

How Prosecutor Elections Fail Us

Ronald F. Wright*

I. INTRODUCTION

When government officials have discretion, the rule of law also requires that they be accountable. This ideal carries even into the world of criminal justice, where the individual prosecutor's power dominates the scene. We hope that every exercise of prosecutorial discretion takes place within a framework of prosecutorial accountability.¹

There are several methods for holding prosecutors accountable in this country. Judges enforce a few legal boundaries on the work of prosecutors, and legislatures sometimes have their say about criminal law enforcement. Prosecutors with positions lower in the office or department hierarchy must answer to those at the top. As licensed attorneys, prosecutors must answer to the bar authorities in their states. But none of these controls binds a prosecutor too tightly. At the end of the day, the public guards against abusive prosecutors through direct democratic control. In the United States, we typically hold prosecutors accountable for their discretionary choices by asking the lead prosecutor to stand for election from time to time.

This is not true in most places around the globe. In the various civil law systems in other countries, the idea of electing prosecutors is jarring. In the civil law depiction of the public prosecutor's job, training and experience hold criminal prosecutors accountable to public values and legal standards. Prosecutors in a civil law tradition perform a ministerial function as they progress through a career-long bureaucratic journey. He or she simply assembles and evaluates the available evidence; if that evidence meets the relevant standard of proof to support a conviction for each element of a crime, the prosecutor has the duty to initiate a prosecution. This lawyerly evaluation—nothing more and nothing less—constitutes the prosecutor's job.²

* Professor of Law and Associate Dean for Academic Affairs, Wake Forest University School of Law. I owe thanks to Sara Beale and the other participants in the Ohio State symposium on prosecutorial discretion, including Doug Berman, Stephanos Bibas, Darryl Brown, Sharon Davies, Bruce Green, Alan Michaels, Robert Mosteller, and Ellen Yaroshefsky. Wayne Logan and Marc Miller provided their usual perceptive comments as readers. I also appreciate the excellent research assistance of Jeff Kuykendall, Daniel Moebis, and Joanna Wright.

¹ Cf. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (relational theory of common law rights, defining rights of some in terms of duties owed by others).

² See generally Yue Ma, *A Comparative View of Judicial Supervision of Prosecutorial Discretion*, 44 CRIM. LAW BULL. 31 (2008); William T. Pizzi, *Understanding Prosecutorial*

Consider the rhetoric of the civil law system. The Italian Constitution limits prosecutors to the “initiation” of criminal proceedings, whenever supported by adequate evidence.³ Obviously, the reality of prosecutorial power in civil law traditions is complex, and it interacts with a proactive vision of the judicial role. But the rhetoric that depicts the prosecutor as a ministerial figure lowers the stakes and treats prosecutorial discretion as a modest problem.

Contrast this tradition of ministerial restraint to the celebration of open-ended power that runs through the rhetoric about American prosecutors. For instance, the American Bar Association’s Standards for Criminal Justice tell us that the prosecutor “may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.”⁴ When a single governmental official holds this much power, the methods available for checking the work of that official deserve our close attention.

Does the democratic check on prosecutors work? There are reasons to believe that elections could lead prosecutors to apply the criminal law according to public priorities and values. Voters choose their prosecutors at the local level, and they care enough about criminal law enforcement to monitor the work of an incumbent. The conditions, in some ways, are promising.

Yet the reality of prosecutor elections is not so encouraging. A national sample of outcomes in prosecutor elections—described here for the first time—reveals that incumbents do not lose often. The principal reason is that challengers do not come forward very often, far less often than challengers in state legislative elections. Uncontested elections short-circuit the opportunities for voters to learn about the incumbent’s performance in office and to make an informed judgment about the quality of criminal enforcement in their district.

Even in those exceptional campaign settings when the incumbent prosecutor faces a challenge and is forced to explain the priorities and performance of the office, elections do not perform well. The themes that incumbents and challengers invoke in their campaign speeches represent a lost opportunity to judge whether the prosecutor has applied the criminal law according to public values.

This article surveys the typical rhetoric in prosecutor election campaigns, drawing on a new database that collects news accounts of candidate statements during prosecutor elections. Those statements reflect the candidates’ claims about how voters should evaluate the work of a chief prosecutor. Sadly, these campaign statements dwell on outcomes in a few high visibility cases, such as botched murder trials and public corruption investigations. Incumbents and challengers have little to say about the overall pattern of outcomes that attorneys in the office

Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 OHIO ST. L.J. 1325 (1993).

³ COSTITUZIONE [Constitution] art. 112 (Italy).

⁴ A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9(b) (3d ed. 1993).

produce or the priorities of the office. The debates do not pick up genuine ideological differences among candidates; they are misguided attempts to measure non-ideological competence.

In sum, prosecutor elections fail for two reasons. First, they do not often force an incumbent to give any public explanation at all for the priorities and practices of the office. Second, even when incumbents do face challenges, the candidates talk more about particular past cases than about the larger patterns and values reflected in local criminal justice.

In the concluding section of this article, I consider briefly a few possible responses to these failures of prosecutor elections. One strategy might strengthen elections themselves, either by improving the quality of information available to voters or by aligning voter incentives at the state and local levels. Another strategy would promote alternatives to election campaigns, by expanding the occasions when prosecutors would reveal and explain their structural choices to the public—not waiting for new elections every four years.

In combination, these reforms offer some hope for holding prosecutors to account. Better evaluations by the voters will not succeed alone, but they can work alongside other external controls to encourage prosecutions in line with public values.

II. DEMOCRATIC ACCOUNTABILITY OF PROSECUTORS

Many actors get involved in criminal law enforcement, and the public uses a mix of devices to control those actors. Take the police, for example. There was a time when political patronage systems built into local government controlled the work of police, with some peripheral support from tort doctrines and state procedural rules.⁵ Over time, however, legal doctrine and legal institutions became more important in the effort to hold the police accountable for their choices. In the latter half of the twentieth century, the federal constitution became a more potent source of limits on the police, and other legal doctrines and legal institutions reinforced the trend.⁶ Today, limits on the work of police officers derive from the federal constitution, state constitutions, statutes, ordinances, judicial rules of criminal procedure, internal departmental regulations, and various other legal sources.⁷ Electoral accountability still matters in the work of the police; sheriffs are typically elected, and police chiefs are among the most visible and important

⁵ See George L. Kelling & Mark H. Moore, *From Political to Reform to Community: The Evolving Strategy of Police*, in COMMUNITY POLICING: RHETORIC OR REALITY 5 (Jack R. Greene & Stephen D. Mastrofski eds., 1991).

⁶ See Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411 (2002); Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429 (2002).

⁷ See generally MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS (3d ed. 2007); Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789 (2003) (book review).

appointments of local elected officials.⁸ Over the last half century, however, the relative importance of legal controls on the police has increased.

A blend of legal and electoral controls also works on judges. State court judges face constitutional limits—founded on separation of powers principles—along with statutory limits on their pre-trial and trial rulings. Procedural rules guide many of their choices before conviction, and sentencing guidelines or statutes channel their traditional discretion in selecting the sanction.⁹ Again, electoral controls are also relevant for judges: they are elected in many jurisdictions, and elsewhere they are appointed by elected officials.¹⁰ Still, the legal controls at work on judges are vigorous, and the debates about electoral controls ask whether even a residual electoral check on judges is worth keeping.¹¹

In short, limits based on positive law have moved to the center of our efforts to control the work of police and judges. The positive law strategy has been less successful, however, with prosecutors. The legal controls over criminal prosecutors are relatively weak, and over the long run, we do not seem to be moving toward more vigorous legal limits. By default, more of the work of accountability for prosecutors must come from the voters.

In this section, I offer a quick tour of the legal sources of accountability for prosecutors, stressing their limited reach.¹² I then turn to elections, detailing some of the theoretical promise of this technique to align criminal law enforcement with public values.

⁸ See David N. Falcone & L. Edward Wells, *The County Sheriff as a Distinctive Policing Modality*, 14 AM. J. POLICE 123 (1995); Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 15 CRIME & JUST. 51 (1992).

⁹ See David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196 (1995); Jennifer Earl, *The Process is the Punishment: Thirty Years Later*, 33 LAW & SOC. INQUIRY 737, 762 (2008); David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 51 (2008).

¹⁰ See DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, BUREAU OF JUST. STAT., STATE COURT ORGANIZATION 2004 (2006).

¹¹ See Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107 (2007); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004).

¹² For more complete reviews of the limited strategies for control of prosecutor discretion, see ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155 (2005).

A. Limited Legal Sources of Accountability

The power of the state to punish for crimes is profound, and the prosecutor directs this awesome power. How might “We the People” control the choices of such a pivotal public servant?

The most obvious choice involves a parsimonious criminal code. If the legislature defines crimes narrowly and sets penalties at modest levels, it confines the power of the prosecutor to misuse the criminal sanction. Less power available means less power to abuse.

This technique, however, does not flourish in the American political climate. Voters expect prosecutors to take the lead in addressing crime, and they expect legislators to give them the legal tools to do the job. Legislatures do exactly that.¹³ Just as the U.S. Congress passes statutes that set workplace safety standards in broad terms and empowers the Occupational Safety and Health Administration to enforce those standards and give them specific meaning,¹⁴ legislatures do much the same with prosecutors. They pass criminal statutes, create prosecuting agencies, authorize them to enforce and give more detailed meaning to the criminal laws, and appropriate their annual budgets.

Instead of confining the work of prosecutors, criminal codes add to their power. As the years pass, the legislature expands the legal tools available to prosecutors. Criminal codes tend to cover more behavior and increase the range of punishments that could attach to conduct that is already declared criminal.¹⁵

It would be an overstatement to say that legislation always expands the reach and impact of the criminal code. In settings where the criminal law regulates business practices, or where the pool of potential criminal defendants is already well-organized, legislatures do sometimes repeal criminal statutes.¹⁶ Legislatures also seem willing to restrict the punishments available for crimes or the investigative tools available to law enforcement; perhaps they economize in these areas more often than they tighten up the criminal code.¹⁷

Nevertheless, it is fair to say that criminal codes do not limit the choices of prosecutors in the United States in the same way that codes limit the power of

¹³ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005); Sara Sun Beale, Essay, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641 (2002).

¹⁴ See THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* (1993).

¹⁵ William Stuntz put it this way: “The definition of crimes and defenses . . . empower[s] prosecutors, who are the criminal justice system’s real lawmakers. Anyone who reads criminal codes in search of a picture of what conduct leads to a prison term . . . will be seriously misled.” William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–07 (2001).

¹⁶ See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007).

¹⁷ See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004). Think in particular of the reporting requirements connected with wiretapping authority.

prosecutors elsewhere in the world, in civil law systems. Criminal codes here do not solve the problem of uncontrolled use of state power by a government official. They embody that problem.¹⁸

Since legislators do not constrain prosecutors through the terms of the substantive criminal law, they might hold them accountable through other techniques. The state budget might include line items that fund extra prosecutors to pursue designated crimes, such as child sex offenses, that the legislature hopes to give a higher priority.¹⁹ Similarly, legislation might create within the Department of Justice a sub-unit devoted to a particular law enforcement activity, such as firearms prosecution or asset forfeiture.²⁰ Appropriations that target particular categories of prosecutions and laws that structure justice agencies have some effects on the prosecutor's work.

In a few exceptional areas, the legislature attempts to compel the prosecutor to file more charges. A few mandatory sentencing laws, such as the drug trafficking laws in New York, purport to mandate prosecution when the available evidence is strong enough.²¹ Some jurisdictions have laws that encourage or mandate charges for domestic violence crimes.²²

While these legislative directives can be meaningful, their current impact is small. Budgetary line items that direct prosecutors to devote resources to one type of crime rather than another are still exceptional. Most of the funding that arrives in the prosecutor's office does not have strings attached; the chief prosecutor can allocate the funding to meet local priorities.²³ When the legislature designates funds to beef up certain types of enforcement, the prosecutor can redirect some other generic funds formerly devoted to that type of case. As for the unusual "mandatory charge" or "no drop" laws, they still leave it to the prosecutor to determine whether the minimum factual basis for the charge is provable in a given case.²⁴

¹⁸ See Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: A Reply to Comments*, in CRIMINAL LAW CONVERSATIONS (Paul Robinson, Kimberly Ferzan & Steven Garvey eds., forthcoming 2009). Some academics, including Paul Robinson and Michael Cahill, have not quite given up hope for code reform, but they certainly recognize the miles of twisted road lying ahead. See Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000).

¹⁹ See Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005).

²⁰ See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369 (2001).

²¹ See Jacqueline Cohen & Michael H. Tonry, *Sentencing Reforms and Their Impacts*, in RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 305, 348-49 (Alfred Blumstein et al. eds., 1983) (evaluating New York mandatory minimum penalty laws).

²² See MILLER & WRIGHT, *supra* note 7, at 890-96.

²³ See KRISTEN A. HUGHES, BUREAU OF JUST. STAT., JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (2006).

²⁴ See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

On the whole, then, legislatures in the United States do not effectively control the exercise of power by prosecutors. Legislatures show more interest in monitoring and limiting other executive branch agencies, such as health and safety regulators. The criminal enforcement bureaucracy gets regular funding, occasional increases in its statutory authority, and little ongoing accountability to explain enforcement priorities or decisions in particular cases.²⁵

Judges also refuse, for the most part, to assume the responsibility for monitoring and controlling the work of criminal prosecutors. When defendants invite judges to override prosecutor choices about the selection or pre-trial disposition of charges, judges view those requests through the lens of the separation of powers doctrine. Such choices are seen as quintessential executive choices.²⁶ The judge only insists that the charges have some minimal factual support in the available evidence. The judge does not evaluate the prosecutor's decision to decline prosecution and has nothing to say at all about the relative priorities on display in the mix of cases that a prosecutor files.²⁷

Granted, judges do have the statutory authority in many jurisdictions to approve the dismissal of charges after the police or prosecutor files them.²⁸ Even more important, judges hold the power to accept or reject guilty pleas, along with the plea agreements that the parties present to them.²⁹ These judicial powers, however, operate within a system of mass justice. The judge knows less about the alleged crime and the defendant's background than the parties know, so the judge only rarely overrides the recommendations of the parties. The caseload would become overwhelming if judges balked regularly at proposals to remove a case from the trial docket.

Separation of powers concerns, together with the exigencies of high-volume criminal courts, work together to block judges from becoming an important limit on prosecutorial discretion. Judges stand ready to catch the extreme outliers,³⁰ but they do not get involved in the smaller and more common errors of prosecutorial judgment.

The legal profession regulates its own members. Thus, the rules of professional responsibility as enforced by state licensing authorities are also a potential source of limits on the choices of prosecutors. Again, however, we get

²⁵ Cf. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1021 (2006) (noting the differential application of separation of powers doctrine to criminal enforcement bureaucracies and to other administrative agencies).

²⁶ As Judge Gerard Lynch famously phrased it, we now operate an "administrative" criminal justice system, where the important decisions typically happen in charging and plea negotiations, before the case ever makes it to trial. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

²⁷ See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

²⁸ See MILLER & WRIGHT, *supra* note 7, at 909.

²⁹ *Id.* at 1161–86; Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055 (2006).

³⁰ See *United States v. Armstrong*, 517 U.S. 456 (1996).

limited accountability from these regulators.³¹ Scholars have searched for evidence that prosecutors are disciplined on a regular basis and have found few such disciplinary proceedings and all with light punishments attached.³²

If these legal institutions *outside* the prosecutor's office do not meet the need for controls over prosecutor decisions, what are the prospects for *internal* regulation? That is, what forces within the prosecutor's office might produce decisions that remain true to declared sources of law, in keeping with current public priorities in the enforcement of that law, applied with reasonable consistency across cases? Some legal scholars are now exploring the capacity of chief prosecutors to promote consistent choices, guided by legal values and professional traditions, among the line prosecutors in their offices.³³

While there is much promise in the power of chief prosecutors to hold their line prosecutors accountable, the source and motives of the chief prosecutor's choices are still mysterious. To some extent, we rely on the chief prosecutor's professional conscience: the prosecutor must remain individually committed to the ideal of responsible prosecution. Our most beloved descriptions of the job speak to the importance of a prosecutor doing the job well without any prompting from the outside. The prosecutor "may strike hard blows" but "is not at liberty to strike foul ones."³⁴ Such familiar quotes speak to the professional integrity of prosecutors as individuals, not the institutional constraints on their work.³⁵

With so much depending on the choices of the chief prosecutor and the way she enforces those choices in her office, it would be prudent to consider the forces that shape the individual choices of that chief prosecutor. As we have seen, there are no robust limiting forces that come from the legislature, judges, or state licensing authorities. Instead, in the United States, we rely on elections to keep the chief prosecutor within bounds that the public can accept.

³¹ See R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635 (2006). The recent proceedings involving North Carolina prosecutor Mike Nifong are exceptional. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure To "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007).

³² See Fred C. Zacharias, *The Professional Discipline of Prosecutors,* 79 N.C. L. REV. 721, 725-43 (2001); Bruce A. Green, *Prosecutorial Ethics as Usual,* 2003 U. ILL. L. REV. 1573.

³³ See Miller & Wright, *supra* note 27; Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions,* 68 FORDHAM L. REV. 1511 (2000); Richman, *supra* note 29, at 2055-57; Jeffery T. Ulmer & John H. Kramer, *The Use and Transformation of Formal Decision-Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing Strategies,* 45 SOC. PROBS. 248, 262-65 (1998); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff,* 55 STAN. L. REV. 29 (2002).

³⁴ *Berger v. United States,* 295 U.S. 78, 88 (1935).

³⁵ *Cf.* Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors,* 91 MARQ. L. REV. 9 (2007) (contrasting theories of prosecution that stress individual choices with theories that stress institutional contexts).

B. Localized Accountability

The American people elect their prosecutors directly. These are the big guns of democratic legitimacy; in theory, elections can control the prosecutors' actions, keeping them consistent with public values without resorting to detailed and prospective legal rules.

Chief prosecutors in the federal criminal justice system—the ninety-three United States Attorneys—are appointed, but prosecutors in the much higher-volume state systems are typically elected. All but three states elect their prosecutors at the local level. Even in the three outliers (Alaska, Connecticut, and New Jersey), the elected state attorney general appoints the chief prosecutors at the local level. About eighty-five percent of the prosecutors in the state system are elected to four-year terms.³⁶

Note that democratic control of prosecutors takes its most powerful form: local control. Many prosecutors are elected on a county-wide basis while many others serve districts that only serve a few counties. The local prosecutor remains close to the community, where democratic accountability is thought to be strongest.³⁷ This tight connection between the criminal prosecutor and the local voters grew out of the Jacksonian period, with its emphasis on placing the daily work of governance into the hands of citizens.³⁸

Local prosecutor elections create a radically decentralized criminal justice system. There are 2,344 separate prosecutor's offices in the state criminal systems of this country.³⁹ While the budgets for state prosecutors' offices depend largely on state funds in some states,⁴⁰ the ultimate political authority for spending that budget rests with the chief prosecutor who answers only to the local voters. The local District Attorney does not report up to any statewide hierarchy (such as the state Department of Justice) when setting priorities and practices of the office.⁴¹

Despite the heavy weight we place on election of prosecutors to assure the legitimacy of their work, there is remarkably little empirical study of prosecutor

³⁶ STEVEN W. PERRY, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2005, at 3 (2006).

³⁷ See Harry Blair, *Participation and Accountability at the Periphery: Democratic Local Governance in Six Countries*, 28 WORLD DEV. 21 (2000); Stuti Khemani, *Decentralization and Accountability: Are Voters More Vigilant in Local than in National Elections?*, (World Bank Pol'y Research, Working Paper No. 2557, 1981), available at <http://ssrn.com/abstract=632624>.

³⁸ See Joan E. Jacoby, *The American Prosecutor: From Appointive to Elective Status*, THE PROSECUTOR, Sept.–Oct. 1997, at 25.

³⁹ See Perry, *supra* note 36.

⁴⁰ See BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2003, at 5 (2005).

⁴¹ See MILLER & WRIGHT, *supra* note 7, at 894. District Attorneys often have the authority to request expert assistance from the state Attorney General, or to request that the Attorney General assume control over a case when a conflict of interest arises. But the baseline remains local control over individual cases and office priorities.

elections, whether by legal academics, political scientists, economists, or other social scientists. There are nuanced accounts of presidential elections and national legislative elections, exploring both theoretical and empirical aspects of elections as a method of controlling government priorities and actions.⁴² At the statewide level, there are rich accounts of gubernatorial election campaigns and theories to explain the pattern of results found in those elections.⁴³ The same applies to state legislative elections. Further, there are some empirical studies of judicial elections.⁴⁴

Yet when it comes to the prosecutor, one of the most ubiquitous and powerful figures to appear regularly on the ballot, we rely most on anecdotes.⁴⁵ Scholars have begun to construct theoretical accounts of the likely effects of elections on prosecutor behavior, but these theories so far have developed without much of an empirical basis.⁴⁶ It will require more than anecdotes and untested theories to explain how those elections might operate differently from others.

C. *The Promise of Local Control*

Given the poor prospects for legal controls on prosecutors, the system of voter accountability—by default—carries many of our hopes for controlling prosecutors. How well do elections hold chief prosecutors accountable to public values?

There are reasons to be hopeful. Prosecutors deal with a limited range of public policy questions: those dealing with crime. Unlike presidents, governors,

⁴² See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 2004); Ray C. Fair, *Econometrics and Presidential Elections*, 10 J. ECON. PERSP. 89 (1996).

⁴³ See David Breaux, *Specifying the Impact of Incumbency on State Legislative Elections: A District-Level Analysis*, 18 AM. POL. Q. 270 (1990); Gary W. Cox & Scott Morganstern, *The Increasing Advantage of Incumbency in the U.S. States*, 18 LEGIS. STUD. Q. 495 (1993).

⁴⁴ The scholarly treatment is richer for the highest level of state appellate courts than for elected trial judges. See Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337 (2003).

⁴⁵ For one of the few examples of empirical examinations of prosecutor elections, see Gerard A. Rainville, *Differing Incentives of Appointed and Elected Prosecutors and the Relationship Between Prosecutor Policy and Votes in Local Elections* (Dec. 3, 2002) (Ph.D. dissertation, American University) (on file with American University Library). A survey of related work appears in Daniel C. Richman, *Essay, Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 960–65 (1997).

⁴⁶ See Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002) (game theoretical account of probable effects of elections on prosecutor choices); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 150–69 (2004); J. Mark Ramseyer, Eric Rasmusen & Manu Raghav, *Convictions Versus Conviction Rates: The Prosecutor's Choice* (Harvard Law & Econ., Discussion Paper No. 611, 2008), available at <http://ssrn.com/abstract=1108813> (account based on economic analysis of prosecutor incentives, finding some confirmation in differential conviction rates).

mayors, and legislators, who deal with a larger range of issues, the criminal prosecutor knows that voters will evaluate his or her work based on a single cluster of values.

Moreover, prosecutors work on questions that the voters find salient, those affecting their physical safety.⁴⁷ Unlike the elected heads of state agencies such as the Secretary of Labor, prosecutors can assume that the public pays attention to at least some of their choices.⁴⁸

Finally, prosecutors answer to small, localized constituencies. The chief prosecutor appears in local news reports regularly and is typically active in local political organizations. Both the voters and opinion leaders in the local community have the motive and opportunity to learn about the work of the prosecutor's office. This combination of conditions—concentrated issues, with salience to voters, happening at the local level—creates a promising environment for real accountability to the voters.

III. PROSECUTOR ELECTION OUTCOMES AND CAMPAIGNS

Unfortunately, prosecutor elections do not deliver on their promise. They do not assure that the public knows and approves of the basic policy priorities and implementation of policy in the prosecutor's office. In this Section, I review new evidence about the impact of prosecutorial elections and the types of prosecutorial behavior that candidates emphasize during election campaigns. This evidence shows that voters rarely vote against incumbent prosecutors; more importantly, incumbents face a challenge far less often than incumbents in legislative races. In such a setting, prosecutors have little reason to expect that they will have to explain their choices and priorities to the voters. The outcomes, in sum, demonstrate that elections produce low turnover and few challenges.

This section also discusses new evidence about the content of election campaigns—that is, the statements that candidates make to help voters evaluate the work of prosecutors. This evidence shows that candidates tend to focus on individual qualifications rather than the performance of the entire office. When the campaign rhetoric does turn to office performance, the claims relate to quantity of cases processed rather than the quality of results. Candidates speak to the competence of the District Attorney but they do not offer a coherent measure of competent prosecution. Campaigns do not link the incumbent's choices to public values through an ideological lens. The claims that election candidates make to the voters about effective prosecution ask the voters to choose based on character—a criterion more relevant to a general executive position such as mayor or

⁴⁷ See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006) (reviewing studies of topics that viewers find salient).

⁴⁸ See Timothy Besley & Stephen Coate, *Elected Versus Appointed Regulators: Theory and Evidence*, 1 J. EUR. ECON. ASS'N 1176 (2003).

governor—rather than any skills or values that apply particularly to criminal justice. In short, the campaign rhetoric offers only poor measures of competence and few measures of values or priorities.

A. *Low Turnover, Few Challengers*

Nationwide surveys of chief prosecutors tell us in general terms that there is little turnover in office. According to the most recent national survey of state prosecutors, 40% of the chief prosecutors have served twelve or more years, and 72% have served five years or more. The longevity is slightly less for the larger offices, with 35% of those prosecutors serving twelve years or more, and 70% serving five years or more.⁴⁹

To allow a more precise account of prosecutor elections than we could get from biannual survey results, I assembled two databases: the first targets the outcomes of prosecutor elections, and the second aims to capture the rhetoric used most often in prosecutor election campaigns. The Outcomes database gathers election results between 1996 and 2006 in ten states.⁵⁰

The Outcomes data add more detail to support the impression we get from the biannual surveys: the chief prosecutors in the 2,344 separate prosecutorial districts in the United States hold very secure jobs. We can begin with the success rate of incumbents across all general election races: the sitting prosecutors won 71% of the general elections.⁵¹ The more pertinent number, however, is the success rate of incumbent prosecutors in elections when they seek re-election. Because the incumbent sought re-election in only 75% of all general election campaigns, the incumbent success rate when running for office was 95%.⁵²

How does this pattern for incumbent prosecutors compare to the outcomes for elections to other offices? One close analogy, in terms of the size of the electorate, is the state legislator. The 95% incumbent success rate for prosecutors resembles

⁴⁹ See Perry, *supra* note 36. In 2001, the median tenure in office was 6.8 years (6.5 years in the largest offices), and 20% of the prosecutors had served 15 years or more. CAROL J. DEFRANCES, U.S. DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 2001, at 3 (2002). The median tenure in 2001 was a bit longer than in 1996, when the median was 6.0 years. CAROL J. DEFRANCES & GREG W. STEADMAN, U.S. DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 1996, at 3 (1998).

⁵⁰ The core of this database was assembled by Wake Forest law students Matthew Clark and Peter Stewart. Clark and Stewart identified eight states with election results posted on the website for the Secretary of State. I have supplemented their data by adding primary elections for the original collection of eight states (again, drawing on websites for the Secretary of State), and added results from two additional states. The ten states in the current database are geographically diverse, but are weighted toward states with the highest populations: Colorado, California, Florida, Georgia, Idaho, Maine, Massachusetts, North Carolina, Texas, and Wisconsin.

⁵¹ This was the outcome in 947 of 1329 elections. The term limitations at work in Colorado meant fewer elections in that state involving incumbents.

⁵² This was the outcome in 947 of 993 elections. There were no meaningful differences in this rate among different states or across election cycles for the 1996–2006 period, except for the differences in Colorado based on the term limitations in that state.

the overall win rate for incumbent state legislators, who are re-elected in over 90% of the races when they seek office.⁵³

Another point of comparison for District Attorneys comes from elected judges, particularly trial judges who are not elected by a statewide electorate. The forms of elections for state court judges vary greatly across the country with some judges facing only a “retention” election without any opponents and many running in non-partisan elections. Incumbency for judges, as for prosecutors, is a major advantage during re-election bids.⁵⁴

While the advantage of incumbency is a constant across all state and local elections—prosecutorial, legislative, and judicial—there are interesting differences between prosecutors and other elected officials. Those differences appear in the lineup of candidates in a typical race. Incumbent prosecutors are less likely than incumbent legislators to run for re-election.⁵⁵ Furthermore, prosecutor elections produce relatively few challengers. In general election campaigns, prosecutor incumbents ran unopposed in 85% of the races they entered.⁵⁶

⁵³ See David Breaux & Malcolm Jewell, *Winning Big: The Incumbency Advantage in State Legislative Races*, in CHANGING PATTERNS IN STATE LEGISLATIVE CAREERS 87, 91–103 (Gary F. Moncrief & Joel A. Thompson eds., 1993); John M. Carey et al., *Incumbency and the Probability of Reelection in State Legislative Elections*, 62 J. POL. 671, 682 (2000); Cox & Morganstern, *supra* note 43, at 498–503; Robert E. Hogan, *Challenger Emergence, Incumbent Success, and Electoral Accountability in State Legislative Elections*, 66 J. POL. 1283, 1290–91 (2004); Malcolm E. Jewell, *State Legislative Elections: What We Know and Don't Know*, 22 AM. POL. Q. 483, 487 (1994) (showing the proportion of nominated incumbents who are reelected); Malcolm E. Jewell & David Breaux, *The Effect of Incumbency on State Legislative Elections*, 13 LEGIS. STUD. Q. 495, 499–510 (1988); Norman R. Luttbeg, *Legislative Careers in Six States: Are Some Legislatures More Likely to Be Responsive?*, 17 LEGIS. STUD. Q. 49, 50–51, 56–63 (1992).

The number of prosecutors who hold office for multiple terms also finds a close parallel among state legislators. See Gary F. Moncrief et al., *For Whom the Bell Tolls: Term Limits and State Legislatures*, 17 LEGIS. STUD. Q. 37, 39–42 (1992) (data showing the retention rates of state legislators in all 50 states between the 1978 and 1990 elections; proportion of state legislators retaining their seats for the entire 12-year period was about one-third in the state senates and about one-fourth in the lower chambers).

⁵⁴ See Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 JUDICATURE 79 (1999); Lawrence Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420, 424–25 (1983); Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 LAW & SOC'Y REV. 395, 399, 403–04, 422–23 (1984).

⁵⁵ Only 75% of the prosecutor races involved an incumbent. Although prosecutors choose not to run, prosecutors who do run for re-election win their elections a bit more often. These two effects cancel each other out, so the overall win rate for legislators is about the same as the prosecutor rate (74% for legislators versus 71% for District Attorneys). This is consistent with studies of the National Conference of State Legislatures that indicate a turnover rate of 20% from 1994 to 1996, NATIONAL CONFERENCES OF STATE LEGISLATURES, TOTAL LEGISLATIVE TURNOVER 1994–1996, <http://www.ncsl.org/programs/legismgt/elect/tottrn.htm>, and 26% from 2000 to 2002, NATIONAL CONFERENCES OF STATE LEGISLATURES, 2002 ELECTION TURNOVER, <http://www.ncsl.org/programs/legismgt/Elect/02Turnover.htm>.

⁵⁶ That is, 846 of 993 elections.

The scarcity of challengers might be explained by the high cost of a loss for the challenger. If the challenger works in the District Attorney's office, returning to the former job after a losing election bid to unseat the boss could prove uncomfortable. If the challenger comes from the ranks of defense attorneys, relationships within familiar working groups might be strained after an election loss.

Contrast the large number of unopposed incumbent prosecutors with the much lower rate for state legislators, where only 35% of the incumbents run unopposed—state prosecutors face no opponent more than twice as often.⁵⁷ On the other hand, once the incumbent prosecutor does attract an opponent, the opponent holds surprisingly good odds of winning. Incumbent prosecutors running opposed won only 69% of their races.⁵⁸

The same story—relatively high rates of success for incumbents who choose to run, alongside relatively low numbers of challengers—holds true both in primary and general elections.⁵⁹ Note in Table 1 that the proportion of primary races involving incumbents (70%) is about the same as the proportion of general elections with an incumbent (75%). Even though the opposing party could run a primary with only non-incumbent candidates in every electoral cycle (thus pushing down the percentage of races involving incumbents), this does not happen often. Furthermore, incumbent prosecutors win their primary elections (95%) at the same rate as their general elections (95%).

⁵⁷ See Peverill Squire, *Uncontested Seats in State Legislative Elections*, 25 LEGIS. STUD. Q. 131, 132–33 (2000) (thirty-five percent of state legislative races were uncontested during elections from 1988 to 1996).

⁵⁸ This occurred in 101 of 147 races.

⁵⁹ California, Florida, and Idaho provide data only for general elections. For an analysis of primary elections for state legislative office, see Robert E. Hogan, *Sources of Competition in State Legislative Primary Elections*, 28 LEGIS. STUD. Q. 103 (2003).

Table 1: Outcomes in Prosecutor Elections

	General Elections	Primary Elections
All Races	1333	1028
Incumbent Runs	993 (75% of all races)	718 (70% of all races)
Incumbent Unopposed	846 (85% of all races when incumbent runs)	611 (85% of all races when incumbent runs)
Incumbent Wins	947 (95% of all races when incumbent runs)	679 (95% of all races when incumbent runs)
Incumbent Wins When Opposed	101 (69% of all opposed incumbent races)	68 (64% of all opposed incumbent races)

These patterns change in one important way when we concentrate only on the largest jurisdictions where the prosecutors' decisions affect the largest number of people. Table 2 indicates the election outcomes in larger districts. Incumbent prosecutors in these districts ran for re-election at about the same rate as the incumbents from smaller districts (71% from the larger districts, versus 75% from the entire pool). The difference appears in the number of *challenges* that the incumbents face in larger jurisdictions. The percentage of unopposed incumbents went down from 85% for all races to 55% for races when at least 100,000 votes were cast. On the other hand, incumbent prosecutors won a larger percentage of their opposed elections in larger districts (69% in all races versus 78% for the largest districts).

Table 2: Outcomes in Prosecutor Elections, Larger Districts

	Over 10,000 votes cast	Over 50,000 votes cast	Over 100,000 votes cast
All Races	1078	290	142
Incumbent Runs	768 (71% of all races)	204 (70% of all races)	101 (71% of all races)
Incumbent Unopposed	597 (78% of all races when incumbent runs)	144 (71% of all races when incumbent runs)	56 (55% of all races when incumbent runs)
Incumbent Wins	725 (94% of all races when incumbent runs)	192 (94% of all races when incumbent runs)	91 (90% of all races when incumbent runs)
Incumbent Wins When Opposed	128 (75% of all opposed incumbent races)	48 (80% of all opposed incumbent races)	35 (78% of all opposed incumbent races)

A rational prosecutor facing this pattern of election outcomes should conclude that she could probably continue in office for as long as she wants. Overall, 95% of the incumbents who seek office are re-elected, and the number remains at 90% even for the largest and most competitive jurisdictions.

An incumbent prosecutor could also plan to run unopposed in most races. The typical incumbent prosecutor will win automatic re-election and will not have to explain her performance to voters in a competitive atmosphere.

Granted, there is likely a shadow effect for elections—a bit like the claimed impact of trials on plea bargaining.⁶⁰ The number of actual challengers, or the number of incumbents actually booted out of office, might understate the importance of elections. District Attorneys, like other elected officials, might perceive much more election risk than actually exists. They might perform their duties based on the expectation that a challenger will arise in the next election

⁶⁰ Cf. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

cycle, making it necessary to run the office at all times *as if* the voters will evaluate the work of the prosecutor. Yet with success rates for incumbent prosecutors near 95%, one must wonder how much of a shadow the small number of electoral losses can cast on the huge body of electoral wins.

When viewed from the vantage point of the voter, this is an unhappy arrangement. Incumbent prosecutors face challengers less often than other elected officials—less often than state legislators, and less often than judges—and thus do not have to defend their record. Whether or not the voters might approve of the District Attorney's priorities and management record, they address such questions too rarely. As a result, the press has less reason to monitor office performance. The question of whether the prosecutor is enforcing the criminal law according to the wishes of the people fades from view.

B. Poor Measures of Competence, Few Measures of Ideology

As we have seen, the outcomes of prosecutor elections do not inspire much hope that they can promote fidelity to public values. Unfortunately, the content of the campaigns is also a discouraging tour. Campaign debates look more at competence than at ideology. That is, the debates do not highlight values that the prosecutor might use to set priorities or policies in the office.

The candidates do not help the voters to characterize the overall pattern of results that the prosecutor's office has produced; most of their attention centers on a few infamous recent cases. Even when the candidates do portray the overall pattern of outcomes in the office, they do not connect those patterns to any system of values that would suggest how to set priorities in the future. However frustrating the election campaigns for other offices might be, at least they accomplish more than prosecutor elections on this score.

Instead of promoting debate about priorities and values, the campaigns concentrate on more technocratic claims about the lawyerly skills of the chief prosecutor or the personal rectitude of the candidates. These indicators of competence might tell voters about the ability of a prosecutor to choose wisely in a single case. These qualities, however, do not translate into high-quality justice for the office as a whole.

1. In Search of Campaign Content

It is not obvious where one might look to learn about the information available to voters in the typical prosecutor election. One challenge, already discussed, is the localized nature of prosecutor elections. There are too many of these elections, spread over too large an area; it is therefore impractical to perform enough on-site case studies to support general observations.

In an effort to uncover the common themes of prosecutor election campaigns based on sources available across many jurisdictions, I turned to the news coverage

of campaigns in print journalism.⁶¹ Research assistants identified contested elections involving incumbent prosecutors in selected jurisdictions from the Outcomes database and searched electronic resources for newspaper or magazine articles describing those campaigns.⁶²

There were more articles available for some races than for others,⁶³ but the articles taken together offer a rich portrait of prosecutor campaigns. They describe the candidates' speeches to civic groups, their statements at campaign rallies, their comments about particular criminal cases that morphed into comments about the election, editorials about the races by journalists, letters to the editor from readers, and many other conversational settings.

These articles certainly do not capture everything that influences a voter in a prosecutor election or everything that a campaign does to affect the voter's choice. For instance, this approach does not analyze the candidates' advertising through television, radio, billboards, yard signs, newspapers, the internet, and elsewhere. This survey of print news coverage does not account for the funding or the volunteer efforts available to the candidates.

Nevertheless, it is reasonable to expect that the major themes that a candidate stresses in advertising would also appear during the candidate's other public statements about the race, particularly those made in the presence of news reporters.⁶⁴ Ordinary voters might depend on party leaders, local attorneys, and other opinion leaders to sort through the signals for them. Even so, the record of those signals found in print journalism gives us a reasonably accurate picture of the

⁶¹ For the methodological issues involved in applying content analysis (a standard social science analytical technique) to legal sources, see Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63 (2008).

⁶² We limited the dates of the articles to one year before the election date and one year after the election. Post-election stories were included only if they clearly referred back to the election.

We excluded stories mentioning the District Attorney or the election if the text made no evaluative claim about the work of the office of the District Attorney.

Duplicate articles, such as wire service stories reprinted in more than one newspaper, were coded only once. We counted as duplicates any articles that cut-and-paste virtually all the language from an earlier article, with less than ten percent new material.

⁶³ The Campaign News database covers 632 analyses of news articles, which address 67 separate elections. The documents analyzed in this article are based on contested general elections between an incumbent and a challenger in California (2003, 2004, and 2006), Colorado (2004), Florida (1996, 2002 and 2004), Georgia (2000 and 2004), Maine (1998, 2002, and 2006), Massachusetts (2002), North Carolina (2002 and 2006), Texas (2004 and 2006), and Wisconsin (2000, 2002, and 2004). The researchers looked for articles first in Westlaw, then in Lexis. For any races producing fewer than three articles from these two databases, researchers turned to Google News for any further available news articles that did not require subscription fees for access.

⁶⁴ There may be a difference between what the candidates actually say and emphasize in their public statements on the one hand, and the journalists' accounts of those statements on the other hand. The news media have incentives to emphasize certain themes in their coverage of crime and criminal justice. I assume that candidates appreciate these tendencies in the media and tailor their statements accordingly.

content available to voters, whatever methods they might use to process that content.

After selecting the relevant pool of news articles, editorials, and letters to the editor, we read each item and noted all the claims that incumbents, challengers, or observers (including the journalists themselves) made about the work of criminal prosecution. These included claims about the past performance of the prosecutor's office, the potential future performance of the office, or claims about desirable or undesirable traits in prosecutors.⁶⁵ We coded each of the claims, noting the source of the claim and placing them into subject matter categories⁶⁶ based on ordinary techniques of social science content analysis.⁶⁷

The resulting Campaign Themes database allows a reader to track the prevalence of different categories of claims across all of the elections. It also allows us to isolate the use of campaign themes in different contexts. We can note, for instance, how the claims change over time, how the claims of incumbents differ from the claims of challengers, whether the content of campaigns differ in large and small jurisdictions, and whether some claims tend to happen more often in

⁶⁵ Most news articles made more than one claim about prosecutorial work. Sources of those claims included the incumbent prosecutor, the other candidate(s), the writer of a news editorial, or the writer of a letter to the editor. A single article might account for multiple entries in the database if associated with more than one election. For instance, if a Boston newspaper article covered events relevant to several prosecutor elections in the metropolitan area, it would appear as a separate entry for each election.

⁶⁶ We developed this scheme of categories after reading a sample of fifty articles apiece. A generalized claim of "toughness" on crime did not qualify as a claim about prosecutorial work unless the speaker tied the claim to some more specific outcome or priority. The categories we used were as follows: aggregate outcomes, conviction rate; aggregate outcomes, declination or dismissal rate; aggregate outcomes, sentence severity for categories; aggregate outcomes, plea bargaining; aggregate outcomes, processing time and backlog; aggregate outcomes, other; prominent case, investigation or charging or dismissal; prominent case, litigation capability; prominent case, disposition; priority shift, more white collar or public corruption; priority shift, more drug cases; priority shift, more violence cases (including domestic or guns); priority shift, more property cases; priority shift, less commitment to any category of case; fairness, racial equity; fairness, equal treatment more generally; fairness, other; general; crime control, general; crime control, concentration on juvenile crime; leadership on crime policy and anti-crime legislation; relationship with employees; relationship with law enforcement; relationship with other chief prosecutors; relationship with defense attorneys; relationship with judges; relationship with victims or witnesses; relationship with community and press; candidate individual qualifications; candidate experience as defense lawyer; candidate legal misconduct or ineffectiveness; candidate personal integrity, ethical pledges, or misconduct in scandal; other, including views on death penalty.

We adopted a coding convention that a given set of words should be assigned only one "claim" code; the reader chooses a more specific code over a more general code. A given claim was coded only once per article, unless the same claim came from more than one source (e.g. both candidates made claims of the same type).

⁶⁷ For each claim, the coder noted the source of the claim (incumbent, challenger, editorial, letter to editor, or some other source), the category of the claim based on the scheme described above, and a "language link" recording a few distinctive words from the passage that formed the basis for the claim in the coder's judgment.

close elections. In this article, I will concentrate on the prevalence of themes across all of the elections.⁶⁸

2. Individual Qualities and Cases

What did the candidates talk about during the campaign? For one thing, they talked about character and individual experiences far more often than they discussed the performance of the office as a whole. Claims about individual qualities of the incumbent and the challenger top the list of claims made during campaigns. The most prosaic of these were assertions that a candidate was an “experienced, hard-nosed prosecutor.” Such claims, however, offered voters such generalized claims that virtually all candidates made them.

As Table 3 shows, individual experiences and qualifications of the candidates were the most common campaign theme discussed across all the races surveyed. The second column shows the number of articles in the database (out of 632 total articles) addressing each theme, while the third column indicates the number of distinct election campaigns (out of 67 total campaigns) to raise the theme at least somewhere in the news coverage.

⁶⁸ I performed a reliability check to determine the level of inter-coder agreement. Coder 1, a law student, made 405 entries in the database, while Coder 2, another law student, made 243 entries. I randomly selected thirty articles for double coding. For each of the fields involving the identity of the news article, the candidates, the jurisdiction, and the outcome of the election, the double coding showed complete agreement with the original coding. There was more judgment involved, and more disagreement between coders, in the subject matter categories. Using the kappa statistic for nominal data as a measure of agreement, the figures for sixteen “claims” ranged from a high of 1.00 (complete agreement) to a low of 0.52. The percentage of articles showing the same coding for a given claim ranged from 100% to 57%, with only four of the sixteen claims producing agreement in 70% or less of the articles. This reflects an acceptable level of agreement for the core claims categorized in each article. See Hall & Wright, *supra* note 61, at 112–16 (discussing reliability testing in content analysis).

Table 3: Claims Made During Contested Incumbent
Prosecutor Election Campaigns

Type of Claim	Articles mentioning claim	Elections mentioning claim
Individual characteristics claims		
Challenger qualifications or experience	195	49
Incumbent qualifications or experience	150	48
Challenger integrity, personal qualities	107	31
Incumbent integrity, personal qualities	83	31
Challenger misconduct	40	12
Incumbent misconduct	49	22
Prominent case		
Prominent case: investigation and charging	171	30
Prominent case: conduct of trial and disposition	79	26
Relationship claims		
Relationship with employees in office	144	37
Relationship with law enforcement	126	37
Relationship with community and press	94	31
Relationship with victims of alleged crimes	49	28
Relationship with other chief prosecutors	37	12
Relationship with defense attorneys	16	10
Office performance claims		
Backlog of cases, processing time	109	39
Conviction rate	74	27
Aggregate sentence severity	50	23
Plea bargaining	44	18
Other aggregate office performance claims	27	12
Shifting priorities of office		
More violent crime enforcement	104	35
More white collar crime enforcement	76	19
More drug crime enforcement	30	18
Less enforcement of any crime category	20	7
Crime control		
Crime control tied to office policies or practices	85	21
Leadership on crime policy and legislation	82	32
Crime control, juvenile	56	26
Fairness		
Racial equity	33	11
Other fairness claims	41	14

Candidates also frequently raised issues of personal integrity and misconduct, moving beyond professional training or experience to other conduct that allegedly shed light on the moral character of the candidate. The exchanges on these topics are entertaining in a prurient way, but they are not good measures of accountability for performance. In one race, for example, the challenger asserted that the incumbent's management style was unethical, dishonest, and vindictive; she also pointed out that he made anti-Semitic comments about a fellow prosecutor years earlier. The incumbent questioned the mental health of the challenger.⁶⁹

Such claims about individual characteristics of the candidates do not help voters evaluate the work of a prosecutor's office. In this sense, prosecutor elections are different from elections of chief executives such as mayors or governors. A chief executive of government must decide questions that cut across many different subjects, and it is impossible to predict which events will raise the most important questions of governance over the years. In such a setting, voters must depend on general assessments of character. In the prosecutorial context, however, the work is quite predictable. Voters can hear directly about plans for handling this work and about the past performance of the office. Resorting to claims about character tells voters less than a discussion about the operation of a single office that will face a known set of challenges.

The focus on individual characteristics of the candidates finds a parallel in the emphasis on individual cases during the campaign discussions. The candidates talk a great deal about last year's notorious case. Sometimes the challenger criticizes the incumbent for an overly aggressive investigation in a newsworthy case, such as a political corruption investigation; or perhaps the point of contention involves the failure to bring charges in a big case, or the poor conduct of a trial, or a plea bargain or acquittal that disposed of the charges.

Again, this common type of claim offers the voter no real guidance to evaluate the work of the prosecutor. Given the randomness in the strength of evidence and other events at trial, an outcome in one big case tells us little about the quality of prosecution work more generally. There is also a large random element in the process that leads the public to view particular cases as "heaters." Voters would learn more from a discussion about the aggregate outcomes in the office, rather than the turn of events in a few headline cases.

3. Office Performance and Ideology

Voters should assess the overall performance of the prosecutor's office rather than outcomes for individual cases. In pursuit of this goal, they might draw some insights from another common theme in the election campaigns: the relationships

⁶⁹ Supporters of the incumbent in the same race pointed out that the challenger was a lesbian who attempted suicide decades earlier. See John M. Broder, *In A First, A Lesbian Is Elected District Attorney in San Diego*, N.Y. TIMES, Nov. 13, 2002, at A20; Tony Perry, *Judge Ousts San Diego D.A. After Close Race*, L. A. TIMES, Nov. 13, 2002, at B6.

that the chief prosecutor maintains with other prosecutors, with law enforcement officials, and with other groups. As Table 3 indicates, the incumbents and challengers speak quite often about the relationship between the chief prosecutor and the other attorneys working in the office. Other prominent themes include the chief prosecutor's relationship with law enforcement officials, with the community and press, with victims of alleged crimes, with other chief prosecutors, and with defense attorneys.⁷⁰ These claims do not arise as often as the discussions of individual character traits or individual case outcomes, but they are not uncommon.

The prominence of this theme in prosecutor elections is reasonably encouraging. The ability of a chief prosecutor to work effectively with law enforcement, the line prosecutors and other staff in the office, victims, and defense attorneys all can affect the quality of work at the end of the day. While a number of the claims in this category actually involve fairly trivial personality conflicts, others speak more generally to the ability of the chief prosecutor to form effective working groups.⁷¹

Relationships, however, offer an indirect measure of prosecutor quality. This theme does not speak to the case outcomes that the office produces, or the social impact of the prosecutor's work on crime rates, or on public perceptions of their own safety. A focus on relationships does not allow the public to determine directly whether the prosecutor remains true to public priorities. At best, this campaign theme allows the voter to see what other system operators—most of them not directly accountable to the public—think about the prosecutor. Unless voters favor consensus itself as a value in criminal justice, discord between the prosecutor and various other system actors does not reveal which of the parties to the conflict are most closely in line with the wishes of the voters.

The most direct and meaningful claims about the quality of a prosecutor's work address the output of the office. As shown in Table 3, the most common claims about office performance relate to the backlog of criminal cases pending in the courts together with references to the slow processing of cases. Substantially less often, the candidates discuss the percentage of cases filed that result in convictions—that is, the “conviction rate.” A lesser theme in this category involves the sentence severity obtained by the prosecutor's office, either for particular categories of cases or for defendants more generally. A number of the news articles also document the debates of the candidates about plea bargaining practices for the office.

One surprise from this category of claims is the relative rarity of discussions about conviction rates. Academic portraits of the elected prosecutor—particularly those based on an economic model of the behavior of public officials—assume that

⁷⁰ The articles virtually never discuss the relationship between the chief prosecutor and the trial court judges. A total of two articles in the entire database mention this theme.

⁷¹ A number of the law enforcement relationship claims involve endorsements by police chiefs, sheriffs, or various professional organizations of law enforcement officers.

prosecutors routinely broadcast their high conviction rates.⁷² As it happens, conviction rates receive some mention in about 40% of the elections,⁷³ and the claim receives only a passing mention in the news coverage in most of those races. Only 12% of the total articles in the database⁷⁴ discussed conviction rates and only 23% of those articles involved any dialogue about the issue⁷⁵ where the incumbent and the challenger made competing assertions about conviction rates and their meaning.⁷⁶

Conviction rates amount to a lesser theme in prosecutor elections, not the central measure of office performance that the candidates spotlight for voters. The success of the office at converting charges into convictions is discussed less often than the backlog of cases and the time needed for case processing. Apparently, the candidates believe that voters care more about the speed and quantity of work than they do about the nature of the outcomes.

More frequent discussions of aggregate office outcomes on the campaign trail would offer voters a better starting point for evaluating the work of the office. Nevertheless, a single measure is only a starting point, and must be tested through meaningful analysis and debate.

A gauzy number like the office “backlog” or the “conviction rate” is easy to manipulate. When it comes to backlogs or processing times, an incumbent prosecutor might instruct the attorneys in the office to dismiss more cases, or to decline many more. As for conviction rates, consider the possible variations on the comparison pool. Candidates might claim to win “85% of all jury trials,” or “94% of all sex crime, murder, and child abuse charges.” Challengers might draw on the pool of all those arrested for felony crimes, pointing out how few of the arrestees are ultimately convicted of a felony. Consider as well what a prosecutor can do to influence the conviction rate of the office: either decline many close cases, or offer steep discounts to get at least some conviction in every case.

Another staple of election campaigns is talk about new priorities. This is a category that could offer voters useful information about the future direction of the office. As phrased in actual elections, however, the candidates’ claims about priorities are no more realistic than any other political campaign promise of higher spending with no cost attached. In that tradition, challengers in District Attorney elections often propose greater emphasis on various types of prosecutions. They

⁷² See Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL’Y REV. 1 (2007) (asserting an increased reliance in public debate on number of prosecutions filed and percentage of cases won); Gordon & Huber, *supra* note 45; Medwed, *supra* note 45; Ramseyer, Rasmusen & Raghav, *supra* note 46.

⁷³ That is, twenty-seven of sixty-seven total elections.

⁷⁴ Seventy-four of 632 total articles.

⁷⁵ Seventeen of the seventy-four relevant articles.

⁷⁶ Coders recorded for each article a single example of a claim deriving from a single source (say, the incumbent), but recorded separately a discussion of the same theme by another source (say, the challenger) in the same article. The database shows ninety-one distinct mentions of conviction rates, spread across seventy-four articles that cover twenty-seven distinct elections.

assert that selected types of crimes (especially violent crimes and white collar crimes) are under-prosecuted in some unspecified way. These claims are not limited to challengers; the incumbent sometimes promises a new emphasis on particular classes of crimes after the election. Like office-seekers everywhere who promise the voters ponies without proposing how to pay for them, the prosecutor candidates usually do not specify which other cases should receive less emphasis. Only 10% of the elections involved a claim by either an incumbent or a challenger that any type of case should receive less resources or a lower priority.⁷⁷

A lesser theme in the election campaigns involved discussions of the prosecutor's leadership role outside the courtroom, either in lobbying for new crime legislation or otherwise improving efforts to enforce the criminal law and to reduce crime. The prosecutor's impact on crime legislation and the coordination of criminal enforcement resources can be enormous.⁷⁸ Voters who care about the effectiveness of this public official should treat this non-courtroom role as a major criterion for evaluating the incumbent prosecutor. Nonetheless, while it could be a major theme, effects on crime rates and leadership on crime policy appear less frequently in campaign rhetoric than the other topics already discussed.

In sum, the rhetoric of election campaigns puts too much weight on the wrong criteria and completely ignores some criteria that could help voters make meaningful judgments about the quality of a prosecutor's work. Some of the most common themes are downright silly.

These campaign talking points do not serve voters well because they offer too little of two commodities that voters need. First, voters need office-wide measures of competence. As we have seen, the most common campaign themes deal with individual character traits and courtroom skills, or outcomes in individual cases. In a criminal justice system with predictable and consistent challenges, the past performance of the prosecutor's office as a whole could tell voters much about the next four years. That performance can be measured best, I suggest, through case outcomes: the track record of the office in applying the criminal sanction, consistently and economically, to the criminal wrongs that most concern the residents of the community. Voters could also assess a prosecutor's competence through the crime control effects of prosecution,⁷⁹ although this measuring stick is not terribly reliable.⁸⁰

Second, voters need ideological markers or other clues about the values that guide the priorities of a prosecutor. When the measures of competence offer a

⁷⁷ Seven of sixty-seven elections.

⁷⁸ See Ronald H. Clark, *Prosecutorial Management Skills*, THE PROSECUTOR, Jan.-Feb. 2002, at 8; Miller & Wright, *supra* note 27.

⁷⁹ See Michael Marcus, *Limiting Retributivism: Revisions to Model Penal Code Sentencing Provisions*, 29 WHITTIER L. REV. 295 (2007).

⁸⁰ See John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008); Michael Tonry, *Learning from the Limits of Deterrence Research*, 37 CRIME & JUST. 279 (2008).

mixed message, the values of the prosecutor can show the basic objectives that he or she is likely to pursue. They offer clues about the likely priorities of the prosecutor.

The campaign rhetoric for prosecutor elections, however, does not emphasize overarching values. Discussions about a candidate's plans to invest more heavily in some types of prosecutions crack the door open but ultimately reveal little about general values. Some states designate these elections as non-partisan, offering voters less information than usual about the party affiliations of the candidates.⁸¹ Even when party labels are available, the candidates do not place much weight on them. They invoke politically-charged issues such as the death penalty infrequently.⁸²

Heavier use of party labels might not accomplish much in prosecutor elections—Democrats and Republicans are equally capable of talking about the best combination of toughness and fairness—but voters do need systematic clues about the priorities that a candidate will pursue in office. They need a frame broader than individual case outcomes. Voters need themes to help them predict which prosecutions will thrive and which will fade into the background. Current campaign rhetoric does not deliver.

IV. SOME POSSIBLE RESPONSES

In light of this developing empirical evidence about the outcomes of elections and the typical content of election campaigns for prosecutors, the responses could proceed in two different directions. First, one might begin the search for improved content to perfect the election device. If voters got better information, perhaps they would make better choices. Second, one might wonder more fundamentally about elections as an accountability technique. Should we search for ways to supplement elections as a method for the public to evaluate the work of prosecutors? Should we abandon the election of prosecutors altogether?

A. Improve the Metrics

Many of the typical themes in campaigns are not meaningful measures of prosecutor performance. They offer trial-based measures in a plea-based world. They follow developments in single cases when voters must select the best manager for a high-volume world. The rhetoric emphasizes general leadership traits when more specialized abilities would tell the voters more.

Campaign debate would better meet the needs of the public if the press, other opinion leaders, and the challengers to incumbents started looking to more detailed

⁸¹ See *In Profile Frank Weathersbee*, 41 PROSECUTOR 15 (Jan.–Feb. 2007) (mentioning laws in Hawaii and California that provide for non-partisan elections for prosecutors).

⁸² Fewer than thirty-five articles in the database (less than 5% of the total) mentioned candidate claims about the death penalty.

measures of quality in the work of prosecutor offices. The measures that voters need would focus on the dominant reality of plea negotiations and would resist manipulation more easily than claims about the “backlog” or the “conviction rate.”

One such measure of quality could be the “convicted as charged rate.”⁸³ This measure treats plea negotiations rather than trials as the central activity of prosecutors. It encourages more transparent charging and plea practices, allowing easier public scrutiny of case valuation.⁸⁴

Another possible improved metric might be changes in acquittal rates.⁸⁵ Big changes in the acquittal rate for a jurisdiction might be good, bad, or indifferent, but such changes in rates do indicate a need to look more closely. If the acquittal rate goes down, an observer might look for clues about the reliability of outcomes in the system. Lower acquittal rates might result from new enforcement resources that improve the quality of evidence to prove cases. In the absence of new enforcement resources, however, lower acquittal rates might be traced to changes in sentencing laws that give prosecutors a bigger club for scaring defendants into a plea. We use the visible outcome here (pattern of acquittals) as a necessarily imperfect way to flag possible trouble with the more invisible practices of plea negotiations.

Other measures spring to mind. We might want to measure consistency within the prosecutor’s office. For instance, one might ask whether people initially recommended for similar offenses (with similar prior records) are treated consistently. We could measure both the frequency of different outcomes and the size of the differences.

In trying to measure consistency, the Vera Institute’s Prosecution and Racial Justice project is providing an interesting case study.⁸⁶ They are developing new management uses of caseflow data as an active management tool to identify and

⁸³ Marc Miller and I have described the metric as follows:

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

See Wright & Miller, *supra* note 33, at 35.

⁸⁴ This measure assumes that convictions obtained through bluffing about evidence are a bad thing. This is not an assumption that everyone shares, but I believe it is the approach most respectful of the rule of law. See Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409 (2003).

⁸⁵ See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

⁸⁶ For an overview of the “Prosecution and Racial Justice Project” of the Vera Institute in New York, see <http://www.vera.org/otherwork/prj.html>. See also Miller & Wright, *supra* note 27, at 162–65.

address potential inconsistent treatment. For instance, if charges for possession of drug paraphernalia are dropped more often for white defendants than for black defendants, managers need to inquire further.

Another measure of office quality might involve the efficient use of office resources, a concern reflected in the frequent use of campaign rhetoric about case “backlogs” and processing time. A properly weighted caseload measurement could address the question of how much output the office is getting per capita. This happens routinely now when prosecutors go to the legislature to ask for more hiring slots.⁸⁷ Simple backlog numbers are too crude to account for changes in arrest rates, or for losses and gains of prosecutors, or slowdowns attributable to courts rather than prosecutors.

Yet another group of metrics could measure punishment levels obtained. The “overdepth” of criminal codes—the presence of multiple code sections and multiple punishments that could all apply to a single defendant based on a single criminal transaction—gives prosecutors a powerful say in the total amount that the state spends on criminal punishments. Prosecutors often overspend the available budget by filing charges and requesting sentences that the state cannot afford. Voters could hear an estimate of the prison years to be served by defendants convicted by the office that year, with a dollar figure attached and a population-adjusted estimate of that county’s “share” of the statewide system.⁸⁸ Such a measurement should prove feasible in a state with sentencing guidelines and the institutional capacity to track changes in the use of corrections resources.

It will not be enough to improve the information available to voters; it will also prove necessary in some cases to change the incentives of voters to obtain and use this improved information. For instance, why would voters exert the effort to learn about punishment levels? Granted, the tax payments for poorly-used corrections come from the pockets of voters. Yet prosecutor elections target the wrong voting public. These elections happen at the local level, while the money for the most expensive criminal punishments comes from the state level. Local voters have no reason to ask their own prosecutors to spend more carefully the revenue from other taxpayers around the state. Voter interests and taxpayer interests must be better aligned.⁸⁹

⁸⁷ See Wright, *supra* note 17.

⁸⁸ See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996). Another punishment measure might be the number of cases sent into diversion programs, or the number of community or intermediate sanctions obtained for cases charged initially with certain offenses best suited to those outcomes.

⁸⁹ See Ronald F. Wright, *Prosecutor Elections and Overdepth in Criminal Codes*, in CRIMINAL LAW CONVERSATIONS, *supra* note 18.

B. *Change the Forum*

Even if we could improve campaign rhetoric, fundamental doubts remain about whether the ballot box—even with improved campaign rhetoric and voters with an incentive to pay attention—can create meaningful accountability for prosecutors. Are voters who approach criminal justice issues only during an election season capable of anything more than bloodthirsty clamor for the longest possible sentences? Do District Attorneys run for election often enough to affect their routine policy choices when the next campaign remains years away?

In response to difficulties such as these, we might want to change the relevant group of listeners, those who hear and respond to claims about the quality of work in the prosecutor's office. While the entire electorate might show collective disinterest, what about individuals or groups who do have more intense and sustained interest? Measurements of prosecutor quality might be constructed with special interests in mind. This is a setting where intermediary institutions (as de Tocqueville noted) reinforce democracy.⁹⁰ As voters, we cannot be bothered about our prosecutors very often, but it is reassuring to know that we have agents watching closely for us, and competing with one another to offer this service—and to receive credit for offering the service. The alarm functions of the ACLU, victim advocacy groups, and others are broadly useful for all of us.

An administrative law strategy can encourage the work of monitoring agents. In some areas of government, we build up legitimacy by insisting that government agencies do their business with the benefit of expertise, inviting participation from interested parties, and in the sunshine. Administrators typically have to explain their choices and not just announce them. Administrators must explain some choices within a designated analytical framework (think of cost-benefit analysis).⁹¹

Unfortunately, criminal law operates with a weakened form of administrative accountability. Administrative laws such as notice-and-comment rulemaking or open records laws do not apply to the police or prosecutors.⁹² Federal law here is particularly limited. For instance, the Freedom of Information Act makes a blanket exception for criminal law enforcement matters, and the public rulemaking provisions of the Administrative Procedure Act do not apply to criminal law enforcement.⁹³

⁹⁰ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 129–34 (Francis Bowen ed., Henry Reeve trans., 1863).

⁹¹ See Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741 (2008).

⁹² As Darryl Brown has noted, public explanations for choices and cost-benefit techniques do not reach the administrators of criminal justice. See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004).

⁹³ See 5 U.S.C. §§ 552–553 (2006).

There is some variety at the state level, and more promise. Some state statutes include broadly phrased open records laws.⁹⁴ That being said, most internal prosecutor records never get exposed to the sunshine, and most prosecutor meetings are not reported in the press. Changes to the administrative law background of criminal prosecution could go a long way toward supplementing the accountability that is possible outside the election cycle.

Discussions about improved campaign rhetoric start with the assumption that people will listen to higher quality information and make better choices as a result. Happily, this does not need to be true for all the people all the time; we would be foolish to depend only upon elections and higher quality campaigns. It is enough to make me hopeful—and to inspire further thought and research—if some of the people, some of the time, will make the most of performance measures for prosecutors.

Prosecutor election campaigns fail us because we ask too much of them. If elections were to carry only part of the load, and we were to rely on other devices to promote prosecutor accountability, the prospects would look brighter. The public must rely on many agents and many devices if the rule of law in criminal prosecution is to thrive.

⁹⁴ Florida is one example. See Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245 (2008).