants who share his outlook.[204] District attorneys may install trusted confidantes as supervisors, strengthening their ability to implement central policy.[205] Or they may pick experienced trial attorneys with the credibility to evaluate

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[202]See, e.g., Flemming, supra note 115, at 29 (describing a prosecutor who "swept out the part-time staffers [and] handpicked new, aggressive assistants with crusader-like attitudes").

[203]See, e.g., id. at 43 (pointing to an office that altered its hiring practices to target newly minted attorneys instead of the skilled and experienced attorneys it had targeted in the past).

[204] See, e.g., id. at 45 (depicting a prosecutor who recruited attorneys who shared his "'conservative' philosophy" and let them work without extensive oversight).

[205] See, e.g., id. at 38-39 (noting that district attorneys often chose close friends as their deputies because of their loyalty).

cases and make plea-bargaining policies stick.[206] Getting rid of opposition is also important. One new district attorney laid down the law by firing an assistant on the spot for violating a rule against plea bargaining in drug cases.[207] This move sent a clear message that he was serious about changing business as usual. Other old-timers leave of their own accord when a new administration vigorously implements new priorities and rules.[208]

District attorneys can use these tools to promote other values as well. If prosecutors suffer from an excess of adversarial zeal and a notches-on-the-belt conviction mentality, personnel decisions could change that. Hiring could weed out prosecutors who believe that all defendants are guilty and defense lawyers wear black hats. For example, prosecutors' offices could require a minimum level of criminal defense

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[206] See, e.g., Wright & Miller, supra note 15, at 62-63 (highlighting the New Orleans District Attorney's Office, which gave experienced attorneys responsibility for screening and evaluating cases).

[207] Flemming, supra note 115, at 42-43.

[208] See, e.g., id. at 43 (pointing to a mass exodus in the wake of an administrative change).

experience for new prosecutors. If an across-the-board requirement is too broad, then district attorneys could require half or two-thirds of their new hires to have this experience. They could also require criminal defense experience for certain supervisors.[209] Doing so might transform the office culture from a battle of good versus evil into a more balanced view of the search for truth. Training exercises could reinforce this message, underscoring common causes of wrongful convictions and appropriate criteria for leniency.

Likewise, prosecutors may eventually become wedded to convicting defendants and less careful about presuming innocence and questioning evidence of guilt.[210] They may develop a black-

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[209] At least one prominent federal prosecutor's office already has such a requirement. Ellen Yaroshefsky, Cooperation with Federal Prosecutor: Experiences of Truth Telling and Embellishment, 68 **Fordham L. Rev.** 917, 964 (1999) (reporting that the chief of the criminal division of the U.S. Attorney's Office for the Southern District of New York must have experience as a defense lawyer).

[210] George T. Felkenes, The Prosecutor: A Look at Reality, 7 **Sw. U. L. Rev.** 98, 110-19 (1975) (reporting empirical evidence that many prosecutors, particularly more experienced prosecutors,

and-white view of the world and fail to see shades of gray.[211] In addition, empirical evidence shows that veteran prosecutors resist changes in office policy. They see themselves outlasting the current head prosecutor, they think they know what is best

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manifest "conviction psychology" and presume guilt, and that this psychology "may cause the prosecutor to ignore his quasi-judicial role"); Stanley Z. Fisher, In Search of the Virtuous Prosecutor: A Conceptual Framework, 15 **Am. J. Crim. L.** 197, 206 (1988) (noting that "conviction psychology" is a more powerful force than the pressure to be fair); Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 **BYU L. Rev.** 669, 690 (1992)(noting that "conviction psychology" makes it more difficult for prosecutors to protect innocent defendants).

[211] See Yaroshefsky, supra note 209, at 964 n.234 (quoting one former federal prosecutor as stating: "Career prosecutors are inevitably cynical about the human race. . . . [S]omeone who has been a defense lawyer gets to see the person and is aware of the complexities and motivations, the ambiguities of acts and sees things from a different tactical perspective.").

for the office, and they are less eager to invest extra work.[212] Over the last three decades, careerism has grown into a problem, at least at the federal level.[213] A radical solution would be Great Britain's, which requires barristers to alternate

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[212] Todd Lochner, Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants, 23 **Just. Sys. J.** 271, 282, 285-88 (2002)(finding an overall increase in the number of prosecutors who choose to work in a U.S. Attorney's Office as a career, and noting that career prosecutors are less motivated, take "easier" cases, and often resist changes within the prosecutor's office.

[213] Id. at 281-83 & tbl.2 (noting that median tenure of Assistant U.S. Attorneys has increased from three to eight years and that annual turnover rate has dropped from 6% to 2%, and describing careerism as "[t]he number-one problem facing the federal prosecutorial system today inasmuch as this careerism made it more difficult for U.S. attorneys or the [D]epartment [of Justice] to set prosecutorial agendas."). It is not clear whether this problem exists at the state level, as salaries and benefits are not as generous there. Federal civil-service protections also contribute to the problem. Id. at 283-84.

prosecuting and defending cases and so prevents prosecutors from developing a conviction mentality and careerist mindset.[214] Less radical measures might also work. For example, one could require prosecutors to spend a month each year defending criminal cases so that they learn to see things from the other side's perspective.[215] Another possibility is term limits for line prosecutors, requiring that after six years in office, prosecutors rotate out into a criminal defense job for a while before being eligible to rotate back into the prosecutor's office. Offering no or scanty retirement plans and capping

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[214] Bennett L. Gershman, The New Prosecutors, 53 **U. Pitt. L. Rev.** 393, 456 (1992); Gordon Van Kessel, Adversary Excesses in the American Criminal Trial, 67 **Notre Dame L. Rev.** 403, 446-47 (1992).

[215] Cf. Gershman, supra note 214, at 457-58 (suggesting that prosecutors and public defenders swap places for one year). Recognizing that conflicts of interest might pose a problem, these temporary defenders would, ideally, defend cases in a nearby jurisdiction or at a different level (state or federal). Failing that, perhaps ethics rules could allow them to defend crimes of a sort different from those handled by their departments.

raises for seniority would reinforce pressures to rotate out after four or five years.[216] This rotation in office, so valued by the Founding generation,[217] would prevent one-sided institutional attitudes and careerist incentives from hardening.

E. Information, Evaluations, and Incentives

Information matters not only to voters, as Section II.A suggested, but also to leaders and managers. Successful, effective firms help information to flow up, down, and sideways throughout the organization. Leaders must be able to learn from their subordinates' knowledge and perspective and to communicate priorities and policies to them. To do this, successful leaders

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[216] See **Edward E. Lawler, III, Strategic Pay** 207 (1990) (noting that entrepreneurial organizations put much of their compensation at risk with programs such as pay-for-performance schemes, and that Apple Computer has no retirement plan because it does not want to attract security-oriented employees).

[217] Cf. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 **Yale L.J.** 1131, 1189 (1991)(finding that mandatory rotation is central to an effective jury system and that some of the Founding Fathers also supported mandatory rotation for legislators).

regularly listen to and speak with subordinates and eliminate filters that block information.[218] Managers should discuss and sell proposed changes throughout the organization, which engenders feedback and forces them to respond to knowledgeable criticism.[219] Anonymous internet surveys elicit candid responses from employees, forcing management to improve its own performance and initiatives.[220] Even the physical layout of an office can promote or hinder information flow. Open office layouts, glass doors, kitchens, and eating areas foster informal communication.[221]

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[218] See, e.g., **Lowe**, supra note 172, at 83-86 (General Electric).

[219] See, e.g., **Sloan**, supra note 157, at 433-34 (describing the advantages of the General Motors system, which requires division managers to sell new ideas to central management).

[220] See, e.g., **Welch & Byrne**, supra note 157, at 393-94 (describing anonymous online surveys at General Electric SB: You had General Motors, but I presume that was a typo; check).

[221] See, e.g., **Schein**, supra note 145, at 240-41 (contrasting two different office layouts that foster communication and privacy, respectively, and noting that layouts often reveal how leaders manage relationships, acquire information, and carry out tasks);

Many prosecutors' offices violate these principles. Some lack feedback loops, so line prosecutors who err at an early stage of a case may never see errors come to fruition later in the case, under another prosecutor.[222] Others are stuck with antiquated computers that hinder tracking cases and case-processing statistics. Thus, for example, prosecutors may not be aware of how their colleagues are using and rewarding cooperating witnesses.[223] Some supervisors are unsociable, insular and make little effort to listen to and learn from

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Robert J. Grossman, Offices vs. Open Space, **HR Mag.**, Sept. 2002, at 36, 38 (reporting that each of CommonHealth's buildings has an atrium with a kitchen, bistro-style cafeteria, coffee bar, or similar area to encourage workers to congregate, interact informally, and generate ideas collaboratively).

[222] See, e.g., **Carter**, supra note 175, at 129-30.

[223] Melanie D. Wilson, Prosecutors "Doing Justice" Through Osmosis–Reminders to Encourage a Culture of Cooperation, 45 **Am. Crim. L. Rev.** 67, 106 (2008) (noting an "inexcusable . . . dearth of information, communication and conversation" about how to use cooperatoring witnesses effectively within U.S. Department of Justice).

colleagues and adversaries.[224] Prosecutors are sometimes scattered across various offices or buildings and may lack water coolers or cafés where they can congregate and talk.[225]

Good information helps managers to formulate and critique policies. As noted earlier, it helps them to communicate and document the need for change.[226] It creates benchmarks that

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[224] See, e.g., **Carter**, supra note 175, at 49-56 (describing the conduct of a "formalist" manager who struggles to build social relationships with fellow attorneys and to address the human aspects of working as a prosecutor).

[225] See, e.g., **Nardulli et al.**, supra note 150, at 142 (describing the difficulty of collecting and distributing information in a decentralized court community where line prosecutors and head prosecutors have separate office areas); cf., **Carter**, supra note 175, at 53 (discussing the importance of lunchtime conversations about office problems and how a supervisor who regularly ate lunch at his desk isolated himself from this source of information).

[226] See supra note 153 and accompanying text (discussing how effective managers marshal data to demonstrate the need for reforms).

facilitate consistency and equality, creating focal points for decisions in keeping with colleagues' past decisions. For example, data may guide and harmonize prosecutors' decisions about declinations, cooperators, plea bargains, et cetera. Prosecutors guided by data and benchmarks may be less likely to fall back on race and class biases. Computerized data collection and analysis can measure patterns of race-neutral case processing and disparities due to defense lawyering. Head prosecutors and outsiders are better able to review systemic patterns than individual decisions. Making this data available to head prosecutors, legislatures, litigants, and voters can create feedback loops and new metrics for prosecutorial success.[227]

Information also illumines personnel decisions. Frequent performance evaluations and appraisals help to reward, retain,

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[227] See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 **Iowa L. Rev.** (forthcoming 2008) (manuscript at 47-55) (noting that information technology can greatly improve both internal transparency--information-sharing within prosecutors' offices--and external transparency--opening prosecutorial performance to scrutiny and criticism by litigants and legislatures).

and educate top performers.[228] Identifying and culling the weakest performers, as well as those who resist the desired office culture, improves performance. General Electric goes so far as to fire the bottom 10% of its employees each year, in an effort to keep improving its workforce.[229] For this system to work well, the organization must develop a culture that prizes openness and candid feedback.[230] If an office is unable or unwilling to fire its bottom performers, perhaps because of

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[228] **Welch & Byrne**, supra note 157, at 158-68 (describing General Electric's system of annually rating the top 20%, middle 70%, and bottom 10% of employees, rewarding top performers generously to retain them, and firing poor performers).

[229] See id. at 158-67, 387 ("From my first days, I thought [ranking] was the key to building a great organization. . . . [W]e used it relentlessly to push leaders to continually upgrade their teams. Year after year, forcing managers to weed out their worst performers was the best antidote for bureaucracy."). See also id. at 389 (reporting the importance of firing employees who resisted the new company's culture after a merger).

[230] Id. at 162.

civil-service protections, it should pay them poorly so that they leave on their own.[231]

I have already discussed how performance evaluations by other prosecutors, defense counsel, judges, victims, and jurors could discipline head prosecutors.[232] The same tools could effectively influence line prosecutors. First, performance evaluations would educate prosecutors, creating a valuable feedback loop that could be coupled with training exercises to improve deficiencies. Second, they would reward the best prosecutors and practices, increasing their incentives to stay and to invest in their work. Third, they would help to improve the quality of prosecutors, weeding out those whose skills, ethics, or diligence are questionable.

Incentive pay systems are an important tool for rewarding and encouraging performance in the corporate world.[233] The same

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[231] See **Lawler**, supra note 216, at 25 (describing poor performers' dissatisfaction with pay as desirable catalyst of turnover).

[232] See supra notes 117-119 and accompanying text.

[233] See, e.g., **Sloan**, supra note 157, at 407-28 (discussing the details of General Motors bonus plan); **Welch & Byrne**, supra note

idea might work for prosecutors. Tracey Meares has proposed combating prosecutorial overcharging by financially rewarding prosecutors whose initial charges closely match the charges of conviction. She also proposes financial incentives to penalize prosecutors who engage in misconduct at trial.[234] While the idea is promising in theory, it is probably unworkable in practice. Sizable monetary rewards for particular statistics could lead prosecutors to undercharge rather than overcharge and to plea bargain to avoid losing rewards for ethical misconduct.[235] These difficulties exemplify a broader problem with many incentive-pay schemes. Reward systems tend to overemphasize and breed objective, quantifiable, highly visible successes at the expense

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157, at 159-60 (discussing how General Electric's reward system of raises, stock options, and promotions aids retention of top performers and encourages average performers to improve).

[234] Meares, supra note 79, at 873-77, 901-02.

[235] Cf. id. at 884-87, 916-17 (noting the danger that prosecutors could undercharge to earn rewards but suggesting that other mechanisms could counteract these dangers and that financial rewards could nevertheless work).

of other important values.[236] When head prosecutors set performance goals, they tend to emphasize quantitative statistics that are manipulable and inflatable, such as conviction statistics.[237]

Performance evaluations by fellow prosecutors, defense counsel, defendants, judges, jurors, and victims might be a

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[236] See Steven Kerr, On the Folly of Rewarding A, While Hoping for B, 18 **Acad. Mgmt. J.** 769, 775 (1975)(citing sports and business examples in which coaches or managers reward quantifiable achievements but neglect to reward intangibles). See also **Welch & Byrne**, supra note 157, at 387 (describing a General Electric sales contest that produced enormous sales but no profit margin: "That's the simplest example of a universal problem: What you measure is what you get--what you reward is what you get.").

[237] Cf. **Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Services** 167, 233 n.10 (1980) (noting that when incentive pay rewarded Washington, D.C. police officers for reducing crime, officers manipulated statistics by misreporting burglaries as larcenies or under-reporting the dollar values involved).

sturdier foundation for an incentive-pay system. The beauty of performance evaluations is that they can aggregate feedback that is scattered in the minds of hundreds of observers. This quantitative and qualitative collective evaluation would be far more subtle, reliable, and resistant to manipulation than a single statistic. Peer groups, for example, have better collective information and better collective judgment than individual supervisors alone.[238] Peer evaluations can improve performance over time and can gradually articulate criteria of success more subtle than those laid down in rules from on high.[239] Computers could help to track, recognize, and reward

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[238] See **Lawler**, supra note 216, at 80-81 (noting that peer-awarded bonus schemes are promising: Xerox and Wells Fargo, for example, let employees give other employees $25 or $35 awards for excellence or helpfulness).

[239] See Peter A. Bamberger et al., Peer Assessment, Individual Performance, and Contribution to Group Processes: The Impact of Rater Anonymity, 30 **Group & Org. Mgmt.** 344, 365, 367-68 (2005) (reporting empirical evidence that peer evaluation, particularly non-anonymous peer evaluation, improved managers' ratings of subordinates' performance and attitudes); Lior Jacob Strahilevitz, "How's My Driving" for Everyone (and Everything?),

top performers. One would still have to figure out how to weight each constituency's appraisal and how much to reward. Experimentation would be necessary. Nevertheless, annual bonuses based on these evaluations are far preferable to raises based simply on seniority or manipulable conviction statistics.[240] Publicized, positive recognition for individuals and groups of prosecutors who perform well would underscore the message.[241]

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81 **N.Y.U. L. Rev.** 1699 (2006) (discussing how decentralized peer evaluations can develop norms over time, resulting in assessments that are more subtle, contextualized, and accurate than police can achieve with spot checks of compliance with handful of clear rules).

[240] See **Lawler**, supra note 216, at 82-83 (explaining that bonuses reward and encourage current performance, while base-pay raises may reward past performers even if they are no longer performing well).

[241] See id. at 84 (noting the importance of evaluating group and team performance and giving special awards for exceptional individual performance); id. at 125 (noting the symbolic and

CONCLUSION

Though prosecutors share many of the community's values, they face strong temptations to shirk, indulge risk-aversion, and be selectively lenient. These hidden, poorly supervised individual decisions may result in patterns that look arbitrary, discriminatory, or skewed toward clients of highly paid, well-connected defense counsel. Some prosecutorial discretion is necessary and desirable, but it need not be so self-interested and unstructured.

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communicative benefits of paying everyone for the performance of the organization as a whole); **James W. Fairfield-Sonn, Corporate Culture and the Quality Organization** 155-56 (2001) (reporting that quality organizations tend to focus on building and rewarding successful cultures by rewarding customer service that achieves long-term goals, rewarding group efforts, and using public, positive recognition to spur continual improvement).

Conventional external regulation has failed to guide prosecutors. It cannot work well because outsiders lack the information, capacity, and day-to-day oversight to structure patterns of decisions. Ex ante rules cannot forecast all possible cases, and ex post case-by-case review is too ad hoc to see the forest for the trees. Rather, prosecutors' offices could learn from corporations. Victims, defendants, and the public could better discipline head prosecutors if they had more information and participation. Head prosecutors could then use more internal tools to regulate line prosecutors. Accountability and institutional design, in short, are more promising reforms than external regulation.

I do not mean to suggest that prosecutors' offices are exactly analogous to corporations. Prosecutors' offices have broader duties to do justice, which includes freeing the innocent and showing mercy to sympathetic guilty defendants. They also operate under rules that reduce flexibility, such as civil-service statutes, as well as political patronage pressures. Corporations strive primarily to maximize profits. Yet successful corporations recognize duties to broader stakeholder constituencies, and their cultures prize integrity

and ethical conduct. Emulating these corporations might reinforce prosecutors' sense of mission to do justice.

The broader lesson is that criminal procedure should focus less on precise statutory and judicial standards and more on institutional design. Telling a prosecutor to behave ethically and consistently is far less fruitful than creating an environment that expects, monitors, and rewards ethical, consistent behavior.