

Prosecutor Institutions and Incentives

Ronald F. Wright*

Criminal prosecutors must do a complex job, one that is crucial to public safety and the quality of justice. Unfortunately, they must do so under circumstances that are tilted toward failure. The typical local prosecutor, working within the current legal framework, must “fly blind” and “fly solo.” The prosecutor flies blind because so little information is available about overall trends in case processing, prevention programs, corrections costs, and voter concerns about public safety. Prosecutors can see some details about individual cases but not so much about systemic effects of their work. Supervisors within larger prosecutor offices also operate in the dark about many case-level choices of line prosecutors. It is equally troubling that prosecutors fly solo. Judges, police, defense attorneys, and community groups have relatively little influence over the diversion, charge selection, and case resolution choices of individual prosecutors or office policies on these topics. To address the problems of flying blind and flying solo, improvements in the information available to prosecutors and changes in the partners they consult hold the greatest promise for improving prosecutors’ work.

INTRODUCTION

Public safety is a local matter. And in that local setting, there is no more important figure in American criminal justice than the local prosecutor—not judges, not police chiefs, and certainly not public defenders. The prosecutor drives outcomes in expensive and essential systems.

The courtroom duties of the prosecutor are the most straightforward part of the job. But in the United States, prosecutors must reach out beyond their roles as courtroom advocates in single criminal cases; they also work as system managers for the criminal courts and community leaders for public-safety efforts. While the work of a courtroom advocate is not easy to do well, the systemic parts of the job add layers of complexity and make it awfully hard to succeed as a chief prosecutor.

* Needham Y. Gulley Professor of Criminal Law, Wake Forest University. I thank Stephanos Bibas, Russell Gold, Jason Kreag, Maximo Langer, Marc Miller, Jenia Turner, and Shi Yan for helpful comments based on an early draft of this chapter. I am also grateful to Christopher Lewis and Sarah Spangenburg for research assistance.

Two dangerous qualities of the prosecutor's working environment tilt the map toward failure. First, prosecutors carry out their duties with little data about trends in the justice system, in the corrections system, or in the community. To use an aeronautical analogy, they are "flying blind." Some of the gaps in prosecutors' knowledge remain empty because nobody publishes the relevant information about court processing, law enforcement activities, or crime in the community. Other gaps occur because prosecutors get a skewed and anecdotal view of the community's public-safety concerns and their priorities for criminal law enforcement.

Second, prosecutors make many decisions according to their own lights: they "fly solo." Compared to many other government officials, prosecutors operate within a legal framework that leaves them free to choose office priorities that they—and they alone—believe are appropriate. Prosecutors make a lot of their case-processing choices without the approval or cooperation of other actors. They can file criminal charges, select evidence to support charges, and invoke mandatory minimum sentencing laws without asking for review or consent from judges, defense attorneys, law enforcement, or any supervisors beyond the local prosecutor's office.

Prosecutors, even though they must fly solo and fly blind, manage to do excellent work in many circumstances. But sometimes they respond poorly to the dangerous weather and they crash. In a few cases, they obtain convictions against the wrong people. Some prosecutors put too much emphasis on the wrong categories of crimes, asking for too much or too little of the state's correctional resources for certain crimes. In many places, important parts of the community distrust the justice system and feel unsafe. And prosecutors have, on the whole, contributed to an expensive prison system that produces far too little social benefit to justify its massive cost.

Legal reforms could give prosecutors the information and the community partners that they need to succeed more often. Reforms to the institutional environment of prosecutors could reduce erroneous convictions, misplaced enforcement priorities, and bloated prisons. Such reforms would give prosecutors more systemic information, along with the incentives to use that information. Improved prosecutor institutions and incentives would encourage prosecutors to consult and respond to other system actors in a wider range of situations.

The formula for improved prosecution must recognize local variety among prosecutors and the needs of the communities they serve. In particular, solutions must account for the differences among urban and rural offices. And in the end, part of the changed legal landscape must come from within

prosecutors' offices. New legal standards imposed on prosecutors from the outside, through legislation or constitutional rulings, have a poor track record and equally poor future prospects. The most promising reform strategies do not demand particular outcomes from prosecutors in criminal cases; instead, they promote community partnerships and informed prosecutor leadership on criminal justice.

Other chapters in this volume address the work of prosecutors during specific phases of the criminal adjudication process, such as charge selection, pretrial discovery, plea bargaining, and sentencing advocacy. This chapter offers instead a tour of the institutional context for the prosecutor's work. At each stop on the tour, we ask this question: How do we hold prosecutors accountable to the criminal law and to the current values of the community? Part I surveys the legal rules and practices that structure the prosecutor's environment, concentrating on the working relationships between prosecutors and other actors in the criminal courts and in the local criminal justice community. Part II summarizes and evaluates the major types of institutional and legal changes that academics have proposed. I conclude with recommendations for the handful of changes that could make the biggest difference in the quality of the prosecutors' work.

I. THE PROBLEMS OF FLYING BLIND AND FLYING SOLO

In this section, I describe the current legal boundaries on the work of criminal prosecutors. These constraints include formal rules of law, as well as institutional practices and incentives that shape prosecutor choices within those formal legal boundaries.

In subsection A, I discuss the influence of prosecutors in criminal justice matters outside of the courtroom and explain the limited information available to prosecutors to monitor and pilot the overall direction of office practices, both in and out of the courtroom.

In subsection B, I describe how the prosecutor's power over criminal justice outcomes has grown stronger over time, making it less important for the prosecutor to obtain the consent of other actors. This legal environment often leaves prosecutors acting alone, without valuable input that other criminal justice actors and community groups could provide.

Finally, in subsection C, I describe the prosecutor's contribution to criminal justice results, some of them unhappy ones.

A. FLYING BLIND

Legislatures in the United States tend to create criminal codes that are broad and deep, making it possible for prosecutors to choose among several statutory options (and sentencing levels) for many common factual scenarios. Moreover, legal tradition in the United States gives prosecutors the duty to look beyond the legal definition of terms in the criminal code. Within this tradition, the prosecutor addresses two distinct questions about each case.¹ First, the prosecutor reviews the investigative file and reviews potential sources of evidence to confirm the legal sufficiency of the charges. Second, after asking whether charges are *sustainable*, the prosecutor asks whether charges are *wise*. The issue is whether the provable charges will serve the ends of justice. This includes some prosecutorial judgment about how to balance public safety with public trust on the local level, and whether the charges are warranted in light of other potential uses for limited prosecutor resources. Field studies of prosecutors confirm that prosecutors routinely consider these two different levels of reasoning as they decide whether and how to charge suspects.²

The answer to the second-level “wisdom” question for a prosecutor depends on context, and the individual line prosecutor—especially a newer prosecutor—usually makes choices without much knowledge about the context. Prosecutors make choices about charges, case resolutions, and sentencing recommendations in many cases without the most rudimentary data about the defendants, the victim, or other aspects of the case. In some offices, line prosecutors resolve criminal cases without any reliable information about the collateral consequences of a criminal conviction; these include access to occupational licenses and public housing, along with loss of immigration status.³

The data problem becomes worse when managers in the prosecutor’s office need to know about the performance of the line attorneys who charge and resolve individual cases: They usually cannot reconstruct important aspects of the attorney’s performance. In this data-starved environment, case-level missteps or misconduct are hard to diagnose and control. The larger the office, the bigger

1. Legal systems outside the common law tradition tend to characterize the prosecutor’s job as a ministerial evaluation of the legal sufficiency of charges. Systems in various countries fall along a spectrum from the principle of “mandatory prosecution” to the discretionary prosecutorial tradition in the United States. See SHAWN MARIE BOYNE, *THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW?* (2014); Glenn Schram, *The Obligation to Prosecute in West Germany*, 17 AM. J. COMP. L. 627 (1969).

2. See BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING* (2012).

3. See Ingrid V. Eagley, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013).

the management challenges that flow from poor data. Any office larger than about 25 attorneys faces this issue—that’s the average size of an office serving a mid-sized city with a population greater than 100,000 and less than 1,000,000.

The problem of weak data systems for prosecutors is compounded because state prosecutors are so radically localized. District attorneys, who typically enforce the state criminal laws and promote public safety within a single county or city, do not answer to the state attorney general.⁴ They set enforcement priorities at the local level.

As a result of this institutional fragmentation, it is difficult to compare the work of one district attorney to another or to set a performance benchmark for prosecutors’ offices. Uniform data collection and reporting throughout a state of independent offices are serious challenges. Most states have only a crude data-collection system that focuses on the needs of the statewide court system. Prosecutors cannot answer, based on this data, the questions that might inform their local performance.⁵ Even when they declare local priorities for enforcement, the data infrastructure does not allow them to measure the overall office performance in the key areas.⁶

Whatever the weaknesses of case-processing data for prosecutors, the information gaps are even wider when prosecutors operate outside the courtroom. The historical core of the prosecutor’s job is to process cases by filing criminal charges based on police investigations and resolving those charges through later dismissals, acquittals, convictions after a trial, or convictions after a plea. But the prosecutor’s job today also reaches both upstream and downstream from the criminal courts.⁷ Many offices take an active role in training and advising police departments in their districts. Some sponsor outreach programs to connect juveniles and potential defendants to social services, or track people who present a high risk of future offending or victimization.⁸ They “divert” current defendants (or suspects about to face

4. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011).

5. This observation is decades old, going back to the influential American Bar Foundation field studies of the 1960s. See FRANK MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154 (1969) (recommending improved documentation of discretionary choices); Joseph R. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

6. See Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439 (2004) (calling for more declination data).

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

8. See Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705 (2016).

charges) out of the criminal courts and into community service and treatment programs.⁹ Prosecutor offices also work downstream from the criminal courts, taking an advocacy role in parole proceedings or operating reentry programs for local residents when they return to the community from a prison term.¹⁰

For each of these functions outside the criminal courts, prosecutors have little reliable data to guide them. They rely on anecdotes and hunches to identify upstream programs and downstream initiatives that are most likely to prevent future crime; the same ad hoc decisions often determine which defendants stay in or go out of diversion programs.¹¹ Programs come and go, operating on tight budgets that typically do not allow for serious evaluation of their results. Thus, prosecutors move from their courtroom roles into more ambitious “community prosecution” programs with profound blind spots.

The weak data environment is not just an internal management problem for prosecutors; it is also a barrier to democratic monitoring and accountability. When prosecutors cannot describe the overall trends to legislators, they find it difficult to explain the need for new legal tools or funding. When a prosecutor knows about overall case numbers and community activities, it becomes possible to explain to legislators that less enforcement in one area frees up resources for more enforcement in other areas.

Poor information about prosecutor performance also affects the way the voters evaluate them. Chief prosecutors in the state courts are elected, most of them at the local level. This arrangement is unusual from an international perspective, and the weight of academic opinion disfavors the election of prosecutors.¹²

9. See Ben David, *Community-Based Prosecution in North Carolina: An Inside-Out Approach to Public Service at the Courthouse, on the Street, and in the Classroom*, 47 WAKE FOREST L. REV. 373 (2012); Gerard Rainville & M. Elaine Nugent, *Community Prosecution Tenets and Practices: The Relative Mix of “Community” and “Prosecution,”* 26 AM. J. CRIM. JUST. 149 (2002). See generally Michael Tonry, “Community Punishments,” in Volume 4 of the present Report.

10. For a discussion of reentry, see Susan Turner, “Reentry,” in Volume 4 of the present Report.

11. See Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691 (2006).

12. See Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135 (2009); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUSTICE 1 (2012).

Whatever the theoretical justification for electing prosecutors,¹³ it does not work especially well in its current form. Incumbents typically win their races; in fact, they run unopposed more often than the typical incumbent legislator.¹⁴ As a result, incumbent prosecutors do not feel compelled to explain their priorities and policies to the voters. At the same time, chief prosecutors do seem to change their behavior during campaign years, despite the low risk of an election loss. The prosecutors in those offices dismiss fewer cases, take more cases to trial, and take greater legal risks during the proceedings.¹⁵

Faulty information infects both sides of this electoral connection: Voters know little about the actual performance of prosecutors, while the prosecutors themselves have only selective knowledge about the public-safety fears and enforcement priorities of voters in the district. There are early signs of change on both sides. Some prosecutors solicit input from community groups during the long stretches between elections, both through engagement with civic groups and through public surveys.¹⁶ Voters, for their part, seem in recent electoral cycles to pay closer attention to prosecutor performance, both for notorious cases such as filing decisions in police-involved shootings, and for general office practices, such as the office strategies for drug possession and juvenile matters.¹⁷

It is still too early to judge the strength of these changes in the atmosphere. But it is clear that these exchanges of information still leave prosecutors and their communities too much in the dark.

13. The election of prosecutors reflects important value choices about the relative importance of positive law and policy discretion in the prosecutor's work. See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011).

14. See Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014); Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?* THE ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/> (describing research by David Schleicher and Elina Treyger).

15. See Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials*, 161 PUB. CHOICE 141 (2014); Andrew Dyke, *Electoral Cycles in the Administration of Criminal Justice*, 133 PUB. CHOICE 417 (2007); Bryan C. McCannon, *Prosecutor Elections, Mistakes, and Appeals*, 10 J. EMPIRICAL LEGAL STUD. 696 (2013).

16. Some observers have designated this trend as "community prosecution," noting parallels with the well-established community policing movement. See Brian Forst, *Prosecutors Discover the Community*, 84 JUDICATURE 135 (2000).

17. See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017). For a discussion of juvenile matters, see Barry C. Feld, "Juvenile Justice," in Volume 1 of the present Report.

B. FLYING SOLO

The signature constitutional structure in the United States fragments power among different levels of government (that is, federalism) and among branches within a single level of government (separation of powers). Furthermore, constitutional doctrines and traditions force each actor to obtain cooperation from other actors at some points along the way before government action is complete (checks and balances).

These power-sharing arrangements, however, recede to the background in the context of criminal justice. Other legal actors have little to say about the prosecutor's selection from the wide menu of charges or about the terms that prosecutors offer to resolve cases. Similarly, other government officials have little input into the priorities of the local prosecutor's office.

The analogy I use here—the prosecutor flying solo—does not imply that prosecutors act alone or without legal constraints. Rather, the point is that prosecutors' offices, relative to other government entities, look internally to set their priorities. They have no legal obligation or institutional habit of consulting other legal actors about their major choices. If the law does not require or incentivize them to consult with others, prosecutors (like anyone else) will not routinely involve outsiders in choosing strategy or direction.

The relationship between prosecutors and police (or other law enforcement agencies) varies from place to place. In some places, prosecutors explain their case priorities to the police and they respond by shifting their investigations and arrests to match the targets that the prosecutor designated. Sometimes the prosecutor-police relationship includes cooperation at the case level. Individual prosecutors advise police officers at key points in the investigation, such as a search warrant application. In other locations, prosecutors and police pursue their own conflicting agendas with neither deferring to the other; in those settings, prosecutors routinely decline to prosecute high percentages of the cases that the police deliver to them. And finally, in a surprising number of jurisdictions, prosecutors charge cases more or less as the police deliver them, even if the prosecutors themselves would choose other priorities.¹⁸ Whatever form it takes, however, prosecutors can themselves choose the amount of input that they accept from police departments about their cases and overall priorities for public safety.

18. See Brian Forst, *Prosecutor Policy and Errors of Justice*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 51 (John Worrall & M. Elaine Nugent-Borakove eds., 2014); Ronald F. Wright & Marc L. Miller, *The Screening/Bargaining Tradeoff*, 55 *STAN. L. REV.* 29 (2002).

Local judges do not have much practical input into prosecutor choices or priorities, either. Judges do not overturn prosecutors after they decline to file charges, explaining that this choice remains solely in the executive branch under the separation-of-powers doctrine.¹⁹ The defense can test the sufficiency of the evidence to support the charges, but the standard is low (probable cause) and easy to satisfy. It is quite unusual to see a judge dismiss a case based on insufficient evidence to “bind over” the defendant for trial. When judges review plea agreements, they usually endorse whatever deal the parties negotiated.

Finally, neither juries nor public defenders get much input into the choices of prosecutors. Grand juries can indict a case, as the prosecutor requests, based on a small amount of evidence, amounting only to “probable cause.” While trial juries do have the power to acquit defendants when the prosecutor overreaches,²⁰ the trial rate remains low. Furthermore, prosecutors hold some power to decide who serves on a jury—in effect, prosecutors choose their own bosses. And while public defenders might threaten to drive up the local trial rate by advising all of their clients to reject plea offers, the ethical codes that govern defense lawyers make it difficult for them to advise individual defendants to refuse a good deal.

The relative autonomy of the prosecutor’s office has strengthened over the last few decades. Up until the last quarter of the 20th century, fertile criminal codes and the prosecutor’s robust charging authority co-existed—uneasily—with the constitutional tradition of fragmented power. Interdependent working groups in the courtroom mediated between these conflicting forces. Prosecutors shared de facto power with other full-time courtroom actors, especially judges and defense attorneys, in the processing of cases.²¹ Each needed the others to cooperate in processing the high volume of cases passing through the courts.²²

19. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 101 (2016).

20. See SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016).

21. See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978); PETER F. NARDULLI, JAMES EISENSTEIN & ROY B. FLEMMING, *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* (1988).

22. See Albert Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857 (2000).

During the last decades of the 20th century, however, a combination of factors pushed other courtroom actors to the sidelines and left prosecutors in the center of the frame. New sentencing laws created more-severe punishments, available on the motion of the prosecutor. Defendants faced a higher “trial tax” (the gap between a typical sentence after conviction at trial and the ordinary sentence that defendants received after pleading guilty). Not surprisingly, the trial rate in the federal and state courts went down. In this world, plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”²³

Instead of adversarial justice, with parties presenting their competing views of facts to a judge, criminal courts with low and ever-dropping trial rates operate through administrative justice. Prosecutors mostly decide cases on their own, sometimes after presentations and negotiations with the defense; judges check the quality of the executive officer’s work only in extraordinary cases.²⁴

Sentencing rules designed to constrain the sentencing discretion of judges also make prosecutors relatively more powerful.²⁵ State sentencing guidelines in particular make the prosecutor’s selection of charges a critical determinant of the final sentence.²⁶ Sentencing guidelines also place great weight on the prior convictions of a defendant, giving prosecutors an incentive to file charges even in low-priority cases; the resulting conviction in today’s case sets the stage for a much more severe penalty later if the defendant reoffends or violates probation terms.²⁷ In other jurisdictions, new mandatory minimum sentencing statutes

23. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992), *quoted in* *Missouri v. Frye*, 566 U.S. 134, 144 (2012). For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in the present Volume.

24. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 *WASH. & LEE L. REV.* 1413 (2010); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

25. See David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 *JUDICATURE* 196 (1995).

26. See David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion under Mandatory Minimum Sentencing*, 48 *J.L. & ECON.* 591 (2005); Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 *AM. J. SOC.* 1357 (2000); Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 *J. CRIM. L. & CRIMINOLOGY* 155 (1987); J. Langley Miller & John J. Sloan, *A Study of Criminal Justice Discretion*, 22 *J. CRIM. JUST.* 107 (1994).

27. For a discussion of sentencing guidelines, see Douglas A. Berman, “Sentencing Guidelines,” in Volume 4 of the present Report.

give the prosecutor all of the important sentencing power: Their choices to pursue some statutes as mandatory penalty cases while charging others under the ordinary sentence laws make all the difference.²⁸

Growth in diversion and deferral programs also expands the map of places where prosecutors act without serious input from other actors. In some cases, prosecutors do not simply decline prosecution. Instead, they set conditions for the suspect or defendant to meet, whether it be restitution to victims, treatment programs, or community service. If and only if the person meets the stated conditions, the prosecutor declines to file charges or dismisses the charges that were filed earlier. Both the nature of the conditions offered to the defendant and the ultimate judgment about whether the person complied with those terms rest entirely with the prosecutor; it amounts to a form of pre-conviction sentencing with no involvement from the judge.

Just as prosecutors face no effective checks and balances from their counterparts in the criminal courts, they also experience no real supervision from the legal-ethics enforcement authorities responsible for the discipline of attorneys. Historically, complaints against prosecutors led to discipline less often than complaints against other lawyers.²⁹ This situation, however, may be changing. More recently, bar authorities have revised ethics rules to cover more of the specialized situations that prosecutors face. There are preliminary signs that the treatment of prosecutors in disciplinary proceedings has become more aligned with the treatment of other lawyers in recent years.³⁰

Because prosecutors fly solo these days—without effective input from other legal actors—the important ways to promote regular and predictable conduct from line prosecutors come from within their local offices. Many chief prosecutors issue internal guidance to their assistants about the appropriate

28. See Milton Heumann & Colin Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 *LAW & SOC'Y REV.* 393 (1979); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 *AM. CRIM. L. REV.* 231 (1989); Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 *J. RES. CRIME & DELINQ.* 427 (2007). For a discussion of mandatory minimums, see Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report.

29. See Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 *HOFSTRA L. REV.* 275 (2007); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. REV.* 721 (2001).

30. See Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 *OHIO ST. J. CRIM. L.* 143 (2016).

charges to file and the acceptable resolution of cases before trial.³¹ While these policies routinely declare that they create no judicially enforceable rights, they do shape and regularize the choices of line prosecutors. For many individual prosecutors, team membership is a powerful force even though it lacks binding legal authority. The local office culture gives the most important guidance about how to prioritize among different types of criminal cases, in a world of scarce resources.

C. EFFECTS

What have been the effects when prosecutors engage less completely with other criminal justice actors and operate with such impoverished performance data? That is, what have been the results of flying solo and flying blind?

By definition, it is impossible to know the full effects of flying blind. The nature of the complaint is that prosecutors cannot see the systemic effects of their case-specific actions. Thus, one can point to anecdotes galore, showing both good and bad outcomes from prosecutor offices. A large number of idealistic and public-spirited people work very hard in prosecutor offices; one might safely assume that positive results for the public result from all of that sincere effort.

And yet, it is not surprising to find field studies that point to some troubling results that prosecutors create. For one thing, many studies find evidence that prosecutors, in the aggregate, contribute to disparate treatment of suspects based on race, gender, and other extra-legal factors.³² Other studies point to the “tunnel vision” and “conviction mentality” that lead some prosecutors to pursue wrongful convictions of innocent defendants, and to resist efforts to address those errors when new evidence comes along.³³

31. See Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335 (1990).

32. See Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651 (2001); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 1 (2013). For discussions of the impact of race on adjudication and sentencing, see Paul Butler, “Race and Adjudication,” in the present Volume; and Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

33. See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 110-119 (1975); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004). For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in the present Volume.

Residents in some places—especially those who are racial minorities—hold the criminal justice system in low regard.³⁴ They do not trust in the legitimacy of its outcomes and do not believe that criminal justice makes them any safer. Police relationships with the public drive much of this distrust, but prosecutors and courts also contribute to perceptions of broader problems in the system. Prosecutors might address this trust deficit more effectively if they had better information about community needs and better listening habits.

Finally, it is clear that prosecutors contributed to the phenomenal growth in the use of prisons over the last two generations in the United States.³⁵ Our current incarceration rates are many times higher than historical norms for this country and many times higher than rates in other countries. There is consensus (albeit not uniform) that this level of prison usage is wasteful and cruel. Prosecutors have not slowed down this systemic and sustained failure in American criminal justice.³⁶ Indeed, some analyses place the responsibility first and foremost on the increase in prosecutor filings of felony charges.³⁷

II. POTENTIAL PARTNERSHIPS AND PERFORMANCE MEASURES

In this section, I review the most prominent ideas for improving prosecutor action that is too uninformed and unilateral. These proposals give prosecutors more information about their communities and about their own work, and give the public more-specific information about prosecutor performance. The ideas also aim to restore or create new competing centers of power to counterbalance prosecutor choices, or partnerships to give prosecutors stronger abilities or insights to address community needs.

I evaluate these proposals within the boundaries of political reality. Unlike prosecutors in some other nations, prosecutors in the United States apply criminal codes that create many possible charges and punishments for a given factual scenario. I assume, based on decades of futile efforts to create robust and

34. See generally Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report; David A. Harris, “Racial Profiling,” in Volume 2 of the present Report; L. Song Richardson, “Police Use of Force,” in Volume 2 of the present Report.

35. For a discussion of mass incarceration, see Todd R. Clear & James Austin, “Mass Incarceration,” in Volume 4 of the present Report.

36. See NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCE* 70–103 (Jeremy Travis et al. eds., 2014).

37. See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237 (2012) (most important contributor to prison expansion is prosecutor felony filings per arrest); John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program*, 13 AM. L. & ECON. REV. 491 (2011). But see NAT’L RESEARCH COUNCIL, *supra* note 36 (attributing prison growth during period 1980–1990 to increased admissions and during period 1990–2000 to increased sentence lengths).

coherent criminal codes, that code revision is not a viable strategy. While much of the world relies on robust legal standards and detailed bureaucratic controls to produce sound prosecutor decisions, the United States puts its hopes into looser legal controls, weaker bureaucratic structures, and stronger political accountability.³⁸ The ability of voters and community groups to monitor and check prosecutors is the best available way to domesticate the prosecutor's free-ranging power to "do justice" and to use limited resources wisely. I treat that basic blend of political and legal controls as foundational.

Similarly, I embrace local variety, the differences one encounters between local prosecutors' offices within a single state. Even though the offices operate under the same criminal codes and court systems, urban and rural districts deliver remarkably different flavors of criminal justice. They face different patterns of crime and respond to different expectations from local voters about the greatest threats to public safety. Variety among prosecutors is desirable to some degree, and probably inevitable. For that reason, reforms face long odds of success if they attempt to impose uniform legal standards on prosecutors who work in very different local environments.

I organize the leading academic reform proposals along two axes. One variable is the *source* of the influence on the work of prosecutors: Some inputs come from sources external to the prosecutor's office and others from inside the office. A second variable is the *substantive or procedural nature* of the input for prosecutors. Some reforms take the form of pre-declared substantive rules of law, banning or requiring certain outcomes from the prosecutor. Others pursue a procedural strategy. They take the form of a required exchange of information—what I call notice and consultation—that leaves the prosecutor free to choose among all legal options after completing the required exchange.³⁹ The following grid lays out four possibilities, each addressed in a subsection below.

38. See Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1 (2014); David Alan Sklansky, *Unpacking the Relationship between Prosecutors and Democracy in the United States*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY (Maximo Langer & David Alan Sklansky eds., 2017).

39. For a similar organizational scheme that sorts legal regulation from enhanced information regimes, see Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

	External Source	Internal Source
Pre-Declared Substantive Legal Rule	Subsection A	Subsection B
Notify and Consultation Process	Subsection C	Subsection D

Legal scholars have developed most fully the prospects for reform in Subsection A. But in light of the poor track record of those proposals and the great variety among prosecutors' offices, a more diversified portfolio offers a better bet. The reforms in Subsections C and D deserve more attention and funding than they have received until now.

A. SUBSTANTIVE LEGAL STANDARDS, IMPOSED FROM EXTERNAL SOURCES

The center of gravity for reform proposals sits in this quadrant. Over the years, many scholars have observed the remarkable amount of discretionary power that prosecutors hold over criminal proceedings and how little the law seems to matter.⁴⁰ The solution, then, might be more law, creating more guard rails to keep the prosecutor on track. Just as the “Due Process Revolution” replaced some police discretion with legal standards for many important search and interrogation techniques, and just as sentencing guidelines cut back on judicial discretion in selecting a punishment, so a new body of law might create more-specific legal standards for prosecutors to meet during the charging, pretrial proceedings, plea negotiation, trial, and sentencing.

Which legal rules might create new standards to structure the discretionary choices of prosecutors? There is no shortage of proposals to rewrite criminal codes, aiming to thin out the extra options. While criminal-code reform might accomplish quite a bit, that is a decades-long project. It must somehow overcome long-standing political incentives and habits that created the current expanded menu of crimes and punishments.⁴¹ Reform is likely to make inroads elsewhere. In particular, proposals for new, specific legal standards are most realistic when they empower *other* criminal justice actors rather than reducing the range of legal options available to the prosecutor.

40. For an overview, see ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2009).

41. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

Legislative proposals to restore judicial power in the selection of sentences hold some promise. The legislature might pass laws to cut back on the coverage of expensive mandatory minimum sentencing laws, as the U.S. Congress did in 2010.⁴² Because the selection of charges directs the sentencing judge into boxes with relatively few legal options under the sentencing guidelines or similar structured sentencing laws, some reformers propose an increased judicial power to review declinations⁴³ or to dismiss charges after filing based on factors beyond the sufficiency of the evidence.⁴⁴ The number of counts also profoundly affects the available sentence, so new statutes that increase judicial sentencing authority in multi-count cases might also restore some balance of powers to the law of sentencing.⁴⁵ There is also some promise in revisions to rules of criminal procedure that allow judges to participate more actively in plea negotiations; judges who involve themselves in these discussions tend to create a counterweight to inexperienced or uncompromising prosecutors.⁴⁶ Such rule changes would give judges a stronger hand to block the worst case outcomes.

Some reform proposals relate to prosecutor performance during trial preparation or the trial itself rather than prosecutor choices at the moment of charging or guilty-plea negotiations. Expanded discovery rules offer one example.⁴⁷ This is an area where non-judicial actors, such as professional ethics

42. See Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 191 (2015); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010).

43. See Brown, *supra* note 19.

44. See Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629 (2015); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659 (1981) (proposing laws to compel written prosecutor charging guidelines that would bolster judicial enforcement of equal protection claims).

45. See Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107 (2005).

46. See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

47. See Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016). For a discussion of such rules, see Darryl K. Brown, "Discovery," in the present Volume.

enforcers, might have a weighty role.⁴⁸ Another set of proposals focuses on cheaper summary proceedings as alternatives to a full-blown jury trial, to give judges and juries more opportunity to evaluate the charging decisions of prosecutors.⁴⁹

When it comes to substantive legal standards that legislators create, prosecutors are likely to have some influence during the drafting process. Prosecutors lobby the legislature on criminal justice bills, either individually or through their professional associations. They do not write their own tickets in the legislative process. Prosecutors do, however, often exercise an effective veto over changes to the criminal code or to sentencing laws that limit their options. As a result, the views of prosecutors about acceptable political responses to the public-safety needs of the day will say a lot about which bills can pass through the legislature. Prosecutors—or at least some of them—must be convinced of the wisdom of substantive standards before others will enact them into law.⁵⁰

B. SUBSTANTIVE LEGAL STANDARDS, IMPOSED FROM INSIDE

As we saw in the previous subsection, pre-declared standards for prosecutors to follow as they do their work might take the form of constitutional rules, legislation, procedural rules, or ethics rules enforced by legal actors outside the prosecutor's office. But pre-declared standards for prosecutors might also originate from inside the prosecutor's office.⁵¹

A great many prosecutors' offices already issue internal guidance for line prosecutors, instructing them about the proper charging decisions to make based on the presence of certain provable facts. For instance, the leadership in an office might declare that line prosecutors must file felony burglary charges whenever a suspect entered some part of a residence other than the garage. It is also common to find chief prosecutors who issue guidance to their assistants

48. See Harry M. Caldwell, *Everybody Talks About Prosecutorial Conduct But Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. (forthcoming) (proposing creation of an independent commission empowered to investigate and discipline prosecutorial misconduct).

49. See Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010).

50. See Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, in PROSECUTORS AND DEMOCRACY, *supra* note 38.

51. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 (conceptions of neutrality all flow from assumption of articulable standards). For a more detailed examination of this collection of reform proposals, see John F. Pfaff, "Prosecutorial Guidelines," in the present Volume.

about the proper resolutions to offer during plea negotiations. These “price lists” vary in the amount of choice they leave to the line prosecutor, and often focus on a group of high-priority crimes, leaving other types of charges unregulated.⁵²

Internal declarations of standards typically do not create judicially enforceable rights: If a prosecutor were to violate the standard, judges would not order the prosecutor to comply or invalidate the prosecutor’s action.⁵³ Nevertheless, these pre-declared standards do change conduct among prosecutors who try to follow the internal rules of their offices.

While prosecutors themselves choose the content of these rules, the decision to issue the rules does not always originate with the prosecutor. Sometimes legislatures pass statutes that mandate the use of internal guidance documents in specialized enforcement areas such as domestic violence.⁵⁴ In a few unusual situations, judges have ordered prosecutors to issue internal guidance.⁵⁵ Some proposals call for sentencing commissions or other government agencies with expertise in criminal justice to press prosecutors for a declaration of standards in selected areas.⁵⁶

These internal rules take advantage of the specialized knowledge of prosecutors regarding the tradeoffs between enforcement spending in various areas.⁵⁷ They also raise the question of publication: To what extent should prosecutors keep their standards strictly internal, to avoid their use in arguments during court proceedings or plea negotiations? The realities of modern communications media suggest that publication will be the dominant norm going forward.⁵⁸

52. See Wright & Miller, *supra* note 18.

53. See Ellen S. Podgor, *Department of Justice Guidelines: Balancing Discretionary Justice*, 13 CORNELL J.L. & PUB. POL’Y 167 (2004).

54. See WIS. STAT. § 968.075 (“Each district attorney’s office shall develop, adopt and implement written policies encouraging the prosecution of domestic abuse offenses.”).

55. See *State v. Brimage*, 706 A.2d 1096 (N.J. 1998) (requiring prosecutors to issue statewide guidelines for filing of school-zone drug charges with mandatory sentencing implications).

56. See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

57. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

58. See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

C. INFORMING AND CONSULTING, ENFORCED FROM THE OUTSIDE

The next group of policy reforms for prosecutors step away from pre-declared substantive standards to govern the decisions of line prosecutors. Instead, these proposals pay attention to the groups or the sources of information that a prosecutor consults before making a decision. They also address the information that prosecutors themselves provide to others (both inside and outside their offices) about their decisions. Put another way, these proposals address the *process* that the prosecutor uses to decide how to handle a case, rather than the substantive standards that the choices must meet.

The “inform and consult” framework that I use to analyze these proposals draws loosely on the successful policymaking model for administrative agencies.⁵⁹ For that reason, the sources of law most relevant to reform might reside in public-records statutes, budget rules, election law, and state administrative law.

1. Reforms that require or encourage the prosecutor to consult

One of the most intriguing proposals on the “consult” side of the equation relates to the state corrections budget. As several scholars have noted over the years, the local prosecutor can benefit from a “correctional free lunch.”⁶⁰ That is, local residents benefit from their use of prison beds and other correctional resources, even though taxpayers all over the state fund those correctional programs. From the local prosecutor’s vantage point, voters elsewhere in the state will fund a local benefit: the most expensive form of crime control.

One possible remedy for this mismatch problem is to inform prosecutors (and perhaps their constituents in the district) about the local usage of state corrections resources on a regular basis, in comparison to other local prosecutors in the state.⁶¹ The local prosecutor would receive a report showing the actual spending attributable to local cases, alongside a target per capita level of proportional spending. Such a report would require some metric for determining the pro rata share of corrections resources that each local prosecutor is entitled to use, and many such metrics are possible.

Some variations on this proposal treat the local spending of state corrections dollars as something more than just information for the prosecutor to consult, converting the report into a budget. Any prosecutor overuse in the state corrections

59. Cf. 5 U.S.C. § 553 (notice and comment procedures for legislative rules issued by administrative agencies); see also Sekhon, *supra* note 38; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

60. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991).

61. See Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47 (2008).

budget might trigger local tax increases to pay for the extra resources, or greater use of the local jail.⁶² Another variation on this theme would allow prosecutors to make the best use of their limited corrections budgets by requesting parole release for past convictions as a way of staying under budget.⁶³

The concept of community prosecution could also get a boost from state statutes. A legislature might require the local prosecutor to provide reports about topics of special interest to community groups, or to create internal processes for exchanging views with local interest groups. These might include groups involved in juvenile justice, domestic violence, or recurring business frauds.

Another group of consultation ideas deals with the quality of information that the prosecutor receives about criminal investigations and evidence. When prosecutors operate or supervise their own forensic laboratories and other support functions for criminal investigations, it compromises the quality of the information they receive; best practices call for management of labs and similar functions from government (or private) entities that are independent of the prosecutor.⁶⁴

Prosecutors also depend on defense attorneys to test the quality of the information that they plan to use as evidence in criminal cases. In those places where the defense attorneys for indigent defendants are underfunded when compared to the prosecution, that quality-control function slips out of reach.⁶⁵ A state law—or even a routine budget practice—that enforces parity of funding between prosecution and defense would reinforce the quality of information that the prosecution uses to support the convictions the office pursues.⁶⁶

Finally, various reforms to election laws might encourage prosecutors to listen more carefully to the priorities of local voters and community groups with special interests in criminal justice. While larger prosecutor districts might

62. See Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?* 51 WAKE FOREST L. REV. 677 (2016); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996).

63. See Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 359 (2017).

64. See SANDRA GUERRA THOMPSON, *COPS IN LAB COATS: CURBING WRONGFUL CONVICTIONS THROUGH INDEPENDENT FORENSIC LABORATORIES* (2015); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013). For a discussion of issues raised by forensic evidence, see Erin Murphy, “Forensic Evidence,” in the present Volume.

65. See generally Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

66. See TENN. CODE § 16-2-518 (“any increase in local funding for positions or office expenses for the district attorney general shall be accompanied by an increase in funding of 75 percent in the increase in funding to the office of the public defender in such district,” reflecting percentage of defendants represented by public defender).

be more efficient to operate, they allow the chief prosecutor to ignore the views of minority groups most directly affected by criminal enforcement policies.⁶⁷ Smaller operating units for prosecutors lead the office to consult more carefully with the local groups most invested in their work.

2. Reforms that require or encourage the prosecutor to inform

On the “inform” side of the equation, a number of reform proposals call for legislation or other external prompts, forcing prosecutors to give to the public more information about their work. These reports might give voters more-detailed information about office policy or performance. Such reports already appear in the press on a sporadic basis; legislatures or other legal actors might compel or encourage prosecutors to inform the public on a regular basis about specific aspects of office performance.⁶⁸ Because all prosecutors would report the same metrics, comparisons across districts would become possible. The proposals reflect a distinctive view of democracy and prosecution: They treat criminal justice as a place to encourage popular participation, rather than insulating criminal justice experts from the excesses of popular passions.⁶⁹

Some of these reporting proposals focus on prosecutor estimates of the costs of investigation and prosecution of crimes, along with estimates of the potential costs of cases declined for prosecution.⁷⁰ Others focus on aspects of prosecutor performance that current court data could capture.⁷¹ Still others call for other criminal justice actors to collect and disseminate their views about the performance of individual prosecutors.⁷²

67. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

68. See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2017) (exploring role of internet in setting public attitudes about prosecutor misconduct and performance).

69. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055 (2016) (diagnoses repercussions caused by defendants’ lack of information and understanding, laymen’s lack of voice, and the public’s lack of information and participation).

70. See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004) (asking prosecutors to consider enforcement costs); Gold, *supra* note 13 (proposing required disclosure of prosecution and declination costs to address voter information deficits).

71. See Andrew M. Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016) (exploring potential aggregation of court data to report on prosecutorial performance); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. (forthcoming 2017) (exploring examples of potential analytics to address race-based jury selection practices, prosecutorial misconduct, and other measures of prosecutorial performance).

72. See BIBAS, *MACHINERY*, *supra* note 69.

The varieties of information that prosecutors might collect and report to the public about their activities are almost endless. Most academics agree that the “conviction rate” of the office is an unhelpful measure of office quality; beyond that, the proposals fan out in all directions, each writer proposing a different set of metrics.⁷³ In this setting, it would be wise to tap the insights of prosecutor professional associations to develop a short consensus-based list of relevant measures that legislatures or others might require prosecutors to collect and report.

D. INFORMING AND CONSULTING, ENFORCED FROM THE INSIDE

Finally, we turn to instances when prosecutors decide for themselves—without external prompts—to consult sources and to collect information that could inform wise prosecutorial policy. Similarly, prosecutors sometimes inform voters, community groups, and other criminal justice actors about the trends and practices in the office.

In an effort to obtain more-specific information about public priorities than prosecutors can obtain through the blunt instrument of vote totals in elections, offices might resort to public polling, focus groups with community organizations, and other methods to solicit specific views and values from the residents of the district. This feedback loop between the office and the public is fundamental to the concept of community prosecution.

Collection of data is also a fundamental building block for management of prosecutor offices.⁷⁴ The topics that prosecutors might inquire about include the possible racial disparities in their charging and plea practices.⁷⁵ Managers of a prosecutor’s office also might generate data about performance to inform their choices about hiring,⁷⁶ training of new prosecutors, the creation of

73. See Sklansky, *supra* note 38.

74. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008) (discussing “internal transparency”); William H. Simon, *The Organization of Prosecutorial Discretion*, in PROSECUTORS AND DEMOCRACY, *supra* note 38 (key elements of post-bureaucratic organization are presumptive rules, root cause analysis, peer review, and performance measurement).

75. See Angela J. Davis, *Prosecutors, Democracy and Race*, in PROSECUTORS AND DEMOCRACY, *supra* note 38 (discussing use of racial impact analyses in Milwaukee).

76. See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988) (emphasizes hiring and training rather than standards or external review); Kay L. Levine & Ronald F. Wright, *Prosecution in 3D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012) (advocating an office staff with a range of experience).

specialized units within the office,⁷⁷ compensation schemes,⁷⁸ and auditing systems for diagnosis of errors.⁷⁹

These internal uses of data, if they are to become standard practice among prosecutors across a wide range of offices, must originate from prosecutors themselves. They must grow out of typical management needs in prosecutors' offices. For that reason, professional associations of prosecutors might address the topics for data collection and the uses of such data. Every state has a professional association for district attorneys, which typically addresses the training and management issues that chief prosecutors face around the state.⁸⁰ National groups also provide a space for the development of professional standards among prosecutors.⁸¹ If these groups were to develop metrics for successful prosecution, they might gain credibility because the use and collection of this data grows out of the daily experiences and needs of prosecutors. These professional associations might prove to be the most important incubators of reform.

RECOMMENDATIONS

In an effort to improve the performance of prosecutors who find themselves, too often, flying solo and flying blind, reformers have a range of realistic options. Any of them might improve the institutional environment to promote sound prosecution. In an effort to spotlight the best of those possible reforms, I list below one promising possibility from each of the four major categories of reforms reviewed above. Because of the great variety among local prosecutors' offices, I prioritize the reforms that stress notice and consultation rather than changes in substantive legal standards.

77. See Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461 (2005).

78. See Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441 (2009); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

79. See JOHN HOLLWAY, *A SYSTEMS APPROACH TO ERROR REDUCTION IN CRIMINAL JUSTICE* (2014); *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1995-2010 (2010).

80. The full-time staff for each of these statewide prosecutor groups come together nationally to form the National Association of Prosecutor Coordinators.

81. These groups include the National District Attorneys' Association, the Association of Prosecuting Attorneys, and the Institute for Innovation in Prosecution. The NDAA and the APA have drafted performance standards for use within prosecutors' offices. See M. ELAINE NUGENT-BORAKOVE, LISA M. BUDZILOWICZ & GERARD RAINVILLE, *PERFORMANCE MEASURES FOR PROSECUTORS: FINDINGS FROM THE APPLICATION OF PERFORMANCE MEASURES IN TWO PROSECUTORS' OFFICES* (2007).

1. **Advocate for professional associations to set standards** that assure specific amounts and topics for training of new prosecutors, aiming to give prosecutors early awareness of the public-safety priorities of the local office.
2. **Issue reports to local prosecutors and to the public regarding the annual use of state correctional resources by local prosecutors**, in comparison to an expected baseline of usage.
3. **Revise sentencing laws and practices** to restore the judicial input into the sentence imposed as a meaningful counter-weight to prosecutor control over the initial selection of charges.
4. **Enact legislation or sentencing guidelines that require prosecutors to declare local or statewide standards for the selection of charges**, especially in categories of crimes that present particular risks of unequal treatment among cases or special interest for the voting public.

In the end, legislators and others who care about the quality of the prosecutor's work should balance the reform portfolio, paying some attention to each of the quadrants discussed above. There is no single definitive change in prosecutor institutions and incentives that will make all the difference. In a world with so many local prosecutor offices, working in so many distinct environments, a full menu of reform options will be necessary.