LOCKED IN
THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM

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PART II

A New Narrative
CHAPTER FIVE

THE MAN BEHIND THE CURTAIN

FEW PEOPLE IN THE CRIMINAL JUSTICE SYSTEM ARE AS POWERFUL, or as central to prison growth, as the prosecutor. Recall that over the 1990s and 2000s, crime fell, arrests fell, and time spent in prison remained fairly steady. But even as the number of arrests declined, the number of felony cases filed in state courts rose sharply. In the end, the probability that a prosecutor would file felony charges against an arrestee basically doubled, and that change pushed prison populations up even as crime dropped.

Yet here’s the remarkable thing. For all their power, prosecutors are almost completely ignored by reformers. No major piece of state-level reform legislation has directly challenged prosecutorial power (although some reforms do in fact impede it), and other than a few, generally local exceptions, their power is rarely a topic in the national debate over criminal justice reform. They are essentially invisible.

Perhaps the most revealing example of this invisibility comes from a report by the National Research Council on the causes of prison growth. The NRC is the branch of the prestigious National Academy of Sciences tasked with producing expert reports on important public policy issues. Yet when called on to explain the causes of soaring incarceration rates, it barely discussed the role of prosecutors at all. In this chapter I confront this startling blind spot in our national conversation on prison reform.

A LITTLE HISTORY OF THE PROSECUTOR

American prosecutors have not always operated as they do today: politically powerful, directly elected and independent of almost any oversight, and substantially better positioned than defense attorneys. Public
Prosecutors have existed since the colonial era—although at that time they were appointed, not elected—but they were generally not viewed with much respect; even well after the American Revolution, victims often preferred to hire private prosecutors to try their cases, even when public prosecutors were available. Public prosecutors were generally younger, less skilled, and less well-financed than private defense counsel.

The office of the public prosecutor underwent two major changes during the Jacksonian era (1828–1850). First, Americans came to view appointing officials like prosecutors and judges as a process potentially riddled with corruption. Elections, they believed, would ensure that control rested with the people, not with insiders. Second, states started pushing back against private prosecutions, which increasingly struck people as morally dubious. Prosecutors, many felt, should focus on doing justice, not solely on winning. Across the country, a wave of legislation and state court opinions eliminated or constrained private prosecutions.

Some aspects of the old system nonetheless endure. In certain states, victims can still retain private prosecutors, although their scope is limited and they are rarely used. Some jurisdictions also hire private lawyers to serve as public prosecutors, an arrangement that can actually remind us why states moved away from this model; in Ferguson, Missouri, for example, the local prosecutors were known for being particularly (if ineffectively) aggressive, in part because they were private lawyers who charged the city by the hour and faced no cap on how much they could bill.

As a general matter, however, prosecutors are now government officials. Forty-six states call for the election of prosecutors (in Alaska, Connecticut, Delaware, and New Jersey prosecutors are appointed), and 85 percent of district attorneys are full-time public officials—a notable rise from 1974, when only 44 percent of them were full-timers. In the 15 percent of jurisdictions around the country still without full-time district attorneys, he or she remains a public official, albeit one with a separate private practice who has signed a contract with the county to handle its prosecutions.

Prosecutor offices tend to be fairly small. In 2007, almost 60 percent of full-time prosecutor offices served communities with fewer than 100,000 people, and the median number of lawyers in these offices was three: one elected DA and two assistant prosecutors. Yet while most offices are small, most of the cases take place in larger counties with more professional
departments. Barely 11 percent of prosecutor offices were in communities with more than 250,000 people in 2007, but these offices processed almost 60 percent of all felony cases; the 2 percent of offices in districts with over 1 million people alone handled over 20 percent of all felony cases.\textsuperscript{10}

Two features of the modern prosecutor’s office demand particular attention. The first is that the number of line prosecutors (those who actually try cases) has grown significantly over the past forty years, but in a somewhat peculiar way. From 1970 to 1990, the number of prosecutors rose by 3,000, from 17,000 to 20,000. From 1990 to 2007 (the last year of reliable data), the number of line prosecutors grew more than three times as fast, to 30,000. This is the opposite of what one would expect. Between 1970 and 1990, violent crime rates rose by 100 percent, property crime rates by 40 percent, and the number of line prosecutors by 17 percent. From 1990 to 2007, violent and property crime rates both fell by 35 percent, but the number of line prosecutors rose by 50 percent—a faster rate of growth than during the crime boom.

Given the data we have, measuring changes in the productivity of these prosecutors is tricky. Table 5.1 attempts to estimate it using four different proxies: index crimes per prosecutor, index arrests per prosecutor, index and drug arrests per prosecutor, and prison admissions per prosecutor.\textsuperscript{11} Although none of these is a perfect measure of caseloads and productivity, all four show the same general pattern, namely that prosecutors worked harder and harder as crime rose throughout the 1980s, but then output per prosecutor held steady or declined throughout the crime drop. This pattern could provide an important explanation for why felony filings rose as crime rates fell: there were simply more prosecutors. Even if individual prosecutors were no more aggressive than prosecutors in the past, the increase in staff size would lead to more cases even as crime declined.

Table 5.1 Various Measures of Prosecutorial Productivity, 1974, 1990, and 2007
<table>
<thead>
<tr>
<th>Year</th>
<th>Index Crimes per Prosecutor</th>
<th>Index Arrests per Prosecutor</th>
<th>Index + Drug Arrests per Prosecutor</th>
<th>All Arrests per Prosecutor</th>
<th>Prison Admissions per Prosecutor</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>588</td>
<td>141</td>
<td>176</td>
<td>617</td>
<td>9</td>
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<tr>
<td>1990</td>
<td>725</td>
<td>145</td>
<td>200</td>
<td>710</td>
<td>25</td>
</tr>
<tr>
<td>2007</td>
<td>377</td>
<td>73</td>
<td>133</td>
<td>473</td>
<td>23</td>
</tr>
</tbody>
</table>


The second is the magnitude of the discretion they wield. For example, prosecutors have the unreviewable ability to decide whether to file charges against someone who has been arrested, and they face almost no oversight about what charges to file if they decide to move ahead with a case. The US Supreme Court has made it clear that it will not regulate these sorts of decisions: in 1985, the Court said this bluntly in *Wayte v. United States*, calling the “decision to prosecute” something “particularly ill-suited to judicial review.” So while this power is not new—public prosecutors have had substantial discretion since their offices were founded—prosecutors appear to be using it in increasingly aggressive ways these days.

Over the years, legislators have expanded this discretion by giving prosecutors a growing array of often-overlapping charges from which to choose. For example, the Model Penal Code, drafted by the prestigious American Law Institute in 1962 as a framework to help states modernize their criminal codes, included exactly two degrees of assault: simple assault...
(for “bodily injury”) and aggravated assault (for “serious bodily injury”). New York State, however, now has twenty-three or so assault offenses, many of which overlap. Take “Assault on a Judge,” which is simply “Second Degree Assault” with the additional fact that the victim is a judge trying to perform his official duties.\textsuperscript{13} Second Degree Assault is a Class D felony; on a judge, Class C. A prosecutor in New York facing a case that qualifies for Assault on a Judge can nonetheless charge the case as Second Degree Assault if he wishes. No one can review this, and the difference matters. The statutory maximum for a Class D felony is seven years, compared to fifteen for a Class C. By the choice of charge, the prosecutor can more than double the potential sentence a defendant faces.

While in New York the choice of charge only affects the ceiling (at one year, the minimum for a Class C felony is the same as for a Class D), in many states the choice of the charge can determine both the minimum and the maximum, which means that prosecutors can restrict judges to narrow sentencing ranges.\textsuperscript{14} I once heard a retired DA tell a conference that he and his colleagues would figure out what the “just” sentence for a defendant was, and then try to pick the right set of charges to make sure the judge had to impose something close to that. One observer has gone so far as to joke that “one premise of mandatory minimums is that prosecutors are competent to decide appropriate sentences until they become judges.”\textsuperscript{15} We trust no one, except the prosecutor.

Prosecutors can use their discretion to be lenient, but there is basically no limit to how prosecutors can use the charges available to them to threaten defendants as well. Take the landmark 1978 Supreme Court case of \textit{Bordenkircher v. Hayes}.\textsuperscript{16} Paul Hayes wrote a fraudulent check in Kentucky, where the routine sentence at the time was two to ten years in prison. Owing to his prior criminal history, however, he qualified for a now-repealed repeat offender enhancement, which carried a sentence of life. The prosecutor offered Hayes a deal: plead guilty to the fraud, and he’d recommend a sentence of five years, but if Hayes insisted on going to trial, the prosecutor would invoke the repeat felon law and seek life. Hayes gambled, went to trial, lost, and received a life sentence. He appealed, arguing that such a disparity between the offer and the threat was coercive to the point of violating his due process rights. The Court disagreed, and the lesson of \textit{Bordenkircher} is clear. No matter how unjust or uncommon the
charge, if the facts fit, the prosecutor can charge it, or even just threaten to charge it.\textsuperscript{17}

This is a tremendous amount of power for one official to have, and it is made all the more powerful by the fact that prosecutors generally wield it out of public view. Nearly 95 percent of the cases that prosecutors decide to prosecute end up with the defendant pleading guilty.\textsuperscript{18} For all the courtroom drama we see on \textit{Law & Order}, nearly everyone in prison ended up there by signing a piece of paper in a dingy conference room in a county office building, or in a dingier room in a local jail.

This lack of a public record actually makes it easy for prosecutors to look less aggressive than they are. A striking example comes from the federal system, where a single criminal act can implicate numerous overlapping statutes, some of which carry vicious mandatory minimums while others do not. Congress has recently set about trying to roll back some of these mandatory minimums, but the lobbying organization for federal trial lawyers, the National Association of Assistant United States Attorneys, has pushed back strongly. One of the NAAUSA’s arguments is that the mandatory minimums should not be repealed because they are almost never used, but instead are saved only for the worst of the worst defendants.\textsuperscript{19} At a simple level, the NAAUSA’s argument appears correct, since few federal inmates have been sentenced to these mandatory minimums. But federal prosecutors often wield the threat of the mandatory minimum to persuade a defendant to plead guilty to a charge that doesn’t carry such a stiff sentence. Using a gun during a drug deal can result in a mandatory minimum of up to thirty years under a particular statute.\textsuperscript{20} A prosecutor, however, can tell a defendant that if he pleads guilty to just the drug charge, the prosecutor will make the gun disappear. The threat of thirty years is enough to terrify most defendants into agreeing.\textsuperscript{21} So even if the mandatory minimum is rarely imposed, it is \textit{used} much more often. But thanks to the plea process, the public almost never sees how prosecutors actually deploy it. If the public were able to observe how often federal prosecutors threaten relatively minor defendants with these mandatory sentences, there would (perhaps) be a backlash.

Plea bargaining not only shields prosecutors from accountability, it also makes them more powerful by allowing them to process more cases per year. Pleas can be resolved in a matter of days, compared to the weeks or
months that would go into a trial. Most commentators admit that the criminal justice system in the United States would grind to a halt if plea bargaining were banned. The handful of jurisdictions that have attempted to abolish plea bargaining have quickly given up, if they ever really stopped it at all. Furthermore, plea bargains help prosecutors work around weaknesses in their cases. Even if the main case is weak, a prosecutor can come up with a set of charges and sentences that are more appealing to the defendant than the risk of something worse at trial. Given that defendants have almost no constitutional right to discovery during the plea process, prosecutors are often able to convincingly bluff with weak hands, especially given the sorts of threats that Bordenkircher allows and harsh sentencing laws facilitate.

Taken together, these attributes and tools make prosecutors the most powerful actors in the criminal justice system. While the police determine who “enters” the criminal justice process, prosecutors have complete control over which cases they file and which ones they dismiss. If prosecutors decide to move a case forward, their choice of what charges to bring is limited solely by what they think they can prove—or what they think they can convince defendants they can prove. These charges in turn often place significant limitations on the sentences that judges can impose. Prosecutors are free to threaten whatever severe sanctions legislators have passed, and legislators have been happy to enact tougher and tougher laws. It’s true that judges are required to sign off on pleas and can thus reject those they find unsatisfactory, but in general, they will acquiesce to the deals struck by the prosecutors and defense attorneys.

Prosecutors, as we’ve noted, have used this power to drive up prison populations even as crime has declined over the past twenty or so years. To date, however, no state- or federal-level proposal aimed at cutting prison populations has sought to explicitly regulate this power. Everyone else in the criminal justice system currently faces reforms, such as efforts to change interactions between civilians and police, or to amend sentencing laws and parole policies. But prosecutors have remained untouched.

In a few cases, the ballot box has been used to try to regulate prosecutors, and voters have recently deposed a few individual prosecutors over concerns about excessive aggressiveness or other bad decisions. In 2016, Anita Alvarez lost her primary campaign to remain the state’s attorney for
Cook County, Illinois (Chicago), in part because many saw her as needlessly punitive, and more immediately because her office refused for over a year to file charges against Chicago Police Department officer Jason Van Dyke, who shot Laquan McDonald sixteen times. In 2015, Scott Colom, a black Democrat, unseated longtime district attorney Forrest Allgood (a white independent) in northeastern Mississippi, running on a platform that Allgood was too tough on crime.

These are among a handful of isolated examples, however; by and large, district attorneys are reelected with unfailing regularity. It’s hard to view elections as a way to systematically regulate prosecutorial behavior. Yet other than a joint proposal by the American Bar Association and the NAACP Legal Defense Fund on how prosecutors can better address racial inequalities in the criminal justice system, few groups have proposed ways to systematically regulate the unreviewable power prosecutors possess.

THE BLACK BOX

If we hope to rein in this increased prosecutorial aggressiveness, then it is essential to understand how it operates. Here, however, we hit a wall. Despite the power of prosecutors, there is almost no data or research on what drives them. Few scholars study prosecutors with any regularity, surely in no small part because of the lack of data we have on them. Unlike the other branches of the criminal justice system, prosecutor offices are almost entirely “black boxes.” So it is impossible to say with any strong empirical support why prosecutors filed more and more charges over the 1990s and 2000s, but there are certainly some plausible hypotheses that deserve our attention. Here are a few.

**Increased Staffing**

As we’ve seen, prosecutorial staffing rose more quickly during the crime decline than during the crime boom. It’s unclear why this happened (in fact, I’ve never seen anyone even mention it), although the rise could be tied to the expansion in state fiscal capacity we saw in Chapter 4. That said, dig a little deeper and this story gets somewhat more confusing. The increase in staffing was likely concentrated in larger counties. Most offices are small, and thus lack either the resources or the need to add more prosecutors.
Although a majority of cases are filed in the districts with larger offices that have more room to add staff, new evidence shows that incarceration has been growing the fastest in the smallest counties—those with populations under 100,000, which have the least capacity to take on new staff. In other words, much of the increase in staffing since the 1990s likely took place in counties whose incarceration rates grew the slowest or declined, which complicates a “more prosecutors means more prisoners” story.

Perhaps more relevant was the rise in the number of offices with any full-time prosecutors, which as we saw before went from under 50 percent in the early 1970s to 85 percent by 2007. Unlike staffing increases, the shift from having a part-time to a full-time prosecutor’s office almost surely took place entirely in rural counties, where we now see the most rapid prison growth. No one has rigorously examined this effect at this point, so we can’t do more than speculate, but the theory is certainly a plausible one.

**Tougher Sentencing Laws**

Strike laws, other repeat offender laws, mandatory minimums, gun enhancements, long maximum sentences: all these make the prosecutor’s threat to go to trial riskier for the defendant, and they serve as additional cards the prosecutor can offer to drop during the plea process in exchange for a deal. William Stuntz has argued that legislators likely pass tough sentencing laws hoping that prosecutors will use them only as threats to get (less-harsh) plea deals rather than imposing them with any regularity. If prosecutors actually sentenced most defendants to the maximums the legislatures make available, the political and financial costs could be too high. As long as prosecutors simply use the tough laws as bargaining chips, not real punishments, legislators can reap the political benefits of looking tough on crime while avoiding difficult financial decisions. At the same time, in those cases where someone receives something less than the maximum and then recidivates in a particularly bad way, legislators can blame prosecutors for not using the tougher laws the legislature had passed. Moreover, many statutory maximums are harsher than what prosecutors themselves think is generally just. If that is true, prosecutors will gladly offer pleas below the maximum they could seek at trial, as it allows them to resolve cases more quickly and impose sentences they think are more
appropriate.

**Longer Criminal Records**

Crime rose significantly over the 1970s and 1980s, and the decline was slow enough that more crimes were committed during the first decade of the decline than in the last decade of the boom. As a result, from the 1970s through the 2000s there was a growing cohort of people with criminal histories, perhaps extensive ones. Furthermore, even though crime and arrests have declined since the 1990s, the number of felony cases, and thus the number of felony convictions, has continued to rise, implying that the number of people with such records has grown even as crime has fallen. If prosecutors tend to be more aggressive against defendants with longer criminal histories—less likely to drop charges, more insistent on higher bail amounts, more likely to seek prison time, and so on—then prosecutorial charging decisions could have become harsher without much change in overall attitudes.

**A Weakened Opponent**

The American legal system is built on the belief that truth and justice are best achieved adversarially, with strongly partisan advocates fighting hard for their clients in front of relatively neutral and passive judges and juries. Who is the prosecutor’s “adversary”? In almost every case, it’s a lawyer provided by the state or county government.

In *Gideon v. Wainwright* in 1963, and in *Argersinger v. Hamlin* in 1972, the US Supreme Court held that anyone facing prison or jail time is entitled to a lawyer. The *Miranda* warning line used in a thousand TV and movie police procedurals has made this idea famous: “You have the right to an attorney; if you cannot afford an attorney, one will be provided to you.” This is a critically important right, since about 80 percent of defendants in serious criminal cases need a state-provided lawyer. States vary in how they meet this requirement, but the solutions tend to fall into two broad categories: appointed counsel and public defenders. Appointed counsel are lawyers with their own private practices who are also paid by the government, often at remarkably low hourly rates, to represent indigent defendants. Public defenders are lawyers for whom defending indigent
clients is a full-time job; some are government employees, and others work for private contractors who are hired by the government.

The striking thing about public defense is that even though almost all defendants need it, state and local governments spend relatively little on it. In 2008, state and local governments spent $4.5 billion on indigent defense—about 2 percent of the over $200 billion they spent on all criminal justice activities. That $4.5 billion is almost 30 percent less than the $5.8 billion that went to state prosecutors in 2007. Moreover, prosecutor budgets understate prosecutors’ competitive advantage, since unlike defense attorneys, prosecutors do not have to pay for their investigative services, which are provided directly by the police, sheriffs, and other law enforcement agencies. A study in North Carolina found that accounting for these sorts of services effectively tripled the amount spent on prosecution in that state.

While real spending on indigent defense did rise over the 1990s and 2000s, by about 4 percent per year, it apparently wasn’t enough to keep up with the 40 percent increase in felony case filings that occurred over the same period, and we now face a crisis in indigent defense. Caseloads for public defenders nationwide exceed what is manageable; in some jurisdictions, defenders spend only minutes with their clients before deciding whether to accept a plea deal. Counties around the country are now embroiled in lawsuits about inadequate indigent defense. The situation has gotten so bad that the public defender office in New Orleans simply stopped taking certain serious cases—including murders—on account of its inability to represent the defendants adequately. The American Civil Liberties Union immediately sued the state to provide more resources, which might have been the public defender’s goal in declining cases in the first place.

Public defenders are thus increasingly overwhelmed, while prosecutor caseloads appear fairly stable. Prosecutors also have the advantage of being able to regulate their caseloads more than public defenders can. A prosecutor’s office can simply start dropping minor cases, while the public defender must take whatever cases the prosecutor decides to file. In such an environment, it isn’t surprising that prosecutors would be able to convince more and more people to plead guilty. Public defenders simply lack the time and resources to explore whether their clients have viable defenses. They
may not be able to effectively argue against cash bail or for a lower bail amount, they may not have the time to stand firm long enough to get a better deal, and so on, all of which works to the prosecution’s benefit.\textsuperscript{42}

In \textit{Ordinary Injustice}, the lawyer and journalist Amy Bach provides a disheartening account of the failures of indigent defense. She writes about the time she spent watching criminal cases in Greene County, Georgia, a county of about 20,000 people. Greene County had one public defender, Robert Surrency, who also had a private practice on the side. Surrency was all about speed: at one point, Bach watched him plead out forty-eight clients in a row. In later interviews with various defendants, she realized that in his haste Surrency had missed critical mitigators and defenses. This was not entirely, or even mostly, Surrency’s fault. His caseloads were unmanageable—he even privately contracted with a second lawyer to handle some of the formal pleas so he could meet with other clients at the same time—and his budget didn’t pay for expert witnesses or even investigators. In the end, a prosecutor in Greene County went so far as to admit that, “You can mete out a lot more mercy as a prosecutor than as a defense attorney.”

\textbf{Improved Policing}

Perhaps prosecutorial toughness is not just driven by the prosecutors. While police clearance rates haven’t budged that much over the years, perhaps the arrests the police are making are now of a higher quality. This improvement could have taken place for several reasons. Perhaps police have become more professional, so prosecutors are less likely to receive cases marred by shoddy investigations, by evidence that can’t be used because of unconstitutional searches, and so on. It could also be that police simply have better evidence now, such as DNA test results and more extensive camera footage (police car dash-cams, body cameras, security cameras, cell-phone cameras). It’s easy to imagine that defendants presented with security camera footage of the crime will plead out far more quickly than those who think they are only facing one or two unreliable witnesses. Unfortunately, there’s simply no data on the quality of arrests or of the cases that prosecutors file.

\textbf{Changing Political Ambitions}
This is a speculative theory, but an intriguing one. Almost all prosecutors are elected, but those elections often seem like foregone conclusions. Incumbents rarely face challengers, and when they do they usually win. One scholar has gone so far as to say that we’ve come to view district attorneys like civil servants, voting them in regardless of whether crime is going up or down. This practice would seem to make them relatively insensitive to electoral pressures.

What if, however, we’re thinking about the wrong election? What if prosecutors aren’t tough on crime to retain their seats as district attorneys, but in order to win something bigger, such as state attorney general, governor, US representative, senator? There is almost no data on this, but there are suggestive anecdotes of political ambition. Dan Donovan, the former district attorney for Staten Island, ran unsuccessfully for state attorney general in 2010, and successfully for Staten Island’s open House of Representatives seat in 2014. The former governor of Pennsylvania, Ed Rendell, started as the district attorney for Philadelphia, serving for two terms until he ran unsuccessfully for governor in 1986; he later became mayor of Philadelphia and eventually governor. Going further back, both Earl Warren and Thomas Dewey ran high-profile campaigns—for governor of California and president of the United States, respectively—in part based on their accomplishments as prosecutors.

Of course, district attorneys have been elected officials in most states for over a century now, so we need to ask what changed in recent years that may have made them more ambitious. The obvious answer is rising crime. The surge in crime from the 1960s to the 1990s surely elevated the social and political status of prosecutors. Just think of how popular culture generally valorizes prosecutors, such as in the long-running *Law & Order* franchise (which premiered at the peak of the crime wave, in the fall of 1990). It could be that as the officials spearheading the war on crime, district attorneys have seen their political options expand, and this has encouraged them to remain tough on crime even as crime has fallen. After all, a scandal resulting from being too lenient could derail a career; being too punitive (within reason) has traditionally been much less likely to do so. A tough stance on crime could also preserve political support from groups such as police unions that could help turn out the vote for the next campaign.
This is the sort of theory that makes studying prosecutors both exciting and infuriating. On the one hand, we can come up with provocative ideas that point to fascinating explanations for prosecutor behavior. On the other hand, we have so little information on prosecutors that in the end we can do little more than that: speculate, offer a few anecdotes, and move on.

This lack of data, by the way, should not just infuriate scholars who want to peer inside a black box. It should alarm all of us as a case of democratic failure. Prosecutors are profoundly powerful. We should not be forced to guess why they do what they do, or why their behaviors or attitudes have changed over time. Prosecutors should be as closely studied, examined, pushed, and prodded as any other government official. That they have not been is deeply troubling.

INCENTIVES ARE EVERYTHING

The unfettered nature of prosecutorial discretion is to some extent unavoidable. Prosecutors’ jobs may be almost unmanageable without a substantial degree of discretion. At the same time, discretion always raises concerns, and prosecutors are the only actors in the criminal justice system who have successfully held on to almost all the discretionary power accorded to them. Fears of racially motivated behavior and excessive leniency, for instance, have led to substantial restrictions on judges and parole boards, and similar fears of racial bias and misconduct have led to (lesser) restrictions on the police as well.

There is no real reason for prosecutors alone to avoid regulation. In fact, several options available to policymakers and voters to regulate prosecutorial discretion have all proven inadequate. It is worth examining why.

What If You Held an Election and No One Showed Up?

Originally, prosecutorial elections were intended to reduce the risk of corruption that came with appointments and to make sure prosecutors were more accountable to the public. It’s unclear if elections ever accomplished these goals; for our purposes, we can say with certainty that there are real problems with elections today.

One of the only studies to look at prosecutorial elections yielded fairly
bleak results. Prosecutors running for reelection win about 95 percent of their primary and general election campaigns, owing in no small part to the fact that 85 percent of the races are unopposed in both the primary and general elections. When incumbents face challengers, their prospects fade a bit, but they are still likely to win; they come out ahead in 64 percent of their contested primaries and 69 percent of their contested general elections. In larger jurisdictions, which process more cases, the contested-election win rate for incumbents is even higher, at around 80 percent.

Even in contested races, turnout is often low. In 2013, Brooklyn’s twenty-year incumbent district attorney, Joe Hynes, faced a bitter primary challenge amid allegations of wrongful convictions and the under-prosecution of sex crimes among Brooklyn’s insular Hasidic community (which voted consistently for Hynes). Hynes lost the primary election, becoming the first sitting Brooklyn DA to run for reelection and lose in over a century. Yet despite the high stakes, only about 20 percent of the borough’s registered Democrats turned out to vote. Meanwhile, in Cleveland in 2012, there was a race for an open district attorney’s seat during a fairly close presidential election, when turnout should be high. About 482,000 people in Cuyahoga County voted, but 165,000 of them, or over 34 percent, simply left the prosecutor ballot blank.

Given apparent voter apathy, we shouldn’t be surprised that prosecutors serve long terms in office. Few perhaps serve as long as Henry Wade in Dallas (thirty-six years) or Robert Morgenthau in Manhattan (thirty-four years), but a 2005 survey by the Bureau of Justice Statistics reported that 72 percent of district attorneys had served at least five years (implying at least two four-year terms), and 40 percent had served at least twelve. Turnover is slightly higher in larger jurisdictions, but that does not reflect a stronger electoral check, just that there are more reasons for these prosecutors to leave office voluntarily, such as for higher office, or for more lucrative private-sector jobs.

Making matters worse, when there are contested races, they rarely focus on broad penal policy. Because voters lack information on general outcomes, elections turn on a few big cases or a particularly shocking (and thus likely nonrepresentative) scandal. There are a few instances where challengers appear to win based on broad claims about how the office should be run, but these appear to be rare.
Prison Beds for Free

Perhaps if electoral checks fail us, budgetary ones can save us. After all, even if prosecutors face little direct political oversight, they have to get the money to operate from somewhere. Whoever controls the purse strings should be able to exert at least some influence over the prosecutor.

Yet even here prosecutor offices manage to escape regulation. Prosecutors exploit, perhaps not even always intentionally, a gigantic moral hazard problem that arises from the way legal authority and financial responsibility are (poorly) allocated in the criminal justice system. Like jails and probation, prosecutor offices are either entirely or predominantly funded out of county budgets—unlike prisons, which are paid for by the state. The reason for this division is not immediately clear, but the implications are readily apparent: there’s no real financial limit on prosecutors’ ability to send people to prison.

In fact, it’s worse than that. Prosecutors get all the tough-on-crime political benefit of sending someone to prison, but the costs of the incarceration are foisted onto the state as a whole. This alone should make a prosecutor overuse prison, even if unintentionally. That the alternatives—misdemeanor probation or jail time—are paid for by the county only exacerbates the problem. For the prosecutor, leniency is actually more expensive than severity, and severity is practically free. This problem has likely persisted for so long because, until recently, state legislatures had little incentive to address it, if they even noticed it at all. As we’ve seen, prior to the 2008 financial crisis, prison costs weren’t large enough to justify the costs of reining in spending. Even now, prison costs—especially marginal costs—are not that large a share of state budgets, which could help to explain why this issue still gets little attention.

Even if legislators wanted to tighten the purse strings to rein in prosecutors, they may not have sufficiently precise tools to truly punish overly aggressive prosecutors. In Oregon, for example, the state legislature sets the district attorneys’ salaries, while most other budgeting matters are left to the counties. Yet the salary “stick” is a very crude one, since the legislature has only two options: setting one common salary for the district attorneys in the ten “urban” counties (currently $116,868) and one common salary for the remaining twenty-six less urban counties (currently
So if one or two rural county prosecutors become particularly aggressive, the state cannot single them out for reactive salary cuts. To do so, they would have to revamp the budgeting statute, and that would surely result in strong prosecutorial pushback.

Now, this moral hazard problem didn’t cause the surge in incarceration, since it existed long before prison populations started rising in the 1970s. But it certainly facilitated whatever other factors made prosecutors more aggressive. This problem is also a good reminder that we miss a lot when we think about prisons as state-level institutions. It is true that prisons are run by the states, but prisoners come from the counties. The goal is not to reduce the number of prisons, but the number of prisoners; to do that, we have to understand what is happening at the county level far more than the state level. Incarceration, like politics, is local.

The Executive Hydra

For all its dysfunction, one thing can be said in favor of the federal system: it has a unitary structure. In the end, everyone reports back to a single person, the president. The president appoints the attorney general; and all US attorneys, the head of the Bureau of Prisons, the director of the FBI, and the heads of all the other federal criminal justice agencies report to the attorney general, another cabinet secretary, or the president. In practice, many of these officials have a lot of autonomy, but the president can nonetheless exert a certain amount of direct control over the federal criminal justice system as a whole.

By contrast, in the state systems almost no one is in control. The police respond to a directly elected city mayor. The prosecutor is directly elected by the county. The governor is elected by state voters and often controls the parole process, but state-level law enforcement is run by the state attorney general—who in most states is directly elected by state voters as well, and thus not under the control of the governor (and perhaps is even antagonistic toward the governor, if he or she has eyes on the governor’s mansion).

Even within counties, authority is diffuse. Since the prosecutor is directly elected, the county executive and other county officials cannot tell him or her what to do. This leads to situations like the following:
In Sierra County, California authorities had to cut police services in 1988 to pick up the tab of pursuing death penalty prosecutions. The County’s District Attorney, James Reichle, complained, “If we didn’t have to pay $500,000 a pop for Sacramento’s murders, I’d have an investigator and the sheriff would have a couple of extra deputies and we could do some lasting good for Sierra County law enforcement. The sewage system at the courthouse is failing, a bridge collapsed, there’s no county library, no county park, and we have volunteer fire and volunteer search and rescue.” The county’s auditor, Don Hemphill, said that if death penalty expenses kept piling up, the county would soon be broke.\textsuperscript{55}

This reads as if a death penalty case is a natural disaster, an unavoidable financial hurricane that leaves shattered county services and infrastructure in its wake. But, of course, it isn’t. The prosecutor \textit{decides} whether to seek the death penalty. Yet no one, even among county officials, can force him to take into account the costs he imposes—and here, even the DA tries to make it seem like the decision to seek the death penalty is out of even his hands, which is rather disingenuous.

Even more centralized states exhibit peculiar fiscal fractures. In New Jersey, for example, prosecutors are appointed by the attorney general, who is appointed by the governor—which is as close as any state gets to a unitary executive. Yet in New Jersey the county pays for the state-appointed prosecutor’s budget, and if the prosecutor feels like the budget is too small he can go to (state) court to sue for more funds.\textsuperscript{56} As a result, counties admit that they try to accommodate the demands of their locally funded, state-appointed prosecutor.

This is a dispiriting state of affairs. Spending on prosecution crowds out spending elsewhere, but it is probably unreasonable to expect a prosecutor to ask for a smaller budget in the name of better schools, or for someone to run against an incumbent on a platform of fewer prosecutions in order to improve the sewer system. Nor should we expect voters, already poorly informed about what the district attorney is doing, to vote based on complicated budgetary tradeoffs.

A centralized executive exists to decide how best to allocate limited
funds across various bureaucracies. The lack of centralization, or even coordination, within the states’ criminal justice systems is the sort of boring “structural” issue that gets far too little attention in the reform movement, despite the fact that budget constraints can be powerful tools of control, and their absence an all-too-eager accomplice to severity.

**PROSECUTING RACE**

So far we’ve examined how prosecutors have used their discretion to push up the prison population. Let’s now pivot to look at how they can (mis)use that discretion in other problematic ways, particularly when it comes to race.

We need to start with an important concept from psychology called the “fundamental attribution error,” which refers to the fact that we tend to define people we don’t know by their actions. If someone I don’t know gets in a fight in a bar, it’s because he *is* aggressive; if I get in the same fight, however, it’s not a reflection on my character but is instead the product of stresses in my life, like problems at work or home. It’s an easy mental shortcut, because I know what’s happening in my life, but not in his.

In his incredibly important *The Condemnation of Blackness*, the historian Khalil Gibran Muhammad does not use this exact term, but in effect he describes how the fundamental attribution error plays out when it comes to race and crime. Charting how Americans have discussed crime from the immediate post–Civil War era to the present day, he points out that when a white person commits a crime it is often seen as an individual failing, but when a black person commits a crime it is viewed as an indication of the broader failings of black Americans in general. This is the fundamental attribution error writ large, operating at both an individual and social/racial level (that is, at the level of how one racial group classifies the behaviors of another group).

These racial biases need not be conscious, as is made clear by the extensive literature on “implicit racial bias,” which refers to the way people—whites and blacks alike—often harbor unconscious biases toward minorities. It is easy to see how these biases, conscious and intentional or not, can shape the way prosecutors allocate their time and energy. Prosecutors may view crimes committed by black people as more serious
than the same offenses committed by otherwise identical white people, for
the reasons that Muhammad illuminated: they interpret them as indications
of deeper community-wide social pathologies that need to be “controlled.”
They may see their more aggressive response in minority areas, if they are
even aware of it, as a social good, even if it is anything but. This effect may
also explain why, as some studies demonstrate, police appear to concentrate
enforcement efforts in black neighborhoods with seemingly fewer social ills
than other equally dangerous—or more dangerous—predominantly white
neighborhoods.58

Elsewhere in the criminal justice system our concerns about these sorts of
biases in enforcement have led to restrictions on discretion, such as
sentencing guidelines for judges or consent decrees restricting police stops.
Prosecutors, however, face no such constraints, despite the fact that they
surely suffer from similar biases. In fact, that whiter, wealthier suburbs
exert significant influence on who gets elected as district attorney likely
amplifies the impact of the problem. The selection process almost ensures
more social distance between prosecutors and the neighborhoods where
they handle most of their cases, which increases the risk that prosecutors
will exhibit the biases Muhammad describes and thus be overly aggressive
in minority communities.

ON PROSECUTORIAL REFORM

While prosecutors may need some, perhaps a fair amount, of discretion in
order to do their jobs, some sort of regulation is clearly needed. So far,
however, almost none is being proposed. It’s therefore time to start focusing
more directly on what such regulations should look like. In this section,
we’ll start by looking at two reform options that have actually been
adopted, although each by just a single state. One receives almost no
attention at all, despite the fact that most states could adopt it; the other is
the subject of constant attention, even though it would be much tougher for
other states to implement. We’ll then look at a few more possibilities, even
if right now they are nothing more than theories.

The Prosecutor’s Guidebook

Alone among the states, New Jersey has imposed guidelines on prosecutors,
at least when it comes to pleading out serious drug cases. In the 1990s, as part of a decades-long dispute with the legislature over how much sentencing power the legislature was effectively giving prosecutors, the New Jersey Supreme Court limited prosecutors’ almost wholly unreviewable power during plea bargaining to set a defendant’s minimum prison sentence under the state’s Comprehensive Drug Reform Law. Arguing that lower courts had to be able to ensure that such decisions were not made “arbitrarily and capriciously,” the Court ordered the state attorney general to develop guidelines for prosecutors that defined acceptable plea bargains for certain parts of the drug code; trial judges could then review pleas for compliance.\textsuperscript{59}

After several years of trial and error and relitigation, the state attorney general eventually drafted a comprehensive set of guidelines. Called the Brimage Guidelines, they run over one hundred pages and look almost exactly like sentencing guidelines that many states use to regulate judicial sentencing.\textsuperscript{60} The guidelines provide a grid, with the charged offense on one axis and the defendant’s prior criminal history on the other, and each square on the grid provides an approved range of sentences the prosecutor can offer during the plea process.\textsuperscript{61} The guidelines also list aggravating and mitigating factors that allow (and sometimes require) the prosecutor to offer less or more generous plea deals, and they discuss how to handle cases where the evidence is particularly weak or where there are extraordinary reasons to depart from the guidelines’ approved range.

These guidelines appear to have received almost no attention outside of New Jersey.\textsuperscript{62} Perhaps people just assume that what works in a state with appointed prosecutors could never work in a state with elected ones. But that line of reasoning does not convince. The guidelines should work as long as the judges are willing to enforce them, and as long as defense attorneys have enough time and resources to complain to judges when prosecutors fail to follow them. Unfortunately, there seems to be little rigorous data on how well the guidelines are working even in New Jersey. The New Jersey attorney general, however, has since issued plea guidelines for offenses beyond drug crimes, including sexual assaults, DWIs, and shoplifting, which suggests that they are viewed as effective, although none of the other guidelines exhibit nothing close to the rigor and detail of the Brimage guidelines.\textsuperscript{63}
There is, however, at least one reason to be concerned about the impact of such guidelines. For all the good that judicial sentencing guidelines have done, one persistent criticism of them is that they transfer significant power to prosecutors. By choosing the specific offense to charge, how many offenses to charge, and how many prior crimes to invoke, prosecutors have often been able to confine judges to very narrow ranges of possible sentences. At first blush, plea bargain guidelines do not appear to solve this problem. Prosecutors still seem free to choose the charges and thus the ranges of acceptable plea bargains to offer. In fact, one can see how prosecutors could use the guidelines aggressively: “I’d like to offer you a better deal, I really would, but look what the guidelines say…”

This criticism, however, is less about prosecutorial guidelines in general than it is about how they may be written in practice. If guidelines set the default ranges for most offenses below what prosecutors had been demanding before, require that certain additional facts must be shown for borderline cases to result in prison admissions, and establish a generous set of mitigators that defense attorneys can raise before judges, then they will be able to push down prison populations. They may also be able to ensure that pleas are more consistent across race, age, and other factors we think shouldn’t be taken into account when imposing sentences.

The risk is that poorly designed guidelines may make things worse. If the mean sentence is set higher than before, for example, punishments may become more severe. This happened in New Jersey. Before the guidelines went into effect, prosecutors in urban counties had been offering much more generous deals than those in suburban or rural counties; when the guidelines were adopted, the ranges available to prosecutors were more in keeping with the harsher suburban deals than with the more lenient urban ones, effectively “suburbanizing” plea offers.

Guidelines can also unintentionally exacerbate racial disparities, as New Jersey also discovered at first. The initial, pre-Brimage version of the guidelines made it harder for urban prosecutors to plead around “school-zone” enhancements, which elevate the sanctions for selling drugs close to a school (usually within about 1,000 feet). These laws are generally viewed as having disparate racial impacts. Minorities are more likely to live in denser urban areas—in no small part because of redlining and exclusion from more suburban areas—and the denseness of cities means that school
zones cover a greater fraction of cities than they do nonurban areas. Seventy-six percent of urban Newark, for example, falls within a school zone, compared to just 6 percent of rural Mansfield Township. Members of minority groups who sell drugs are thus more likely to do so within a school zone than (less urban) whites are, even if they are not trying to sell to schoolchildren. It soon became apparent that restraining urban prosecutors’ ability to avoid the enhancement in cases where it seemed inappropriate was exacerbating racial disparities with New Jersey’s prison population.

Neither of these problems, however, was impossible to fix. While the guidelines remain somewhat controversial, subsequent revisions have addressed concerns both about general severity and about racial disparity. New Jersey thus demonstrates that it is certainly possible to regulate how prosecutors perform one of their most influential and least transparent tasks.

**California’s Experiment**

California’s effort to regulate prosecutors has been quite different from New Jersey’s, focusing on budgetary incentives rather than targeting prosecutorial behavior directly. These reforms appear to have been quite successful at scaling back incarceration, at least in the short run; the long-run prognosis remains unclear.

At the start of the 2010s, California faced a correctional crisis. Between 1980 and 2006, its incarceration rate quintupled, from around 100 per 100,000 to nearly 500; with its prison population at over 175,000 people, its share of US prisoners had risen from below 8 percent to above 11 percent. The state opened twenty-one prisons between 1984 and 2005 to handle the increase, but by 2005 its capacity was only up to about 80,000—less than half the number of people the system was actually holding.

Conditions in California’s overcrowded prisons were deplorable. Inmate litigation eventually led a panel of three federal judges to find that overcrowding so reduced physical and mental health coverage that there was one preventable death about every five to six days. The panel ordered California to reduce the number of prisoners to below 137.5 percent of the system’s capacity—through new construction, out-of-state transfers, large-scale releases, or whatever else the state could come up with. The US
Supreme Court ultimately upheld the order, and California moved to make serious changes.69

The state’s answer was to adopt the Public Safety Realignment Act of 2011 (or just “Realignment”), one of the most dramatic criminal justice reforms in the United States in decades. Realignment sought to ensure that only serious offenders ended up in state prison by making counties responsible for incarcerating low-level offenders. Though not framed as such, it was a direct strike at the budgetary moral hazard problem of free prison space. The core idea behind Realignment is fairly straightforward. A defendant classified as a “triple non”—someone convicted of a crime that is not violent, nor serious, nor a sex offense that requires registration as a sex offender, and who has no violent, serious, or registration-requiring prior offenses—has to serve his time in a county jail, even if his conviction is for a felony.70 Realignment also shifted some parole supervision to county probation, stated that parole violators could be returned to prison only if they committed a new crime (a major change in a state that had unusually high rates of parole violators returning to prison), and required judges to give defendants even more credit for pre-conviction time spent in county jail when setting a post-conviction sentence.71

Some of the offenses that fall within Realignment’s jail-not-prison list are not ones that immediately seem “less serious,” such as vehicular manslaughter while drunk, involuntary manslaughter, possession of an assault weapon, and brandishing a firearm and causing serious bodily injury, among others.72 By necessity, there are exceptions throughout each of the major provisions, but Realignment nevertheless represents a major shift of obligations onto the counties. Under Realignment, the prosecutor remains free to seek out the statutory maximum for these less serious offenses—which for many is three years, although some carry maximum sentences as high as at least nine—but in theory the county picks up the tab. The hope is that prosecutors will start to ask if incarceration is really worth it for these lower-level cases.

There are, however, two reasons to worry about Realignment’s ability to really make prosecutors pay attention to these budgetary issues. First, counties argued that their jails were ill-equipped to handle increases in inmates and that they needed assistance from the state government to expand them. So far, at least twenty-eight of California’s fifty-eight
counties have received a total of $1.7 billion in state aid for this purpose. Unfortunately, following a similar move by the legislature, the voters in California approved a referendum making these state subsidies permanent. Which, of course, undermines a lot of the potential moral-hazard-solving effects of Realignment. The state is still picking up at least some, if not most, of the cost of housing prisoners. Second, as we’ve seen, it isn’t always so clear how much prosecutors even care about county budgets, despite being county officials. If prosecutors simply storm ahead, then counties will likely just incur increasing costs unless they vote such prosecutors out of office.

These caveats aside, Realignment appears to have produced at least a significant one-time shock to California’s prison system. Within the first year of the program, prison populations dropped by about 30,000, at which point they held steady, and even rose slightly, until November 2014, when voters approved Proposition 47. That proposition reclassified certain drug and property felonies as misdemeanors, causing another decline in the state prison population. Jail populations rose a bit during the first year of Realignment as people who previously would have been sent to prison ended up in jail instead, but ultimately California’s overall prison and jail incarceration rate appears to have declined, at least for now.

So far, Realignment does not appear to have led to any real increase in California’s crime rates. One sophisticated study showed that Realignment did not change California’s violent crime rate at all, and there was only a small increase in property crime (compared to what it otherwise would have been), which was almost entirely due to a relative increase in auto theft; a follow-up study a few years later by other social scientists suggested that even auto-theft rates had leveled off. Fewer prisoners, and no real increase in crime, especially in serious crime.

As with prosecutorial guidelines, there is no reason other states could not attempt to “localize” punishment in much the same way that California has. It appears, however, that only one other state has tentatively followed in California’s footsteps, and only to a small degree. Indiana recently passed a law holding that those convicted of the lowest-level felony could not be sent to state prison, but had to be sent instead to local jails or community programs. But this appears to be the lone effort to copy Realignment. The conditions that induced California to adopt Realignment were fairly
distinctive: it was a response to exceptional overcrowding and exceptional federal judicial oversight. Moreover, California’s state political system was completely controlled by Democrats during this time; Democrats have held the governor’s mansion since 2011; they controlled 62 percent of the Senate and 65 percent of the House in the 2011–2012 term, and they then won supermajorities in both chambers in the 2013–2014 term. This unified power likely gave California more freedom to act on such a sensitive issue than more divided state governments might have.

Prior to Realignment, California (again) experimented in the 1970s with another way to tackle this moral hazard problem, offering counties subsidies for diversion. The Probation Subsidy Act of 1965 offered counties $4,000 for each defendant who was supervised by (county) probation rather than sent to (state) prison.\(^78^{78}\) The program was discontinued in 1978 for a host of reasons, but before its end it was thought to have encouraged counties to divert as many as 45,000 people.\(^79^{79}\) Its spirit survives today in the form of justice reinvestment grants, which similarly try to reward local governments for policies that save the state government money.

To the extent that prosecutors pay attention to county budgets, efforts that make them pay attention to the costs they externalize onto the state, whether by making them feel those costs more directly (like with Realignment) or rewarding them when they avoid the costs (like with probation subsidies), should help rein in incarceration, at least somewhat. But that caveat is far more important than it should be.

The *Brimage* guidelines and Realignment appear to be the only two major state-level efforts to directly regulate prosecutor behavior (although individual counties may have tried other approaches). So let’s think instead about other options that states could consider to rein in prosecutorial aggressiveness.

**Mocking the Constitution**

If nothing else, states (as well as the federal government) could attempt to regulate prosecutorial behavior by making sure that public defenders and other lawyers for the indigent can do their jobs.

In many ways, this may be the most logical solution. It may be hard to ever really rein in prosecutorial discretion, and not just because legislators
will consistently have incentives to give them a lot of power. If powerful prosecutors with wide discretion are going to remain a fixture of American criminal justice, then perhaps we should at least make sure that our nominally adversarial system is in fact adversarial. As things stand now, however, those who defend the indigent simply lack the resources to do their jobs.

While Americans appear to generally believe that all people are entitled to counsel, we don’t want to pay for it. In a 2000 survey, only about two-thirds of respondents agreed that the state should pay for poor people’s lawyers, and initially only 17 percent thought we should increase funding for indigent defense, a number that rose to only 33 percent after some discussion. Public defense is so poorly funded that in forty-three states, poor defendants are required to pay some or all of their defense lawyer’s costs: state provided, defendant funded. The result can be truly unjust. In South Dakota, poor defendants are required to pay $92 an hour for a public defender, and payment is due even if the defendant is found not guilty. Failure to pay is itself a crime that can result in the defendant getting locked up.

So a poor person is arrested, and the public defender convinces the prosecutor that the arrestee was across town at the time of the crime; the defendant is factually innocent. The prosecutor drops the charges, but if it took the public defender ten hours to make the case, the defendant—by definition quite poor—now owes the government nearly $1,000. The very act of acquiring the lawyer needed to establish innocence can result in the defendant committing the crime of not paying that lawyer back.

Making the poor pay for their own constitutionally required lawyer is a mockery of everything the constitutional right to counsel stands for. But in our era of austerity, it is likely that states and counties are even less willing to increase spending on indigent defense than before. This is one area where the federal government could make a big difference. In light of local resistance to funding indigent defense, the federal government could be the agency best able to push through more spending for it. Doubling national spending on public defense would require a grant of about $4 billion per year from the federal government—about 0.4 percent of the $1.3 trillion discretionary federal budget. In other words, a rounding error, but one that could transform how most indigent defendants are represented.
Threat Mitigation

Another way to limit prosecutorial aggressiveness would be to restrict the threats they can make during plea bargains. The easiest way to do this would be to cut statutory maximums. This type of reform may not change time served much, since prosecutors regularly bargain around the maximums anyway, but it could weaken their bargaining power somewhat. The effect of cutting statutory maximums, however, is hard to predict. It’s true that threats based on the draconian mandatory minimums in the federal system certainly seem to have some impact, but states often lack laws nearly so harsh even before the recent reforms. As always, the distinct lack of data on the plea bargaining process makes it difficult to say anything more.83

There are other, less direct ways to regulate the threats of long sentences made during plea bargaining. Stuntz, for example, proposed a way to target “pretextual” threats that a prosecutor makes during the plea process but that the prosecutor himself likely doesn’t think are right or fair or just. Stuntz suggested that prosecutors be required to make public the sentences they have threatened to seek if a defendant did not take the plea.84 If a threatened sanction is the sort that is rarely, if ever, imposed in similar cases—if the prosecutor threatens to seek twenty years for a crime that almost always faces no more than five years when taken to trial—then a judge could refuse to accept the plea on the grounds that it is too coercive.

The appeal of such a reform is that it doesn’t require the legislature to cut the statutory maximum, something that could be politically difficult to do. Of course, the obvious risk is that prosecutors might seek tough sentences at trial more often just to preserve the threat for plea bargains. Still, it is a reform worth considering.

Crimes and Misdemeanors

Rather than changing the back-end sentence lengths, another way to restrict who prosecutors send to prison is to change the front-end admission rules. States can simply redefine offenses that were once felonies as misdemeanors, and misdemeanors as violations, making it impossible for defendants charged with the crimes to end up in prison (for felonies turned into misdemeanors) or perhaps even jail (for misdemeanors turned into
violations).

Some states have, in fact, started implementing changes such as these. California’s Proposition 47 in 2014 raised the dividing line between misdemeanor and felony for various property crimes to $950, up from as little as $450 or even lower. Now, if someone steals a single $600 iPhone, it is simply impossible for a prosecutor to send him to prison, even in the absence of Realignment. South Carolina similarly raised the minimum for felony theft from $1,000 to $2,000, and Mississippi raised the same minimum from $500 to $1,000. Many states have revised their drug codes to raise the quantity of drugs that trigger felony convictions too.

These sorts of front-end reforms may have a bigger impact than reforms aimed at time served, especially since most prisoners already serve much less time than the current statutory maximums allow. Moreover, by keeping people out of prison entirely, rather than shortening the time they spend there, this type of reform reduces the collateral costs that come from going to prison, like lost jobs, frayed relationships, reduced health, and so on.

So far, however, this strategy has been limited to property and drug crimes, since those are the easiest areas of reform for politicians and the general public to accept. These offenses also have the advantage of having clear, objective cut-off points. It’s easy to adjust quantitative lines for “how much was stolen” or “how many grams were sold.” It’s less clear how that might be done for violent crimes. Many criminal codes differentiate among death, serious bodily injury, and bodily injury, but it is hard to see how to draw more precise lines than that. States could, however, still redefine some violent felonies as misdemeanors. This idea is not as implausible as it may sound. New York State’s definition of second-degree assault, for example, overlaps significantly with Illinois’s definition of aggravated assault, yet in New York second-degree assault is a felony, while many aggravated assaults in Illinois are misdemeanors. Such low-level reclassifications will only get us so far, however, since many violent crimes will clearly remain felonies.

Finally, a related reform issue that is discussed far more than it should be is the “overcriminalization” debate, which argues that instead of reclassifying felonies as misdemeanors, we should eliminate entire sections of the code that criminalize conduct that shouldn’t be criminal at all. Some reformers often point to ridiculous laws, like those making it a crime
to fail to pick up a dog’s waste in some national parks in Minnesota, to label pasta that is more than 0.11 inches thick as “spaghetti,” or to sell a toy marble without a label stating that it is a toy marble.\textsuperscript{90} Obviously, these things should not be crimes, and if unnecessary laws can be eliminated easily and quickly, we should repeal them. But for all the attention they might receive, such changes would do little to change the realities of incarceration and punishment generally. Especially at the state level—which has far fewer of these sorts of criminal laws than the federal system—local prosecutors have their hands full dealing with politically “mandatory” crimes like murder, arson, assault, rape, theft, and so on. These are the crimes that grab voters’ attention, and that are used to measure how “safe” a city is.\textsuperscript{91} Stripping the code of “crazy” crimes will have almost no impact on arrests, prosecutions, convictions, and prison populations.

\textbf{Flying Blind}

Even if legislatures are unwilling to directly regulate prosecutors or curtail their power and discretion, they could at least help us better understand how prosecutors wield the authority they have. We have extensive data on crimes, arrests, and prison populations, but when it comes to prosecutors we have next to nothing. We have no reporting systems for prosecutors similar to the Uniform Crime Reports for the police and the National Prisoner Statistics for prisons. We have no comprehensive data on such basic issues as the number of cases resolved by plea bargaining, the number of cases dismissed by prosecutors or judges, or the demographics of line prosecutors—and how those might interact with the demographics of defendants or defense counsel. The data that we do have on prosecutors, such as the number of felony cases filed in state courts, generally come from other bureaucracies, such as the court systems. The Bureau of Justice Statistics has a few datasets that examine the prosecutorial process, but they are surveys of only some jurisdictions, and sometimes cover only a small part of the year. It is, in short, impossible to know what is consistently happening across counties over time.

It’s unclear why prosecutors remain such black boxes. One reason could be their relative invisibility. Police are highly visible at all times, and their
interactions with the public, for good or ill, frequently grab our attention. Judges, in turn, are the ones we often see actually imposing sentences, with TV perhaps making their role seem more central than it is in a world dominated by plea bargaining. Prosecutors sneak through unnoticed.  

The lack of information about prosecutorial decision making could also be more intentional. For example, many states currently use or are working to adopt some sort of uniform ID number that a person would receive upon arrest, which would allow observers to link the records of his arrest, prosecution, trial, sentencing, and parole. A state corrections official once told me that his state had tried to adopt such an ID number, but that the bill had died due in no small part to opposition from the state prosecutors’ lobby. He provided no more detail than that, but I have to assume it was at least in part to thwart transparency.

There are also more mundane reasons for our ignorance, such as the fact that a majority of prosecutor offices have only two or three lawyers and a few support staff; nearly 15 percent of all offices do not even have a full-time prosecutor. Smaller, understaffed offices, some of which are not yet very computer-savvy, will not be able to generate much rigorous data. But while most prosecutor offices are small, a majority of prosecutions take place in large offices based in large counties—the sort of offices that do make sophisticated use of computers and already gather extensive data for internal use.

Whatever the reasons for it, the lack of data makes it nearly impossible for scholars, policymakers, and voters to understand what prosecutors are doing, why they are doing it, and what we can do to change problematic behavior. An obvious, though ultimately tricky, way to reform the system would be to insist that prosecutors provide more data to the public, or at least to have the BJS gather such data and to produce reports comparable to what is done with the Uniform Crime Reports and the National Prisoner Statistics.

Once it has been collected, the information produced could help reformers and legislators identify more precisely what prosecutors are doing improperly and why they are doing it, and thus help them address the problems effectively. Statistics could also provide a powerful impetus for self-regulation. Take fiscal or racial impact statements: simply producing such reports could make prosecutors more aware of problematic
outcomes.\textsuperscript{95} Even if they are already aware of (and perhaps indifferent to) various problems, being forced to make such reports public could lead prosecutors to adopt preemptive reforms, if only to avoid bad press.

By now, it should be clear that there is a rather shocking gap at the heart of the Standard Story’s take on criminal justice reform. Although some reforms limit prosecutorial power to at least a small degree, there have been no efforts, certainly not at the state level, to comprehensively control prosecutors’ ability to send people to prison. Promisingly, discussions of the power of prosecutors and the need to regulate their behavior seem to be coming up with greater frequency of late, but we have yet to see any meaningful reforms. That must change.
CHAPTER SIX

THE BROKEN POLITICS OF PUNISHMENT

Ever since the colonial period, Americans have held punitive attitudes toward crime.¹ The rising crime rate of the 1960s through the 1980s served only to harden this tendency, and as a result Democrats and Republicans have competed for years to appear as tough on crime as possible. California’s notoriously harsh three-strikes law, until recently the most severe in the country, was a bipartisan effort.² Bill Clinton lobbied for and signed a raft of tough-on-crime laws during his eight years as president. And there’s plenty of evidence that elected judges from both parties tend to be harsher than appointed judges, and that they become harsher still as elections near.³

The assumption that politicians must always be tough on crime, however, is now faltering. A few tough-on-crime prosecutors have lost elections, and surveys of even staunchly conservative voters, suggest that Americans increasingly favor “smart” responses to crime, such as diversion programs, treatment for nonviolent offenders, and greater use of parole.⁴ Legislatures, too, have been passing more and more reforms. As states watch both prison populations and crime rates decline together, the political opportunity to roll back harsh criminal and sentencing laws grows stronger. But at least two major political threats loom, and they are either underappreciated or almost completely ignored by reform groups.

First, as we’ve touched on many times, responsibility is fractured across various city, county, and state agencies, and it is often hard for these different bureaucracies to coordinate their actions. Reforms at one level can be thwarted by parties at other levels, or one agency may not undertake effective reforms if the bulk of the benefit goes to a different one. There