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The Problems With  
Prosecutors

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**Abstract**

Most scholarship on prosecutors in the United States is diagnostic, prescriptive, or both; the motivating questions are what is the problem with prosecutors, and how do we fix it? Answering those questions has been difficult, in part because there are at least seven different problems with American prosecutors. Six of those problems are relatively familiar: the power of prosecutors, the discretion they exercise, the illegality in which they too often are found to have engaged, the punitive ideology that shapes many of their practices, their often-frustrating unaccountability, and organizational inertia within prosecutors' offices. These problems intersect, so they are difficult to address separately. The seventh problem is discussed less often but may be the most basic: the ambiguity of the prosecutor's role. That problem needs to be understood as well if progress is to be made addressing the other six.



## INTRODUCTION

A federal appellate judge says there is an epidemic of prosecutors hiding exculpatory evidence (Kozinski 2015). Legal scholars blame prosecutors for overcrowded prisons, out-of-control snitches, and racially lopsided justice (Pfaff 2017, Raeder 2007, Starr & Rehavi 2013). Activists charge prosecutors with protecting trigger-happy cops (Pendergrass 2016). A former prosecutor concludes that no one of good conscience should want the job (Butler 2009). There is a broad and growing sense that prosecutors in the United States are a problem—quite possibly the most pressing challenge in American criminal justice. Not everyone agrees with that assessment (Bellin 2017, Eliason 2006, Pizzi 1993), but the vast majority of scholarship on prosecutors in the United States is diagnostic, prescriptive, or both; the motivating questions are what is the problem with prosecutors, and how do we fix it?

The answers have proven elusive. One reason is that, as this review explains, there is a range of different problems with prosecutors in the United States—seven, to be precise. Six of the problems are relatively familiar: the power that prosecutors have, the discretion they exercise, the illegality in which they too frequently engage, the punitive ideology that shapes many of their practices, their often-frustrating unaccountability, and the organizational inertia that afflicts prosecutors' offices. These problems intersect in complicated ways, so addressing any of them intelligently requires an understanding of all of them. The seventh problem is less remarked upon but may be the most fundamental: the ambiguity surrounding the prosecutor's role. That problem needs to be understood as well if progress is to be made addressing the other six.

Before exploring these seven problems, this review provides some background on prosecutors: their duties, their workplaces, their career paths, their history, and their occupational culture. The review then examines, sequentially, the seven problems with prosecutors. It next turns to seven possible solutions: judicial oversight, internal checks, elections, community prosecution, adaptive management, disempowerment, and role specification. Each of the solutions responds to one or more of the problems, but none responds to all of them. To assess proposed reforms of prosecutors' offices, we need to be clear on which problems they are intended to address.

Throughout, the review focuses on the United States. Prosecutors play an increasingly pivotal role in criminal justice systems in Europe, Latin America, and Asia (Luna & Wade 2012), but American prosecutors remain distinctive in many respects, some pertaining to the power and discretion they wield, some pertaining to the peculiar United States tradition of selecting head prosecutors by popular vote (Tonry 2012), and some pertaining to the scale and range of the pathologies of American criminal justice—pathologies that are, more and more, laid at prosecutors' feet.

## BACKGROUND

Prosecutors in the United States are the intermediaries between the police and the judiciary. They determine what offense should be charged and against whom, and they present the case in court; they are thus both adjudicators and advocates (Sklansky 2016). In criminal cases brought pursuant to state law—the vast majority of criminal cases in the United States—the prosecutor typically works for a county-level office headed by an elected official, usually called a district attorney or state's attorney (Jacoby 1980). Most federal prosecutors work in an office headed by a presidentially appointed US Attorney; there is one such official for each of the ninety-four federal judicial districts, except for the District of Guam and the District of the Northern Mariana Islands, which share a US Attorney (Alm 1999).

The organization and supervision of prosecutors' work vary from office to office. Smaller offices tend to have flat organization charts, with prosecutors all reporting more or less directly to the elected or appointed head of the office. These offices also tend to staff cases vertically, meaning that



the same prosecutor supervises the investigation, charging, and trial of the case, and sometimes also the appeal. Larger offices tend to have more layers of supervision, and sometimes staff cases horizontally, with different prosecutors handling different stages of a case (Levine & Wright 2013).

Working as a prosecutor—either as the elected or appointed head of an office, or as one of the attorneys under that official’s direction—has long served as a stepping stone to other prestigious jobs, including judgeships, other elected offices, and senior positions in law firms (Jacoby 1980). Empirical research suggests, not surprisingly, that prosecutors are motivated by a combination of public-spirited and narrower, career-oriented considerations (Glaeser et al. 2000, Richman 2003). The career considerations have traditionally been thought to push prosecutors to more punitive behavior (Tonry 2012). Boylan (2005) found, for example, that obtaining longer sentences helps US Attorneys secure other prestigious jobs when they complete their tenure. Beyond pragmatic objectives—both for themselves and for the public—prosecutors also appear motivated by what Burke (2007, p. 187) calls “prosecutorial passion:” a drive to pursue justice, framed by prosecutors’ self-image “as warriors in a fight between the good and the guilty.”

Professional prosecutors are a longtime presence in American criminal justice, dating back to the Colonial Era, but the origins and early development of the office are not entirely clear. Influenced perhaps by Dutch and French legal traditions, the Colonies are often said to have broken early with the English practice of private prosecution (Jacoby 1980). Steinberg (1986), though, found that private prosecution persisted into the 1800s and that the functions of early public prosecutors were largely clerical. The nineteenth century appears to have been the critical period for the emergence of the modern American prosecutor; it was during the 1800s that prosecutors gained full control over their docket (Fisher 2004) and became full-time, salaried professionals (Parrillo 2013). By the early twentieth century, prosecutorial discretion, both at the charging stage and during the increasingly central practice of plea bargaining, had emerged as a key tool for reconciling conflicting goals of the criminal justice system—balancing justice with mercy and tempering the demands of positive law with prudential forbearance (Parrillo 2013, Sklansky 2016). As the 1900s progressed, prosecutors were increasingly expected to oversee not just criminal prosecutions but also the activities of the police; they became *de facto* leaders of law enforcement (Stuntz 2013).

## POWER

There is a broad consensus that prosecutors in the United States have enormous power and nearly as broad a consensus that this power should be curtailed. Since the mid-twentieth century, prosecutors have regularly been described as the most powerful figures in the criminal justice system. Most scholars believe that over the past several decades the power of prosecutors has further expanded (Sklansky 2016), although Bellin (2017) argues that the power of prosecutors is greatly overstated.

What do scholars mean when they say prosecutors “rule the criminal justice system” (Luna & Wade 2012, p. xi) with “virtually absolute power” (Miller 2004, p. 1,252)—that “[t]he system’s overriding evil is the concentration of power” in prosecutors’ hands (Dripps 2016, p. 1,356)? Part of what they mean is that prosecutors’ professional decisions are relatively unconstrained and subject to weak oversight: Discussions of power overlap with discussions of discretion and accountability, problems to be discussed below. But prosecutors’ unchecked choices would not be so concerning if they were less consequential. Seventy-five years ago, Robert Jackson, then Attorney General of the United States, warned in a now-famous speech that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.” Jackson explained that a prosecutor



can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole (Jackson 1940, p. 3).

In the years since Jackson's speech, prosecutorial power is widely thought to have increased. Mandatory sentences and restrictions on early release have shifted much of the control over the length of incarceration from judges and parole boards to prosecutors because the charges filed often determine the sentence served. Most criminal cases are resolved by plea bargains, not by trials; that was true in the mid-twentieth century, but it is even truer today (Fisher 2004). And the proliferation of criminal charges carrying stiff, mandatory prison terms has increased the leverage prosecutors exercise when bargaining for pleas (Stuntz 2004).

Prosecutors exercise power not just over individual cases but also over criminal justice policies and strategies. Head prosecutors often serve as *de facto* leaders of the local criminal justice system; this is true both of district attorneys, who prosecute state-law crimes and are generally elected at the county level, and US Attorneys, who prosecute federal crimes and are appointed by the President and confirmed by the Senate (Davis 2007, Jacoby 1980). (Some locally elected prosecutors are called state's attorneys or prosecuting attorneys; this review uses the term district attorney to refer to any locally elected prosecutor, regardless of official title.) At both the federal and state levels, prosecutors also lobby for or against criminal justice legislation, and here, too, they tend to exercise considerable influence (Simon 2007, Stuntz 2013).

Precisely how much influence is difficult to measure, as is the magnitude of prosecutorial power in plea bargaining. But the magnitude of prosecutorial power in both respects appears linked to restrictions on the scope and subjects of prosecutorial power: Prosecutors traditionally have exercised authority only within the sphere of criminal proceedings and only over actual or potential criminal defendants (Sklansky 2016). For that reason, many, if not most, people do not imagine that they may be subject to prosecutorial power, and they have limited sympathy for the people they suppose will wind up in that category. That factor may have made the concentration of power in the hands of prosecutors more acceptable.

That said, the scope and subjects of prosecutorial power have likely increased over the past century. One driver here may be the proliferation of criminal statutes, although there is disagreement about whether the cumulative reach of these statutes has expanded. Many things are now crimes that were not in the past. Immigration offenses are a good, and important, example. But other conduct that once was criminal—buying and selling alcohol, engaging in extramarital sex—no longer is. The net effect on the overall scope of criminal statutes is unclear (Brown 2007).

A less ambiguous change is the growing comfort with, even enthusiasm for, what was called pretextual prosecutions and the broader trend toward *ad hoc* instrumentalism, the use of criminal prosecutions and other legal proceedings as interchangeable tools to be used opportunistically against people or behaviors thought to be dangerous or undesirable (Sklansky 2016). One traditional limitation on prosecutorial power—as well as on prosecutorial discretion, a closely related concern to be discussed below—has been a sense among prosecutors that they should avoid prosecutions that are prompted not by the defendant's violation of the statute being charged but by a desire to punish the defendant for other reasons (Richman & Stuntz 2005). Jackson (1940, p. 5)



thought “the most dangerous power of prosecutors” was the ability to pick defendants rather than cases: Instead of “discovering the commission of a crime and then looking for the man who has committed it . . . picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.” Increasingly, though, something very like that strategy has become celebrated as intelligence-driven prosecution (Sklansky 2016). The Manhattan District Attorney’s office, for example, boasts that it “figured out who [were] the people driving crime in Manhattan,” and then “for four years . . . focused on taking them out” (Sklansky 2016, p. 486). It has also become increasingly common for prosecutions to be used as leverage to secure changes in behavior other than refraining from crime. The best-known examples of this, perhaps, are “nonprosecution agreements” or “deferred prosecution agreements” in which prosecutors forego charges against an organization in exchange for commitments to institutional reform or self-monitoring (Garrett 2007). Levine (2005) provides another example: prosecutors using the hammer of statutory rape charges to coerce broad changes in the personal lives of defendants.

Why do prosecutors have so much power? It is common to find the explanation in burgeoning caseloads and the rise of plea bargaining: As systems of criminal adjudication have become increasingly burdened, they have substituted consensual case dispositions for trials, and as plea bargaining rises, so does prosecutorial power (Luna & Wade 2012). Plea bargaining has in fact increased, both in the United States and abroad, but it is unclear whether rising caseloads have driven that phenomenon, or whether plea bargaining has instead inflated caseloads by expanding the system’s capacity, the way that widening a highway can bring more traffic (Brown 2016). Nor is it clear whether prosecutorial power has been boosted by the rise of plea bargaining, or for that matter by swelling caseloads, as opposed to vice versa. It is not even clear why more criminal cases or more plea bargaining should be expected to boost prosecutorial power.

Criminal defendants whose cases are not dismissed do plead guilty at very high rates, upward of 90% (Sklansky & Yeazell 2006). Guilty pleas vastly outnumber trials. But some of that is the result of case selection: Conviction rates are high in part because prosecutors choose their defendants and because judges dismiss the weakest cases. Another part of the explanation for high conviction rates is that prosecutors trade things away: That is what makes a plea bargain a bargain. The majority of civil cases wind up settling as well, but that is rarely thought to show that civil plaintiffs have vast power or even that they have the upper hand.

Some scholars attribute the power of modern prosecutors not to plea bargaining but to the politics of crime. The idea is that as public opinion increasingly favored “tough on crime” policies, and crime control and public safety became the chief preoccupation of government, prosecutors became the natural champions of the public’s anxieties (Barkow 2009, Simon 2007). This explanation, too, has limits. The expansion of prosecutorial power began well before the emergence of the late twentieth-century “culture of control” (Garland 2001) and does not appear to have been reversed by the waning fear of crime in recent years.

Still another explanation for the rise of prosecutorial power focuses on the ambiguity of the prosecutor’s role (Sklansky 2016). Prosecutors straddle key conceptual and organizational divides in criminal justice: between adversarial and inquisitorial forms of justice, between courts and the police, between vengeance and mercy, between law and discretion, and—particularly in the United States—between politics and law. The intermediation performed by prosecutors may be central to their role and fundamental to their growing power and importance. The broad movement toward greater flexibility and fluidity in governance, a movement that includes not only ad hoc instrumentalism but also the broad categories of negotiated rulemaking, unorthodox rulemaking, and new governance, makes the boundary blurring performed by prosecutors increasingly valuable or at least increasingly valued.



## DISCRETION

Discussions of prosecutorial power are, almost always, simultaneously discussions of prosecutorial discretion. Power and discretion are closely related but analytically distinct. Power is the ability to do something—typically, in this case, to impose harsh consequences on someone—or to influence someone’s actions. Discretion is the freedom to decide whether or not to take those steps. American prosecutors do not just have great clout; they also have broad discretion regarding how and when to exercise their authority, and prosecutorial discretion further bolsters prosecutorial power. This is clearest, perhaps, with regard to the selection of charges. Prosecutors in the United States have broad discretion regarding what criminal cases to pursue, what crimes to charge in any given case, and which if any charges to bargain away in exchange for a guilty plea (Davis 2007). Many criminal statutes overlap, and the same conduct is often punishable by a range of different statutes carrying different maximum—and sometimes minimum—penalties. The result is that criminal statutes often function as “a menu from which the prosecutor may order as she wishes” (Stuntz 2004, p. 2,549). Because the potential penalties under many criminal statutes are quite severe, the prosecutor’s discretion to invoke these statutes or to take them off the table gives her great bargaining leverage, increasing her power. Prosecutors have no legal obligation to file charges that they believe are proportionate to the defendant’s culpability, nor is there any legal limit on the “discounts” prosecutors can offer in exchange for a defendant’s guilty plea—or, viewed another way, the penalty prosecutors can impose for a defendant’s insistence on going to trial (Stuntz 2006).

American prosecutors have great discretion not just collectively but individually. Most county district attorney offices give line prosecutors wide authority over their cases, and supervisory review can be minimal. The result is that charging decisions are often made not by the elected district attorney or by the office as a whole but by an individual prosecutor (Davis 2007). Charging decisions and plea offers by federal prosecutors are, as a general matter, more constrained by office guidelines, departmental directives, and requirements for supervisory approval. But even federal prosecutors often have considerable leeway in choosing what to charge and what to bargain away (Barkow 2009, Richman 2003).

The discretion exercised by prosecutors in the United States has long been seen as problematic for at least three different reasons. First, as previously noted, it bolsters prosecutorial power, which is widely thought excessive. Second, it undermines the uniformity and predictability of criminal sanctions and allows the very kind of arbitrary and capricious decision-making that administrative law generally strives to eliminate (Davis 1969). Third, it leaves prosecutorial decisions vulnerable to racial bias and other forms of unjust discrimination (Davis 2007). There is evidence that part of the racial disproportionality in the American criminal justice system stems precisely from exercises of prosecutorial discretion (Starr & Rehani 2013).

For decades, scholars have suggested that the charging and bargaining discretion of individual prosecutors should be curbed by internal guidelines and supervisory oversight and that courts and legislatures should require prosecutors’ offices to move in this direction (Davis 1969, Vorenberg 1981). Courts and legislatures have not taken up the task (Barkow 2009). Whether prosecutors’ offices nonetheless have increased their use of guidelines and internal oversight is hard to say, because few prosecutors’ offices disclose information of this kind. What is clear is that many if not most line prosecutors continue to enjoy broad discretion over charging and plea bargaining, and that the use of guidelines or supervisory oversight to rein in that discretion varies widely from office to office.

## ILLEGALITY

There are legal constraints—federal and state, constitutional and statutory—on what American prosecutors can do, curtailing both their power and their discretion, but the constraints are often



weakly enforced (Davis 2007). For example, federal constitutional law requires prosecutors to disclose exculpatory evidence to the defense before trial, but when they fail to do so, the violation may never come to light, or it may come to light when it is too late for the evidence to be useful (Gershman 2007). Federal constitutional law also prohibits prosecutors from exercising peremptory challenges against prospective jurors on the basis of race or gender, but proving that they have done so is notoriously difficult (Tomkovicz 2012). It is even more difficult to prove that prosecutors have relied on race, ethnicity, or political affiliation when making charging decisions, although federal constitutional law prohibits them from doing that as well (Davis 2007).

Prosecutorial illegality thus is objectionable in part because it can vitiate constraints on prosecutorial power and prosecutorial discretion. But it is chiefly objectionable for independent reasons. The legal obligations imposed on prosecutors are not aimed, first and foremost, at limiting prosecutorial power; they are aimed at making criminal adjudication fair, trustworthy, and evenhanded by curbing excesses of adversarial zeal. This is a particularly important task in the American system of criminal justice, precisely because so much responsibility for the fair operation of that system is placed in the hands of prosecutors rather than judges.

For example, American lawyers and judges have long emphasized the nation's commitment to adversarial rather than inquisitorial fact-finding and accordingly have vested responsibility for evidence production in the parties rather than the judge (Sklansky & Yeazell 2006). In criminal cases, though, this leads to a radical imbalance: the investigative resources of the defense are dwarfed by those of the prosecution. The solution has been to require prosecutors to share some of the evidence they develop or receive.

Obligations of this kind are imposed by constitutional and statutory rules at the federal and state level as well as by ethical rules promulgated by bar associations (Sklansky 2017c). The most important of these disclosure requirements, announced as a matter of federal constitutional law by the United States Supreme Court in *Brady v. Maryland* (1963), directs prosecutors to provide defense counsel with any material exculpatory evidence. The definition of material is notoriously murky. The Supreme Court has said that a failure to turn over exculpatory evidence violates *Brady* only if, in retrospect, there is a "reasonable likelihood" that disclosing the evidence would have changed the outcome of the trial [*Stickler v. Green* (1999)]. The rule thus creates "a retrospective standard" for "a prospective obligation" (Douglass 2001, p. 471); determining whether *Brady* demands the disclosure of particular evidence requires prosecutors to predict how important the evidence will appear in hindsight following a conviction. And there is a widespread sense that prosecutors often cut it too close, failing to disclose evidence that winds up being material (Gershman 2007).

It is difficult to estimate the actual frequency of *Brady* violations or failures by prosecutors to comply with their other legal obligations. The existing evidence is limited. Many scholars and journalists have cited a federal appellate judge's charge that "*Brady* violations have reached epidemic proportions" [*United States v. Olsen* (dissenting op. of Kozinski, C.J.), p. 631 (2013)], but his conclusion was impressionistic: It was supported by a citation to 29 cases over a 15-year period. The same basic methodology—counting reported cases—has also been employed, albeit more systematically, in most efforts to estimate the prevalence of prosecutorial misconduct (Green & Yaroshefsky 2016). Thus, for example, a 2003 review of 30 years' worth of reported cases identified 2,012 cases in which reviewing courts reversed or remanded indictments, convictions, or sentences in whole or in part because of prosecutorial wrongdoing (Weinburg 2003). Similarly, a 2010 review of twelve years of reported federal and state decisions in criminal cases that went to trial in California found 707 cases involving 782 judicial findings of prosecutorial misconduct, which works out to 59 cases per year, involving 65 violations. Sixty-six of the 782 findings of prosecutorial misconduct involved *Brady* violations (Ridolfi & Possley 2010). Far more common were findings that prosecutors had engaged in improper argument at trial (444 of the total) or



improper questioning of witnesses (164). Less frequent were findings that prosecutors had violated the right against compulsory self-incrimination (47), had engaged in discriminatory jury selection (30), had presented false evidence (10), or had intimidated witnesses (7).

There are roughly 5,640 felony trials in California each year—5,500 in state court (Judic. Counc. Calif. 2014) and 140 in federal court (Executive Office US Atty. 2015). If roughly 59 cases of those 5,640 cases are marred by prosecutorial misconduct, that works out to roughly one percent, and if roughly ten percent of the prosecutorial misconduct involves *Brady* violations, that suggests such violations are occurring in approximately one-tenth of one percent of felony cases that proceed to trial. It is widely believed, though, that reported cases drastically understate the frequency of *Brady* violations and of prosecutorial misconduct more broadly. *Brady* violations, in particular, only come to light if evidence that prosecutors failed to disclose somehow sees the light of day; most evidence that prosecutors keep secret probably stays secret (Gershman 2007). And, remarkably, the Supreme Court has never made clear whether *Brady* obligations apply at all in cases that are resolved by a plea agreement rather than a trial.

Much misconduct by prosecutors may be inadvertent—not in the sense that the prosecutors did not know what they were doing but in the sense that they did not know they were violating the rules (Green & Yaroshefsky 2016). Because the *Brady* rules are so vague and because they require a prospective assessment of how matters will appear in retrospect, it is not difficult for prosecutors caught up in the competitive enterprise of an adversarial trial to conclude, mistakenly, that evidence need not be disclosed. Much the same is true of improper argument and improper questioning of witnesses, the lapses for which appellate courts most commonly fault prosecutors, at least in California. The lines between hard-hitting argument and unfair argument, and between probing questioning and improper questioning, vary from court to court and are often indistinct (Eliason 2006). Some prosecutors and former prosecutors bristle at the very term prosecutorial misconduct; they would prefer a term like prosecutorial error that does not carry a connotation of intentional wrongdoing (Eliason 2006).

## IDEOLOGY

Separate from, but intersecting with, concerns about prosecutorial power, discretion, and illegality, are concerns about the punitive ideology of prosecutors. American prosecutors are often faulted for excessive zeal in pursuing convictions and harsh sentences and for their frequently strident opposition to criminal justice reforms that could lower sentences, curtail prosecutors' discretion, or weaken their bargaining position when negotiating pleas and cooperation agreements (Simon 2007). The punitive ideology of American prosecutors generally is attributed to some combination of the adversary system of adjudication, a workplace culture that prizes victory above all else, the use of local elections to select lead prosecutors, and “the politics of crime”—a political climate that has prioritized public safety and demonized criminal offenders (Stuntz 2013, Tonry 2012). Pfaff (2017) concludes that prosecutors grew more punitive in the 1990s and 2000s, filing felony charges more often, and that this change in prosecutorial behavior was the major cause of skyrocketing incarceration rates during that period. However, Bellin (2017) questions the empirical support for these findings. At the individual level, there is evidence that prosecutors become more balanced and less harshly punitive in their orientation as they gain seniority (Burke 2007, Wright & Levine 2014).

Concerns about the punitive ideology of American prosecutors interact with concerns about the power and discretion of American prosecutors, with concerns about their violations of the law, and with concerns, discussed below, about their unaccountability. The punitive discretion is much (although not all) of what makes prosecutors' power and discretion troubling to many observers, and it is often blamed for the prevalence of prosecutorial misconduct. The relationship between



punitive ideology and accountability is less straightforward: The excessive zeal of prosecutors is often blamed, in part, on the fact that they *are* accountable—or, more precisely, on the *ways* in which they are accountable, as the principal channels of accountability for American prosecutors, as we see below, may be political.

## ACCOUNTABILITY

Prosecutors have so much power and discretion in part because the checks on their actions are relatively weak. This is notably true with regard to judicial checks (Davis 1969, Vorenberg 1981). Courts exercise virtually little oversight over charging decisions by prosecutors. Decisions not to charge a case are almost completely unreviewable in American courts, and decisions to charge can be overturned only by a showing that they are motivated by unlawful discrimination. That burden can almost never be satisfied, in part because the legal standard for proving discrimination is demanding and in part because it is difficult for defendants to get access to prosecutors' records (Davis 2007). Judicial review of plea agreements, moreover, is cursory. A prosecutor's refusal to make a plea offer is virtually immune from judicial review, and courts will not intervene to prevent prosecutors from seeking severe sanctions in retaliation for a defendant's decision not to plead guilty. Internal, bureaucratic oversight of charging and plea-bargaining decisions by prosecutors is also considerably weaker in the United States than in many other countries (Luna & Wade 2012); to a great extent, these matters are often left to the discretion of the prosecutor principally responsible for the case.

Criminal trials are, of course, a check on prosecutors (Pizzi 1993). To make a charge stick, prosecutors must secure a conviction, and unless they have a good chance of doing so at trial, they are unlikely to be able to do so with a plea bargain. Most scholars believe, however, that trials are a weak check on prosecutorial discretion, in large part because the availability of charges with long mandatory minimum sentences gives prosecutors such great bargaining power (Stuntz 2004).

In theory, the United States substitutes local political control over prosecutors for the judicial and bureaucratic supervision that prosecutors face in other legal systems (Pizzi 1993). The vast majority of prosecutors in the United States work in state rather than federal court, and they are organized in offices headed by officials elected at the county level. A smaller number work for state attorneys general, who are also generally elected, albeit statewide. Federal prosecutors work for the US Attorney General and local US Attorneys, all of whom are appointed, not elected. Still, they are political appointees, nominated by the President and confirmed by the Senate, and by tradition they are replaced when the presidency changes hands. By tradition, as well, US Attorneys are expected to reflect local concerns, and it is generally thought that they do so (O'Neill 2004). Thus, federal prosecutors in the United States, although not as politically responsive as state prosecutors, are probably more politically responsive than prosecutors in most other advanced democracies.

There has long been skepticism about the degree to which electoral politics operate as a meaningful check on prosecutors in the United States. District attorneys are reelected at very high rates and often run unopposed (Wright 2009). Moreover, campaign rhetoric in district attorney races has traditionally focused less on policies than on issues of character (Wright 2009). In the past few years, though, incumbent district attorneys have been defeated in several high-visibility races around the country, often by challengers promising a rollback of "tough on crime" policies, greater scrutiny of the police, or both (Sklansky 2017a). These results suggest that electoral politics may be a more meaningful check on prosecutors than previously thought. So far, however, the number of such upsets is relatively small, involving twenty or so of the some 2,500 district attorneys' offices throughout the United States.



One factor that may keep the number of upsets small is the limited information that voters typically have about a district attorney's performance (Wright 2009). Even more important may be the lack of any consensus about what information voters should want: What kind of data would be helpful in assessing how a district attorney has run his or her office? Scholars have called for prosecutors' offices to be more transparent, but there is little consensus about what information should be disclosed. The suggestions include crime and recidivism rates (Eisen et al. 2014), the percentage of defendants who are convicted as charged (Wright & Miller 2010), "regular performance evaluations of head prosecutors" by "[f]ellow prosecutors, judges, defense counsel, defendants, victims, and jurors" (Bibas 2009, p. 989), the "percent of defendants sentenced to incarceration, compared to last year" (the lower, the better) (Eisen et al. 2014, p. 4), the "percent of violent (and serious) crime cases on docket, compared to last year" (the higher, the better) (Eisen et al. 2014, p. 4), the "costs the public bears for each case that was or could have been prosecuted," including "expenditures on prosecution, public defense, and incarceration" (Gold 2011, p. 108), and measures of transparency itself, such as whether the office publishes statistics on the cases it declines to prosecute (Wright 2014). Some scholars have held out hope that with better information, voters will pressure prosecutors' offices to adopt internal guidelines and procedures designed to make exercises of discretion more principled, responsible, and consistent (Bibas 2009). But there is little evidence of voters pushing for those kinds of policies or of candidates emphasizing them, even in the handful of recent races where incumbents have been defeated (Sklansky 2017b).

## INERTIA

When scholars and criminal justice reformers talk about prosecutors, the problems they identify most often are excessive power, unconstrained discretion, recurrent illegality, punitive ideology, and lack of accountability. Less frequently, they focus on a different problem: the organizational inertia that can make prosecutors' offices seem, in many ways, the most hidebound of criminal justice agencies. This problem is also the implicit target of some of the reforms of prosecutors' offices that have received the most attention from prosecutors themselves over the past few decades.

Large, metropolitan police departments—and even many smaller departments—operate today in ways very different from how they went about their business fifty years ago (Sklansky 2007). They are more self-critical and more focused on performance measures, especially reductions in crime (Willis et al. 2007). They are less insular, regularly allowing outside researchers to monitor and observe how they operate. They are less imperious, in large part because of the substitution of community policing for professional policing as the mainstream philosophy of law enforcement (Sklansky 2011). There was some weakening of the commitment to community policing in the wake of the terrorist attacks of September 11, 2001, and the budget crises of the early 2000s (Sklansky 2011, Sparrow 2016), but more recently that commitment appears to have rebounded, fueled by increased attention to the problem of police violence in minority communities. Large police forces are also much more diverse than they were half a century ago, and we know precisely how much progress has been made in this regard and how much remains to be accomplished because police departments routinely make public the demographic composition of their officers (Sklansky 2007). Police departments are more strategic in the deployment of their resources and personnel; intelligence-led policing, based on sophisticated crime analysis, has become increasingly common (Ratcliffe 2016). It is also increasingly common for police departments to use data analytics to identify and to track officers who seem particularly prone to misconduct (Helsby et al. 2017).

Prosecutors' offices, in contrast, have not changed nearly so much; they still operate, in the main, the way they did fifty years ago (Levine & Wright 2013). They do not tend to use performance measures—aside from conviction rates, which are widely acknowledged to be poor tools



for self-assessment. In part, this is because there is little agreement about not only how to measure prosecutorial performance but also what prosecutorial performance is—i.e., what prosecutors should want to measure. With a few exceptions, prosecutors' offices are far less welcoming than police departments to outside researchers or to criticisms or suggestions from outsiders about how they should do their work (Tonry 2012). There is a community prosecution movement, modeled loosely on community policing, but it remains largely an exercise in community relations, not in true partnership. There is talk of intelligence-led prosecution as well; this generally refers to the identification of individuals thought to be responsible for unusually large amounts of crime and violence and targeting them for especially intensive prosecutorial attention (Sklansky 2016). Most prosecutorial resources remain allocated in much more traditional ways, although based on subject-matter specializations within offices (e.g., major narcotics and public corruption) and the kinds of cases brought to prosecutors by law enforcement agencies (Richman 2003). Prosecutors' offices appear less racially and ethnically diverse than many police departments, although this is difficult to determine because, unlike police departments, prosecutors' offices do not generally release information about their workforce demographics (Bies et al. 2015, Zaring 2013). Finally, prosecutors' offices do not, for the most part, use analytics to identify or to track attorneys who seem particularly prone to misconduct (Kreag 2017).

## ROLE AMBIGUITY

The seventh and final problem with prosecutors is the ambiguity of their role. This problem has received less attention than any of the six problems discussed above but may be equally or more fundamental.

Prosecutors face conflicting expectations. They are asked to be impartial ministers of justice but also forceful advocates; officers of the court but also leaders of law enforcement; sticklers for the law but also agents of mercy and discretion. The key to understanding prosecutors, especially in the United States, may be to see them first and foremost as mediating figures, crossing core conceptual and organizational divides in criminal justice (Sklansky 2016). Prosecutors blur the distinction between adversarial and inquisitorial forms of justice, between the police and the courts, and between law and discretion. In doing so, they allow the criminal justice system to soften the edges of its purported commitments (Levine 2006, Parrillo 2013) and to redirect its resources quickly and informally (Sklansky 2016). Those advantages, though, may come at the cost of reduced transparency and accountability (Levine 2006, Sklansky 2016).

The ambiguity surrounding the prosecutor's role intersects with and reinforces several of the other problems discussed above: It may help to explain the growing power of prosecutors, the vast discretion they enjoy, the stubborn prevalence of prosecutorial illegality, and the notorious difficulty of holding prosecutors accountable. As previously noted, in a legal culture that increasingly favors flexibility over hard-and-fast rules, giving power to prosecutors makes sense: they specialize in flexibility. The discretion granted to prosecutors helps them deliver that flexibility. At the same time, placing these conflicting expectations on prosecutors exacerbates the problem of prosecutorial misconduct. One reason prosecutors often fail to turn over exculpatory evidence, for example, notwithstanding the objectivity and impartiality they are supposed to exhibit, is that their understanding of what counts as exculpatory can be warped by the adversarial zeal that they are also asked to exhibit (Wilson 2014). For similar reasons, role ambiguity frustrates efforts to make prosecutors more accountable. It is hard to hold prosecutors accountable when it is unclear what they are supposed to be doing—whether, for example, they should be judged as administrators or as advocates.



## SYSTEMIC OVERSIGHT

The various problems with prosecutors—power, discretion, illegality, ideology, accountability, inertia, lack of accountability, and role ambiguity—have prompted a range of reform proposals. Making sense of and assessing these proposals require understanding which problem or problems each one of them attempts to address.

One longstanding category of proposals for reforming prosecutors' offices consists of calls for greater judicial oversight (Kozinski 2015). It has long struck many observers as odd and inappropriate that prosecutors make so many decisions that seem adjudicatory with but minimal opportunities for judicial review (Davis 2007, Stuntz 2004). A series of scholars and reformers have therefore called for judges to expand judicial supervision over prosecutorial decisions regarding, for example, whether to file charges, what charges to file, what information to disclose to the defense, what kinds of plea bargains to offer or to accept, and which jurors to strike. Expanded judicial oversight of prosecutorial decisions would rein in prosecutorial power, reduce prosecutorial discretion, make prosecutors more accountable, and could help to reduce prosecutorial illegality. For the most part, though, the pressure for greater judicial oversight has been thwarted, in part because prosecutors are politically powerful and fiercely protective of their prerogatives (Barkow 2009) and in part because broad prosecutorial discretion has been understood to be a necessary correlate of the adversary system and the constitutional principle of separation of powers [*Inmates of Attica v. Rockefeller* (1973)].

Judges are not the only other actors in the criminal justice system with the potential to operate as a check on prosecutors. Richman (2003) suggests that law enforcement agents and prosecutors can and do operate as checks on each other and that they should be encouraged to do so more productively. Defense counsel, of course, provides a check on prosecutors, and with adequate funding could do more (Richman 2014). And disciplinary actions brought by bar associations against prosecutors, although rare, appear to be growing more common (Green & Yaroshefsky 2016). Disciplinary actions, though, can at best address the problem of prosecutorial illegality, and this is true, in a broad sense, of defense counsel as well. Systemic checks of this sort could do more to keep prosecutors within the limits of the law, but they do not address concerns that those limits are themselves too loose.

## INTERNAL CHECKS

If prosecutors cannot be supervised and regulated from the outside, perhaps they should supervise and regulate themselves. Beginning in the 1960s and 1970s, there have been persistent calls for prosecutors to channel their discretion through internal office guidelines and internal systems of oversight and review. Many offices do have guidelines and systems of oversight and review, but there is wide variation in how extensive they are and how seriously they are taken. It has been common since the 1960s for scholars to analogize prosecutors' offices to administrative agencies and to seek from prosecutors some of the procedural protections against arbitrariness that administrative law imposes on regulatory agencies.

The analogy was drawn most explicitly by Davis (1969), who found the sweeping discretion granted to prosecutors, and the dearth of procedural checks on that discretion, inexplicable and indefensible. Davis thought prosecutorial discretion should be controlled with office guidelines and with procedural protections borrowed from administrative law, including written statements of reasons and opportunities for internal appeals. Those proposals have repeatedly been endorsed by other scholars, beginning in the 1960s and 1970s and continuing to this day (e.g., Bibas 2009, Miller & Wright 2008, Vorenberg 1981).



Many have shared Davis's view that if prosecutors do not adopt safeguards of this kind on their own, courts should force them to do so as a requirement of due process. Courts have resisted that suggestion though, and recent scholarship has tended to favor elections over litigation as a vehicle for prompting prosecutors to adopt internal checks. Barkow (2009) revives Davis's explicit invocation of administrative law as a source of guidance for taming prosecutorial discretion and adds an emphasis on separation of functions; she argues that prosecutors' offices, like administrative agencies, should separate enforcement personnel (in this case, trial prosecutors) from those with quasi-adjudicative responsibilities (e.g., conducting plea negotiations and recommending sentences).

The recent emergence of "conviction integrity" units in many prosecutors' offices is another form of internal check on prosecutorial discretion as well as on forms of prosecutorial illegality, such as *Brady* violations, that may lead to wrongful convictions. Echoing Barkow, some scholars have stressed the importance of maintaining the independence of conviction integrity units from prosecutors responsible for securing convictions in the first instance (Boehm 2014, Levenson 2015).

Like judicial oversight, internal checks on prosecutors can thus address both the problem of discretion and the problem of prosecutorial illegality. Internal checks, like judicial oversight, can also provide a form of accountability, at least for line prosecutors. Unlike judicial review, however, internal checks do little to make a prosecutorial office as a whole more accountable. Nor do internal checks do much to reduce prosecutorial power, although in some cases they may make it easier for outsiders, particularly defense attorneys, to push back against some forms of prosecutorial overreach (Richman 2017).

## ELECTIONS

Most prosecutors in the United States work in offices headed by a locally elected district attorney. Elections are, in theory, a powerful mechanism for holding prosecutors accountable. In practice, though, prosecutorial elections have long been thought feeble mechanisms for addressing any of the significant problems associated with American prosecutors; at best, elections seem irrelevant to and at worst they seem responsible, at least in part, for the punitive ideology of prosecutors (Tonry 2012, Wright 2009).

Prosecutorial elections seem irrelevant because incumbents seeking reelection are rarely defeated, and the campaigns focus largely on personalities, not policies (Wright 2009). Part of the problem is that the public generally lacks information about how prosecutors' offices are run and how well they perform (Gold 2011). To the extent that elections have any influence at all on how prosecutors do their jobs, the effect seems to be that prosecutors become more hawkish as elections approach, for fear of being labeled "soft on crime" (McCannon 2013, Bandyopadhyay & McCannon 2014). Recently, however, in a series of high-profile races across the country, incumbent district attorneys have been defeated by challengers calling for greater moderation in penal policies, greater scrutiny of the police, or both (Sklansky 2017a). There are some 2,500 local prosecutors' offices in the United States, and it remains to be seen whether this trend will continue. At a minimum, recent elections have brought new attention to the potential to use the ballot box as a tool both to make prosecutors accountable and to make the ideology of prosecutors' offices less punitive.

The utility of elections as a tool for overseeing prosecutors remains limited by the opacity of most prosecutors' offices and by the ambiguity surrounding the prosecutor's role. Voters typically are unable to make fully informed assessments about the elected prosecutor's daily management of his or her office, and even when information is available it can be unclear what voters should make of it.



Elections are also, in important respects, a dangerous way to oversee prosecutors. As prosecutorial elections become more competitive, there is a risk that the handling of individual cases will become politicized. Prosecutors may feel pressure to indict or not indict certain cases or seek harsh sentences or agree to lenient sentences for particular defendants to curry favor with voters. The result could be uncomfortably close to trial by plebiscite. This is precisely why the notion of electing prosecutors seems so odd and wrongheaded to most observers outside the United States (Tonry 2012).

One way to make prosecutorial elections more useful as tools of democratic oversight, and less dangerous, is to provide voters (and opinion leaders such as community groups and media outlets) with better and more easily understandable information about the day-to-day operation of prosecutors' offices. One way to do this would be through the development of best practices, performance measures, or other objective means of assessing prosecutors' offices (Sklansky 2017b). The challenges here are substantial, precisely because expectations for prosecutors are varied and conflicting. Nonetheless, there is reasonably broad agreement about some desiderata for prosecutors—energy, legal skill, evenhandedness, proportionality, respectful treatment of victims, and constitutional compliance—and about some things we want prosecutors to avoid—vindictiveness, incompetence, partiality, and deception. It therefore may be possible to reach broad agreement on a lowest common denominator of best practices for prosecutors' offices. Moreover, criminal justice is rich in statistics and lends itself in many ways to quantitative assessment, even if prosecutors to date have been less interested in collecting, sharing, and learning from data than courts and the police. Therefore, it may also be possible to find quantifiable performance measures for prosecutors that are reasonable proxies for widely agreed-upon desiderata. Finally, the opacity surrounding the operation of most public prosecutors' offices suggests that there are likely to be offices that would score low on virtually any plausible set of best practices or composite measures of performance. Consequently, even if objective measures cannot reliably and uncontroversially identify the best prosecutors' offices, they may be able to flag the worst.

## COMMUNITY PROSECUTION

Over the past two decades, many prosecutors' offices in the United States have embraced the rhetoric of community prosecution. Drawing inspiration from community policing, advocates of community prosecution suggest that prosecutors should view themselves not just as case processors but as problem solvers and that the problems they attempt to solve should be the ones that matter to the communities that they serve (Levine 2005). Many prosecutors' offices have set up community prosecution branches—satellite locations intended to facilitate greater responsiveness to neighborhood concerns (Thompson 2002).

Community prosecution responds to at least two of the problems with prosecutors' offices: their lack of accountability and their organizational inertia. Community prosecution can also respond to concerns about the ideology of prosecutors' offices by prompting prosecutors to focus on pragmatic solutions to community problems rather than punishment for its own sake. But community prosecution branches generally handle only a small fraction of an office's cases. For the most part, community prosecution has been more important as symbolism than as an actual reorientation of routine prosecutorial practices. And even as symbolism, it encounters some difficulties: Communities are complicated places; they can be hard to delineate, and they rarely speak with one voice. Many prosecutors are uncomfortable seeing themselves as community problem solvers or "social workers" (Levine 2005); these roles are in tension with the more combative function prosecutors have traditionally understood themselves to be performing (Burke 2007). Moreover, the thrust of community prosecution can run contrary to the thrust of some other strategies for reforming



prosecutors' offices, particularly intelligence-led prosecution and other top-down efforts to use prosecutorial resources more efficiently.

## ADAPTIVE MANAGEMENT

Intelligence-led prosecution, sometimes called predictive prosecution, refers to efforts to use advanced data analysis to focus prosecutorial resources on individuals responsible for a disproportionate share of the crime or violence in a particular jurisdiction (Ferguson 2016). It is one of a range of efforts being undertaken by some prosecutors' offices to become more adaptive organizations. These initiatives share an assumption that it is profitable to think of prosecutors' offices as organizations that can benefit from managerial tactics borrowed from other spheres of public and private activity. Intelligence-led prosecution, for example, is modeled self-consciously on intelligence-led policing, and more broadly on efforts in a range of public and private sectors that employ computerized analytics to target organizational resources where they will have the greatest impact (Ferguson 2016). Similarly, the Sentinel Events Initiative of the National Institute of Justice borrows the concept of nonaccusatory, multiple-stakeholder after-incident reviews from the fields of aviation and medicine (Doyle 2014).

Sentinel event analysis is far in spirit from intelligence-led prosecution: They respond to different problems (mistakes on the one hand and inefficiency on the other) and use different tools (root-cause analysis on the one hand and data analytics on the other). But they are both efforts to improve the functioning of prosecutors' offices as organizations. They both attempt to make prosecutors' offices more nimble and more skillful at dynamically and iteratively using empirical information to improve their performance. They are examples of what could be called, borrowing from the field of natural resources, adaptive management (Walters 1986).

Efforts to inject adaptive management into prosecution address the longstanding problem of inertia in prosecutors' offices, but depending on the form those efforts take, they can exacerbate other problems. For example, intelligence-led prosecution in some ways makes the problem of prosecutorial discretion more acute. As noted above, one traditional limitation on prosecutorial power and discretion has been a sense among prosecutors that they should avoid pretextual prosecutions, i.e., prosecutions that are prompted not by the defendant's violation of the statute being charged but by a desire to punish the defendant for other reasons. But that is a fairly good description of how intelligence-led prosecution often operates.

## DISEMPOWERMENT

For some critics, the most fundamental problem associated with prosecutors is the amount of power they have at their disposal; it is prosecutorial power that makes the wide discretion of prosecutors and their lack of accountability so objectionable (Luna 2014). One way to address this cluster of concerns is to take some power out of the hands of prosecutors. This could be done, for example, by reducing the number of criminal statutes carrying mandatory minimum sentences, by lowering those sentences, or by lowering maximum sentences (Bellin 2017, Stuntz 2013). Any of those steps would curtail prosecutorial power during plea bargaining by reducing the sentences that prosecutors could hold over defendants' heads.

Prosecutorial power could also be lessened by imposing substantive limits on their exercises of discretion. If prosecutors were prohibited from filing or threatening charges purely for leverage in plea bargaining, i.e., if they were barred from filing or threatening charges that were disproportionate to the defendant's underlying conduct, it would be harder for them to coerce guilty pleas



(Stuntz 2006). The same result could be obtained by limiting the size of the discount prosecutors could offer for a guilty plea (Covey 2008).

Similarly, if the discovery obligations imposed on prosecutors were increased, i.e., if they were required to share more of the information at their disposal with the defense and to do so earlier, regardless of whether the case appears headed for trial, that, too, would reduce their comparative advantage over defense attorneys, both at trial and during plea bargaining. A more demanding discovery standard, if it were simpler and more categorical than the one imposed by *Brady v. Maryland*, could also help to address the problem of prosecutorial illegality: One reason *Brady* violations occur as frequently as they do is precisely that the standard prosecutors are asked to apply is so vague and requires so much judgment to apply (Douglass 2001, Gershman 2007).

Legislators are another potential source of limitations on prosecutorial power. Stuntz (2013) argued that the politics of criminal justice encourages legislators to give prosecutors a blank check, but Richman (2009, 2017) suggests that legislators at both the state and national level can provide meaningful oversight of prosecutors and that they should be encouraged to do so more thoughtfully.

## ROLE SPECIFICATION

Another reason *Brady* violations are so common is that prosecutors are asked to be both zealous advocates and impartial adjudicators. When a prosecutor is deciding whether a piece of evidence is sufficiently exculpatory to warrant disclosure, it can be difficult for the prosecutor to put aside competitive considerations—to stop thinking as an advocate (Wilson 2014). From this perspective, the problem of prosecutorial illegality stems in part from the problem of role ambiguity.

One way to address the ambiguity of the prosecutor's role is by narrowing and clarifying that role, making clear that prosecutors should be understood—by themselves and by others—first and foremost as impartial agents of justice or that they should be seen as advocates and not expected to be impartial. Proposals of this kind have rarely advanced far because our system has come to rely on prosecutors acting both as advocates and as neutral adjudicators (Sklansky 2016). Another way to address the problem of role ambiguity is to divide functions within a prosecutor's office. Barkow (2009) proposes that prosecutor's offices do what other administrative agencies do: separate enforcement function from the adjudication function. For prosecutors, this would mean that the attorneys who investigate a case or take it to trial are not the attorneys who decide whether and how to charge the case, what kind of plea bargain to offer or to accept, and what material to provide in discovery. Some prosecutorial offices already engage in some degree of role differentiation, but most prosecutors continue to function both as advocates and as impartial adjudicators. One reason that prosecutors' roles have remained so ambiguous may be that role ambiguity allows prosecutors to provide the criminal justice system with forms of flexibility our legal culture increasingly values (Sklansky 2016).

## CONCLUSION

There is a strong scholarly consensus that something about American prosecutors needs fixing but not nearly as much consensus on precisely what. It is important to disentangle the various complaints raised about prosecutors—their power, their discretion, the frequency of their misconduct, their punitive ideology, their lack of accountability, their institutional inertia, and the ambiguity of their role—because these different diagnoses suggest different reform strategies, and not all those strategies are consistent. At various times, and in response to various perceived problems, scholars and reformers have called for more systemic oversight of prosecutors, strengthening of internal



checks within prosecutors' offices, greater attention to prosecutorial elections, one or another form of community prosecution, efforts to bring adaptive management to prosecutors' offices, reduction of the power of prosecutors, and clarification of their roles. Some of these initiatives can be usefully combined, but others work at cross-purposes. Thinking clearly about what we want from prosecutors is an important step toward getting what we want.

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