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Publication: *American Criminal Law Review*

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UNDERSTANDING UNCONTESTED PROSECUTOR ELECTIONS

Carissa Byrne Hessick,* Sarah Treul,** and Alexander Love***

ABSTRACT

Prosecutors are very powerful players in the criminal justice system. One of the few checks on their power is their periodic obligation to stand for election. But very few prosecutor elections are contested, and even fewer are competitive. As a result, voters are not able to hold prosecutors accountable for their decisions. The problem with uncontested elections has been widely recognized, but little understood. The legal literature has lamented the lack of choice for voters, but any suggested solutions have been based on only anecdote or simple descriptive analyses of election data.

Using a logistic regression analysis, this Article estimates the individual effects of a number of variables on prosecutor elections. It finds that several factors that have been previously identified as contributing to an uncontested election are not, in fact, what drives uncontested elections for prosecutors. Instead, the factors with the largest effect are whether an incumbent runs and the population of the district. It also identifies two features of state election law that contribute to the dearth of contested elections. The Article concludes by noting that these factors suggest specific policy changes that could help to increase the number of contested and competitive elections—thus ensuring that voters can help guide important criminal justice decisions in their communities.

INTRODUCTION	32
I. PROSECUTORS AND THEIR ELECTIONS	36
A. <i>The Power of Prosecutors</i>	39
B. <i>The Election of Prosecutors</i>	44
II. LESSONS FROM THE POLITICAL SCIENCE LITERATURE.	47
A. <i>Brief Note on the Incumbency Advantage</i>	48
B. <i>Uncontested Elections</i>	50
C. <i>Competitive Elections</i>	53
III. A STATISTICAL ANALYSIS OF PROSECUTOR ELECTIONS.	56
A. <i>Identifying Relevant Variables</i>	56
1. Open Seats	57
2. Partisan Mismatch and General Elections	57

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3. Partisan Match and Primary Elections	57
4. Length of Incumbent Tenure	58
5. “Professionalization” of the Office and Attractiveness of Position	58
6. Supply of Lawyers	59
7. Differences in Election Law	59
8. Crime and Prison Admission Trends	60
B. <i>Description of Data and Summary Statistics</i>	61
C. <i>Lawyer Supply Hypothesis</i>	69
D. <i>Crime and Prison Admission Trends</i>	70
CONCLUSION	74
APPENDIX: SUPPLEMENTARY ANALYSIS	77

INTRODUCTION

The United States is the only country in the world that elects its prosecutors.¹ Whether elections are an optimal method for selecting prosecutors has been a matter of some debate.² The reason for that debate is that we want our prosecutors to be both accountable and independent. In other words, we want them to be answerable to the public for their decisions, while at the same time able to exercise their professional judgment free from political pressure.

These two goals are in tension. Electing prosecutors ensures that they are accountable, but it limits their independence. In contrast, appointing prosecutors increases independence, but it does so at the expense of accountability.

Regardless, whether elections or appointments are the best methods for selecting prosecutors, elections in the United States generally fail to capture the accountability benefits of elections because so many prosecutor elections are uncontested and uncompetitive.³ An uncontested election does not provide citizens with the opportunity to hold their elected prosecutors accountable because there is no alternative on the ballot. At the same time, because they continue to face elections, prosecutors are still subject to political pressure. Several social science studies have found

1. DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 28 (2016). As Michael Ellis notes, “[t]he Swiss cantons of Geneva, Basel-City, and Tessin elect judges who have a prosecutorial function, but they are not public prosecutors in the common-law sense of the office.” Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 *YALE L.J.* 1528, 1530 n.1 (2012).

2. See, e.g., BROWN, *supra* note 1, at 59; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *IOWA L. REV.* 393, 438–43 (2001); Daniel C. Richman, *Accounting for Prosecutors*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 40 (Máximo Langer & David Alan Sklansky eds., 2017); David Alan Sklansky, *Unpacking the Relationship between Prosecutors and Democracy in the United States*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 276 (Máximo Langer & David Alan Sklansky eds., 2017); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, in *PROSECUTORS AND POLITICS: A COMPARATIVE PERSPECTIVE* 27–28 (Michael Tonry ed., 2012).

3. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 *IOWA L. REV.* 1537, 1570–71 (2020) (comparing the costs and benefits of electing and appointing prosecutors and concluding that “elections without contestation are the worst of both worlds”).

that prosecutors change their behavior in election years⁴—suggesting that political pressure overcomes their professional judgment—and at least one study has found that these election-year changes affect prosecutors irrespective of whether they are facing a challenger in their elections.⁵ In other words, uncontested elections may be the worst of both worlds—prosecutors are neither held accountable nor are they independent.

The prevalence of uncontested prosecutor elections has been a topic of concern for several years.⁶ But because comprehensive data about prosecutor elections is

4. See Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials*, 161 PUB. CHOICE 141, 142 (2014); Andrew Dyke, *Electoral Cycles in the Administration of Criminal Justice*, 133 PUB. CHOICE 417, 419 (2007); Bryan C. McCannon, *Debundling Accountability: Prosecutor and Public Defender Elections in Florida 2–3* (Feb. 3, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204623; Melissa R. Nadel, Samuel J. A. Scaggs & William D. Bales, *Politics in Punishment: The Effect of the State Attorney Election Cycle on Conviction and Sentencing Outcomes in Florida*, 42 AM. J. CRIM. JUST. 845, 847 (2017). There are, however, studies that do not identify an election effect on prosecutorial behavior. See Carissa Byrne Hessick, *Prosecutors and Voters*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 399, 404 (Ronald F. Wright, Kay L. Levine & Russell M. Gold, eds., 2021) for an extended discussion of the literature.

5. See Siddhartha Bandyopadhyay & Bryan C. McCannon, *Re-election Concerns and the Failure of Plea Bargaining*, 3 THEORETICAL ECON. LETTERS 40, 40 (2013). *But see* Melissa R. Nadel et al., *supra* note 4, at 859 (finding a difference between prosecutor behavior in face of contested versus uncontested elections in some cases).

6. See, e.g., JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSE OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 134 (2017) (“[B]y and large, district attorneys are reelected with unfailing regularity. It’s hard to view elections as a way to systematically regulate prosecutorial behavior.”); *id.* at 139 (“Almost all prosecutors are elected, but those elections often seem like foregone conclusions. Incumbents rarely face challengers, and when they do they usually win.”); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1103 (2017) (“[I]ncumbent prosecutors rarely face real accountability. . . . [N]inety-five percent of the incumbents who want to return to prosecutorial office are reelected.” (footnotes omitted)); Stephanos Bibas, *Restoring Democratic Moral Judgment within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1690 (2017) (“Prosecutorial elections are notoriously uncompetitive”); Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 660 (2010) (“[Prosecutor] races are distorted by huge incumbency advantages and driven by occasional scandals and unrepresentative, high-profile celebrity trials.”); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us about a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 657 (2006) (“It is exceptionally rare in this country for an incumbent prosecutor to be voted out of office.”); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1269 (2011) (“Prosecutorial reelection rates are high and the vast majority of incumbents go unchallenged.”); Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1478 (2018) (“Several studies suggest that prosecutorial elections are low-information affairs in which incumbency is an overwhelming advantage (indeed, many are uncontested), and in which conviction rates and other metrics of adversarial success bear little apparent relationship to electoral success.”); Janet C. Hoeffel & Stephen I. Singer, *Elections, Power, and Local Control: Reining in Chief Prosecutors and Sheriffs*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 319, 323 (2015) (“Unlike sitting mayors, governors, and state and local legislators, the vast majority of incumbent prosecutors and sheriffs run unopposed.”); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 592 (2017) (“Prosecutorial elections are historically low-information, low-turnout affairs. Often times, there are no opponents to vote for; even when other candidates materialize, incumbents win so often that ‘retention rates . . . would make a candidate for the Supreme Soviet blush.’” (footnotes omitted) (quoting Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1606 (2010))); Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205, 1220 (2017) (“[I]ncumbent prosecutors win reelection the vast majority of the time”).

difficult to obtain, people have been left to speculate about the reasons why so many of these elections are uncontested. Some have speculated that uncontested prosecutor elections are attributable to a lack of interested candidates⁷ or the small pool of eligible candidates.⁸ Others have posited that the problem may be that the office is local, which leads to prosecutor elections being drowned out in the media coverage of state and national elections. The focus on state and national elections makes it difficult for would-be challengers to raise money or get attention for their platforms.⁹ Indeed, this incumbent advantage appears to be confirmed by the correlation between the length of an incumbent's time in office and contested elections.¹⁰ And some have hypothesized that variation in state election laws and processes may increase or decrease the likelihood of contested elections—such as whether the state aggregates counties into prosecutorial districts or whether they hold non-partisan elections.¹¹

Although the empirical literature on prosecutor elections is limited, some insights can be gleaned from the rich political science literature on legislative and judicial elections.¹² That literature shows that incumbents enjoy a significant advantage in elections, and challengers tend to be strategic about when they will run for office. For example, in judicial elections, candidates were more likely to challenge incumbents who had been appointed and were standing for their first election.

The political science literature on legislative and judicial elections frequently relies on logistic regression analysis to assess what factors result in contested and competitive elections. In contrast, the legal literature on prosecutor elections has

7. Ron Wright studied fifty-four contested elections and created professional profiles of the challengers. He discovered that twenty percent of challengers worked in the incumbent's office at the time of the election, while the rest largely worked as defense attorneys. As Wright noted, these challengers would "pay a price well beyond election day" if they failed to defeat the incumbent: Those working in the incumbent's office would either have to leave the office or face professional stagnation, while those working as defense attorneys run the risk of getting less favorable treatment from the incumbent in plea negotiations and other matters. Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 808 (2010).

8. Carissa Hessick and Michael Morse gathered residency information for lawyers in ten states because, in order to run for local prosecutor, candidates must be lawyers with active bar memberships and meet residency restrictions. They found that "many districts have an insufficient supply of qualified candidates for local prosecutor" and that contested elections in small-population districts is correlated with the number of lawyers living in those districts. Hessick & Morse, *supra* note 3, at 1574–78.

9. Stephanos Bibas explained the hypothesis as follows: "Nationwide and statewide races may drown out county elections in the media. District attorneys enjoy access to press conferences and name recognition. Little-known challengers find it difficult to raise money and get the public's attention. Incumbent district attorneys thus enjoy huge advantages." Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 988 (2009).

10. Hessick and Morse found that incumbents who had been in office for less than five years were challenged at a higher rate. Hessick & Morse, *supra* note 3, at 1568 tbl.7.

11. *See id.* at 1578–81 (hypothesizing that consolidating small-population counties into larger districts could lead to more contested elections); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 602–03 (2014) (noting that "incumbents in non-partisan states . . . face opposition more often" and hypothesizing that party affiliation may serve "to prevent some challengers from entering the race").

12. *See infra* Part II.

relied only on anecdotes or simple claims about correlation.¹³ This Article aims to remedy that shortcoming.

This Article, the first of its kind,¹⁴ offers a comprehensive statistical analysis of prosecutor elections. Using a national dataset of prosecutor elections that was only recently made available,¹⁵ it is able to identify several factors which make contested elections more likely.

Our findings confirm that, like legislative and judicial elections, open elections are more likely to draw multiple high-quality candidates. The other major factor that affects the rate of contested elections is the population of the district. We also discovered that state election laws contribute to the dearth of contested prosecutor elections. In particular, state laws that make local prosecutors a non-partisan office and laws that exempt uncontested primary elections from having to appear on the ballot both increase the rate of uncontested elections.¹⁶

There are, however, more unexpected results from our analysis. Perhaps most surprising is that under our regression model, there is no statistically significant correlation between either crime rates or prison admission rates with election contestation.¹⁷ Since these are presumably the factors that voters care about the most in a criminal-justice-related election,¹⁸ it is surprising that there is not a clearer relationship between them and whether an election is contested. It is also surprising that an incumbent's length of term in office had no statistically significant effect. Nor did the number of lawyers in a jurisdiction.¹⁹

To be sure, we were not able to examine every factor that may have affected contestation and competition. For example, negative media coverage may encourage challengers to enter the fray or may take votes away from an incumbent.²⁰ But national data about media coverage was not available, so we could not include it in our analysis.

13. See Bibas, *supra* note 9, at 984–88 (providing anecdotes); Hessick & Morse, *supra* note 3, at 1557–70 (making claims based on correlation); Wright, *supra* note 11, 598–604 (2014) (making claims based on correlation); *id.* at 592–97 (making claims based on correlation).

14. An unpublished Ph.D. dissertation from 2002 looked at whether prosecutors who made efforts to seem more responsive to their constituents enjoyed more public support, and it made some observations about factors that affected vote share in contested prosecutor elections. Gerard A. Rainville, *Differing Incentives of Appointed and Elected Prosecutors and the Relationship Between Prosecutor Policy and Votes in Local Elections* 85–99 (Dec. 3, 2002) (Ph.D. dissertation, American University) (on file with author). But the dissertation examined only a limited number of elections and did not examine the phenomenon of uncontested elections.

15. The dataset was collected by the Prosecutors and Politics Project at the University of North Carolina. It was made publicly available in 2019, and it can be found here: <https://dataverse.unc.edu/dataset.xhtml?persistentId=doi:10.15139/S3/IL14LC>.

16. See *infra* tbl. 3 and text accompanying notes 228–30.

17. Data limitations on crime rates and prison admissions did not allow us to draw definitive conclusions about the relationship between these factors and contestation or competition. See *infra* notes 241–42 and accompanying text.

18. See generally Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002) for the importance of conviction rates in prosecutor elections.

19. See *infra* tbl. 6 and text accompanying notes 238–39.

20. See Rainville, *supra* note 14, at 99 (noting a relationship between incumbent vote share and scandals reported in the media during the time period leading up to an election).

Despite these limitations, our findings are likely to change the conversation surrounding prosecutor elections. For example, because population size has a significant effect on contestation and competition, it may bolster efforts to aggregate low-population counties into larger prosecutorial districts.²¹ And because open races are more likely to be contested, it may prompt calls for term limits, which already enjoy significant public support.²²

How to ensure meaningful choices in prosecutor elections has taken on new importance in recent years, as criminal justice reform advocates have sought to elect candidates who will use their power to curb mass incarceration.²³ But voters cannot elect reform prosecutors until and unless they have at least two candidates on the ballot. Consequently, understanding what leads to contested elections is an important task for those seeking to reform the criminal justice system.

This Article seeks to improve that understanding. It proceeds in three parts. Part I provides context about the power that prosecutors yield, and it explains how elections are essentially the only check on that power. Part I ends by explaining why uncontested prosecutor elections are so troubling and describing the existing legal literature on prosecutor elections.

Part II surveys the political science literature about elections. Although political scientists have not studied prosecutor elections, their findings about legislative and judicial elections provide helpful insights into the possible reasons why there are so few contested prosecutor elections—and even fewer competitive ones.

Part III uses those insights from the political science literature and the descriptive accounts of prosecutor elections from Part I to assess which factors are likely to result in contested prosecutor elections. After developing the list of factors, Part III describes the regression models we developed and presents our findings.

I. PROSECUTORS AND THEIR ELECTIONS

America incarcerates more of its inhabitants than any other country in the world. It has both the highest incarceration rate²⁴ and the largest absolute number of people confined in prisons and jails.²⁵ The incarceration explosion is a relatively recent

21. See, e.g., Carissa Byrne Hessick & Cayla Rodney, Opinion, *Give Nebraskans a Choice in County Attorney Elections*, OMAHA WORLD-HERALD (May 16, 2020), https://omaha.com/opinion/midlands-voices-give-nebraskans-a-choice-in-county-attorney-elections/article_3fc84a3f-5220-580a-951f-8e453cedc4fe.html

22. See, e.g., Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP (Jan. 18, 2013), <https://news.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx> (reporting that “three-quarters of Americans say that, given the opportunity, they would vote ‘for’ term limits for members of both houses of Congress”).

23. See *infra* notes 37–41 and accompanying text.

24. Sintia Radu, *Countries with the Highest Incarceration Rates*, U.S. NEWS & WORLD REPORT (May 13, 2019), <https://www.usnews.com/news/best-countries/articles/2019-05-13/10-countries-with-the-highest-incarceration-rates> (citing data from the World Prison Brief, an online database hosted by the Institute for Criminal Policy Research at the University of London).

25. *The 10 countries with the most prisoners*, MARKETWATCH (Nov. 24, 2015), <https://www.marketwatch.com/story/the-10-countries-with-the-most-prisoners-2015-11-24>.

phenomenon. As recently as the early 1970s, America's incarceration rate was not particularly high; it was comparable to most European countries. But then the rate increased precipitously—from 93 per 100,000 in 1972 to 536 per 100,000 in 2008.²⁶

Many institutions and actors played a role in America's mass incarceration problem.²⁷ Legislators passed new laws, which criminalized broad swaths of conduct and lengthened sentences.²⁸ Police increased their arrest rates.²⁹ Prosecutors brought more criminal charges³⁰ and pressured a larger percentage of defendants to accept plea bargains.³¹ Judges failed to meaningfully constrain legislatures, police, or prosecutors.³² And the American public appeared to repeatedly affirm its desire for such outcomes at the ballot box.³³

Recently, criminal justice reformers have sought to reverse these trends. They have rallied against overcriminalization,³⁴ argued in favor of reducing the footprint of police activity,³⁵ and more generally appealed to the American public to use tools other than the criminal justice system to solve social problems.³⁶ The most

26. PFAFF, *supra* note 6, at 1–2. The rate has decreased somewhat since 2008. *Id.* at 2.

27. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 171 (2019).

28. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–11 (2005); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635–38 (2005).

29. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, ARREST IN THE UNITED STATES, 1980–2009 15 tbl.2 (2011) (documenting the rise in arrests from 1980 to 2009). Much of that increase appears attributable to drug arrests. OFFICE OF JUSTICE PROGRAMS, DEPARTMENT OF JUSTICE, CRIME AND JUSTICE ATLAS 2000 40–41 (2000) (documenting increase in arrest rates for drug crimes).

30. *See, e.g.*, PFAFF, *supra* note 6, at 71–72; Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1444–45 (2004).

31. *See, e.g.*, Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722–23 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 88–91 (2005).

32. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 593 (2018) (stating that, even if police officers lacked probable cause to make an arrest, they had qualified immunity from arrestees' § 1983 false arrest claims); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (plurality opinion) (refusing to strike down state recidivism law that imposed life sentence for stealing three golf clubs); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (permitting a prosecutor to threaten a defendant with life in prison in order to pressure the defendant into pleading guilty).

33. *See generally, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (arguing that America's harsh criminal justice policy reflects voter fears that have been stoked by politicians seeking to win election); Luis Ferré-Sadurní & Jesse McKinley, *How 'Defund the Police' Roiled Competitive Races in New York*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/11/06/nyregion/election-nyc-defund-police.html> (reporting that “several Republican candidates in New York appeared to find success by characterizing moderate Democrats in swing districts as anti-law enforcement”).

34. *See, e.g.*, JOHN-MICHAEL SEIBLER & JONATHAN ZALEWSKI, HERITAGE FOUNDATION, OVERCRIMINALIZATION IN THE 115TH CONGRESS (Mar. 1, 2019), <https://www.heritage.org/crime-and-justice/report/overcriminalization-the-115th-congress>; *ACLU Report Finds Justice Reinvestment Undermined by Expansion of the “Statehouse-to-Prison Pipeline” in 2018*, ACLU (Dec. 18, 2018), <https://www.aclu.org/press-releases/aclu-report-finds-justice-reinvestment-undermined-expansion-statehouse-prison>.

35. *See, e.g.*, Claire Bushey, *Defund the Police: How a Protest Slogan Triggered a Policy Debate*, FIN. TIMES (Apr. 20, 2021), <https://www.ft.com/content/76a8080c-cca9-48cd-be81-891a75676adf>.

36. *See, e.g.*, MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE 1–33 (2010) (discussing restorative justice as a social

visible progress that these reformers have made is the election of a new type of prosecutor: prosecutors who view their role not simply as an enforcer of criminal laws but also as an official who must work to shrink the number of people held in prison and jail.³⁷ Dozens of these reform prosecutors—who are sometimes called progressive prosecutors—have been elected in the past decade.³⁸

These reform prosecutors have proven what academics have long argued—namely, that because the criminal justice system delegates enormous power to prosecutors, a prosecutor's decisions about how to wield that discretion can have a significant impact on the criminal justice system.³⁹ For example, Brooklyn's district attorney, Eric Gonzalez, instituted a new bail policy that decreased the number of people held in jail before trial by fifty-eight percent.⁴⁰ And when Durham, North Carolina elected reform-prosecutor Satana Deberry, she reduced the population of her county jail by twelve percent within the first six months of taking office.⁴¹

Despite the recent attention to prosecutor elections featuring reform candidates,⁴² prosecutor elections remain a sleepy affair in most of the country. The vast

movement); David R. Karp, *Community Justice: Six Challenges*, 27 J. CMTY. PSYCH. 751, 751–52 (1999) (discussing various community justice approaches to crime that eschew traditional criminal justice models).

37. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1419–25 (2021) (describing the “progressive prosecutor” movement); see also Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 758–68 (2018) (describing and critiquing the movement).

38. See Cheryl Corley, *Newly Elected DAs Vow to Continue Reforms, End Policies Deemed Unfair*, NPR (Nov. 26, 2020), <https://www.npr.org/2020/11/26/938425725/newly-elected-das-vow-to-continue-reforms-end-policies-deemed-unfair>; Paige St. John & Abbie VanSickle, *Prosecutor Elections Now a Front Line in the Justice Wars*, MARSHALL PROJECT (May 23, 2018), <https://www.themarshallproject.org/2018/05/23/prosecutor-elections-now-a-front-line-in-the-justice-wars>.

39. For a sampling of academic literature about the power of prosecutors, see generally PFAFF, *supra* note 6; Bibas, *supra* note 9; Davis, *supra* note 2; Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

40. ERIC GONZALEZ, *JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN* (2019), <http://www.brooklynda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf>.

41. Thomasi McDonald, *Six Months in, Satana Deberry Talks about How She's Changing Durham's Criminal Justice System*, INDYWEEK (July 26, 2019), <https://indyweek.com/news/durham/satana-deberry-six-month-report/>.

42. E.g., Jonah E. Bromwich, *Can a Progressive Prosecutor Survive a 40% Spike in Homicides?*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/2021/05/17/us/philadelphia-prosecutor-election-Larry-Krasner.html>; Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, HUFFPOST (May 12, 2018), https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06; Liane Jackson, *Change Agents: A New Wave of Reform Prosecutors Upends the Status Quo*, A.B.A. J. (June 1, 2019), <https://www.abajournal.com/magazine/article/change-agents-reform-prosecutors>; Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/>.

majority of prosecutor elections are uncontested.⁴³ And even when they face a challenger, most incumbent prosecutors win their elections.⁴⁴

Even if voters would not elect reform-minded prosecutors, uncontested prosecutor elections are troubling. The power that is delegated to prosecutors is largely unreviewable within the criminal justice system—either as a matter of law or as a matter of practice. The only real check on that power is democracy—the ability of voters to hold their local prosecutors accountable for their decisions. But when prosecutors face no challenger, how they wield their discretion often goes unnoticed, leaving the public in the dark about some of the most consequential decisions in the criminal justice system.

A. *The Power of Prosecutors*

To understand the powers that prosecutors wield, it is first necessary to understand that not everyone who is arrested is charged with a crime, that most cases are disposed of through plea bargaining, and that prosecutors' decisions about charging and plea bargaining are largely not subject to judicial review. The combination of these three facts gives prosecutors a significant amount of discretion, and that discretion gives them power.⁴⁵

When someone commits a crime, a prosecutor must decide whether to pursue criminal charges. To some extent, that decision initially lies with police because they are the officials who make arrests. But whether to pursue criminal charges against a person who has been arrested is an independent decision made by a person in the local prosecutor's office.⁴⁶ That is to say, the mere fact that a person is arrested for committing a crime does not mean that the person will face criminal charges.

A prosecutor's decision whether to bring charges will depend, at least in part, on whether the prosecutor believes her office can prove the charges beyond a reasonable doubt. As a legal matter, prosecutors may bring charges if they have probable

43. Hessick & Morse, *supra* note 3, at 1563 & tbl.5 (finding that only thirty percent of elected prosecutors faced an opponent in either a primary or a general election).

44. *Id.* at 1561–64 & tbl.4 (finding that incumbent prosecutors facing challengers win 66% of general elections and 51% of primary elections); Wright, *supra* note 11, at 600–01 & tbl.1 (finding that incumbent prosecutors facing challengers win 70% of general elections and 64% of primary elections); Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 144 (2021) (finding that the “victory rate for incumbent candidates was 91%” and that incumbents “were more likely to win than challengers, even after controlling for district population, extra candidates in a race, and candidate demographics”).

45. See Davis, *supra* note 2, at 400–38 (equating prosecutors' discretion with power); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 490–91 (2017) (defining prosecutorial discretion as “the power of the Executive to determine how, when, and whether to initiate and pursue enforcement proceedings” and explaining that prosecutors can use this discretion “to achieve goals that they could not otherwise realize through the legislative process”).

46. See Davis, *supra* note 2, at 408–10 (describing the importance of prosecutorial charging decisions and noting that, in some offices, the decision merely formalizes law enforcement's decision to make an arrest).

cause to believe that a defendant has committed a crime.⁴⁷ That is a much lower standard than proof beyond a reasonable doubt. But pursuing charges when only probable cause exists runs afoul of best practices.⁴⁸ As a result, if a witness seems unreliable or physical evidence was not collected, then the prosecutor is likely to decline to prosecute the case.⁴⁹

But not all declination decisions are about evidence. Some are about policy—policies about assessing individual cases or policies about categories of cases. Prosecutors may, for example, decide not to bring charges in individual cases when mitigating facts are present or when the defendant’s conduct doesn’t seem to fit within the core of the crime.⁵⁰

Some decisions not to prosecute are categorical. Put differently, some prosecutors have adopted policies about when to decline prosecution for certain categories of cases.⁵¹ For example, in 2013, the Department of Justice issued a memorandum to federal prosecutors identifying the circumstances under which prosecutors should decline to bring drug charges that carry mandatory minimum sentences.⁵² And when she was elected district attorney in Boston, Massachusetts, Rachael Rollins established an office policy declining to bring charges in certain low-level cases.⁵³

47. *E.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

48. *See* A.B.A. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-4.3(a) (Ronald D. Rotunda & John S. Dzienkowski eds., 4th ed. 2017) (“A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.”).

49. *See* Fairfax, *supra* note 6, at 1254–56 (stating that “[p]rosecutors often decline prosecution because they do not have the evidence they feel is necessary to secure a conviction on a given charge” and describing evidentiary concerns that might lead a prosecutor to decline to prosecute); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 262 (1980) (reporting the most common reasons for federal declination of charges include “insufficient evidence of a criminal act”).

50. *See, e.g.*, Frase, *supra* note 49, at 262 (identifying “small amount of loss by the victims[,] . . . small amount of contraband, such as drugs or guns[,] . . . [and] the isolated nature of the defendant’s act” as common reasons for declination of charges); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 705–06 (2006) (documenting nonenforcement or early disposition of statutory rape cases when the victim and offender are in a romantic relationship).

51. *See* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 248–52 (2021) (collecting examples); Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 489 n.35 (2020) (same).

52. Memorandum from Eric H. Holder, U.S. Att’y Gen., on Dep’t Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 2 (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

53. Andrea Estes & Shelley Murphy, *Stopping Injustice or Putting the Public at Risk? Suffolk DA Rachael Rollins’s Tactics Spur Pushback*, BOS. GLOBE (July 6, 2019), <https://www.bostonglobe.com/metro/2019/07/06/stopping-injustice-putting-public-risk-suffolk-rachael-rollins-tactics-spur-pushback/IFC6Rp4tVHiVhOf2t97bFI/story.html>.

Although some offices may articulate official enforcement criteria—that is, either bright-line rules that must be satisfied or multiple factors that a prosecutor must consider and weigh before bringing charges—other offices rely on word-of-mouth or informal norms.⁵⁴ Even when offices adopt formal policies, there is no legal requirement that such criteria be communicated to the public.⁵⁵ Nor is there any requirement that the same criteria be applied across cases.⁵⁶

Decisions not to prosecute are often driven by resources. Prosecutors do not have the resources or the manpower to investigate and charge every possible criminal case.⁵⁷ Indeed, interviews with prosecutors indicate that a lack of support staff within their offices impedes their ability to prepare or investigate cases—especially cases involving witnesses or victims—thus affecting decisions about what cases to pursue.⁵⁸

Courts do not review prosecutors' declination decisions. “[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.”⁵⁹ The Supreme Court has justified giving prosecutors “‘broad discretion’ as to whom to prosecute”⁶⁰ by stating that “the decision to prosecute is particularly ill-suited to judicial review.”⁶¹ As the Court explained in *Wayte v. United States*:

Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by

54. Compare Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 27–28 (2013) (discussing office-wide bright-line rules), with *id.* at 19 (discussing informal norms).

55. See, e.g., Nat’l Ass’n of Crim. Def. Laws. v. Dep’t of Just. Exec. Off. for U.S. Att’ys, 844 F.3d 246, 252 (D.C. Cir. 2016) (denying defense attorneys’ Freedom of Information Act request for a copy of the Department of Justice’s Federal Criminal Discovery Blue Book on grounds that would similarly exempt enforcement and nonenforcement policies from disclosure).

56. See Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 1001 (2019) (“Prosecutors regularly make decisions on an ad hoc basis. . . . There is no formal legal requirement that prosecutors act consistently in different cases, nor are there any effective practical mechanisms to make consistency a political requirement.” (footnotes omitted)).

57. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940) (“One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate.”).

58. Stemen & Frederick, *supra* note 54, at 39–40. Notably, cases involving witnesses or victims tend to be cases of property crime and violent crime. Drug cases “were less affected.” *Id.*

59. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

60. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

61. *Id.*

revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.⁶²

A prosecutor's power to decline to bring charges is nearly absolute.⁶³ If a prosecutor decides to bring charges, then some limitations on the charging power begin to appear. Most notably, a prosecutor must have probable cause to support any charges brought.⁶⁴ And even if she has probable cause, a prosecutor is not permitted to bring charges that are motivated only by a defendant's race, religion, or other protected status.⁶⁵ But judges have severely undercut this limitation on prosecutorial charging powers by refusing to allow most defendants to obtain discovery to uncover evidence of discriminatory motivations.⁶⁶

In theory, a prosecutor's decision to bring charges should be reviewed by a jury at trial—the jury will hear the evidence and decide whether the defendant is guilty. But that rarely happens in the modern criminal justice system. In about 97% of federal cases, a defendant will plead guilty rather than proceed to trial.⁶⁷ When a defendant pleads guilty, a jury does not decide whether the prosecutor has proven each element of the crime charged beyond a reasonable doubt; instead, the prosecutor and the defense attorney will negotiate an outcome—usually that the defendant pleads guilty in return for the prosecutor dismissing other charges, agreeing to a certain sentence, or making a favorable sentencing recommendation to the

62. *Id.* at 607–08.

63. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[A]n agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. II, § 3)).

64. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

65. See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1372 (1987) (collecting cases).

66. See *United States v. Bass*, 536 U.S. 862, 863 (2002); *United States v. Armstrong*, 517 U.S. 456, 458 (1996); *United States v. Washington*, 869 F.3d 193, 215 (3d Cir. 2017). The court in *Washington* commented that

Armstrong/Bass has proven to be a demanding gatekeeper. In developing it, the Supreme Court sought to “balance[] the Government’s interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution” by creating a standard that, while difficult to meet, derived from “ordinary equal protection standards” and was not “insuperable.” The lived experience, however, has resembled less a challenge and more a rout, as practical and logistical hurdles abound—especially to proving a negative. The government itself concedes that “neither the Supreme Court nor this Court has ever found sufficient evidence to permit discovery of a prosecutor’s decision-making policies and practices.”

Id. (alteration in original). See also Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHL.-KENT L. REV. 605, 623 (1998) (“[F]or many crimes, *Armstrong* makes discovery impossible even where the defendant is a victim of selective prosecution.”).

67. CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 24 (2021).

judge.⁶⁸ When they negotiate with defendants, prosecutors have the upper hand. Defendants rarely have any leverage in those negotiations, and so they often must agree to whatever terms the prosecutor is offering.⁶⁹ Turning down a plea offer would require the defendant to proceed to trial. Trials are unattractive alternatives to guilty pleas because defendants who are convicted at trial receive much longer sentences: they are unable to reduce their exposure by getting charges with mandatory minimum sentences dismissed as part of a plea deal, and judges routinely impose a “trial penalty” in the form of a higher sentence on defendants who insist on a trial.⁷⁰

When a defendant and a prosecutor negotiate for an outcome, judges have the power to reject these plea bargains.⁷¹ But they rarely do: most judges are content to allow the prosecutor and the defense attorney to come to an agreement.⁷² Only in rare cases will judges reject those agreements—and when they do so, it is almost always because they believe the agreement is too lenient.⁷³

Plea bargains not only allow prosecutors to evade juries, but also can constrain judges’ sentencing power. Prosecutors can limit judges’ sentencing power by negotiating over the precise sentence or sentencing range to be imposed if the judge accepts the bargain.⁷⁴ Judges do not have to accept the agreed upon sentence because they can reject the plea bargain.⁷⁵ But as previously mentioned, judges are rarely willing to do that. And even if a defendant does not agree to a particular

68. In modern American plea bargaining, “[p]rosecutors and defendants negotiate over both the offense of conviction (‘charge bargaining’), and the sentence (‘sentence bargaining’).” William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1071 (2019).

69. See, e.g., Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2037–38 (2006) (describing the “enormous power of federal prosecutors to persuade suspects to accept guilty pleas”); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (noting that the guilty pleas may be the result of “prosecutorial domination”).

70. See generally NAT’L ASS’N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> (explaining the phenomenon of the trial penalty); see also Nancy J. King, David A. Soule, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences after Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973–75 (2005) (finding the trial penalty effect in data from five states).

71. See, e.g., *United States v. Smith*, 417 F.3d 483, 487 (5th Cir. 2005); *United States v. Gamboa*, 166 F.3d 1327, 1330 (11th Cir. 1999); *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985); *United States v. Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981).

72. See, e.g., Stuntz, *supra* note 39, at 596 (“Even when sentencing was everywhere discretionary, judges tended to defer to bargained-for sentencing recommendations.”).

73. See Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 81 (2017) (explaining why judges have more discretion to reject proposed plea bargains that are too lenient than those that are too harsh).

74. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1142 (2011) (distinguishing between two different types of sentencing-based plea bargains: a “stipulated-sentence agreement,” which “binds the judge to a particular sentence if the judge accepts the agreement,” and a “nonbinding” sentence bargain, which “leave[s] judges free to impose different sentences”).

75. See, e.g., FED. R. CRIM. P. 11(c)(5).

sentence as part of the plea bargain, the prosecutor can narrow the judge's sentencing options by selecting the specific charge of conviction—after all, different charges contain different sentencing ranges,⁷⁶ and the Supreme Court has said that states are free to enact overlapping crimes with different sentencing ranges.⁷⁷ Overlapping crimes basically allow prosecutors to choose how much punishment a defendant will receive.

As the preceding paragraphs indicate, prosecutors wield significant power in the criminal justice system. To be clear, prosecutors are not the only officials with power. Legislatures can change laws, police can decline to arrest, and judges could exercise more oversight over charging and plea bargaining.⁷⁸ But the fact that other officials *also* have power does not diminish how much power prosecutors have. And because prosecutors have largely unlimited power *not* to prosecute people, criminal justice reformers have begun to pay more attention to prosecutor elections and to support candidates who promise to use their power to incarcerate less.

B. *The Election of Prosecutors*

The United States is unique in its decision to elect its prosecutors. Forty-five of the fifty states elect local prosecutors who bear the primary responsibility for bringing felony prosecutions in their jurisdictions.⁷⁹ Many states elect one prosecutor per county, but some consolidate their counties into larger prosecutorial districts.⁸⁰

These local prosecutor elections accomplish two important objectives. First, they provide democratic accountability for prosecutorial decisions. Because prosecutors' charging and plea-bargaining decisions are largely insulated from judicial review,⁸¹ it is important that voters have the opportunity to choose a prosecutor who shares their priorities about which crimes to pursue most vigorously.⁸² Allowing constituents a voice (albeit an indirect one) in those decisions also gives the decisions more legitimacy.⁸³

76. Bibas, *supra* note 9, at 971; Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1233 (2016).

77. *United States v. Batchelder*, 442 U.S. 114, 123 (1979).

78. *See* Bellin, *supra* note 27, at 191–208 (discussing the power of non-prosecutorial institutions to reduce mass incarceration).

79. Hessick & Morse, *supra* note 3, at 1550–51 & 1550 tbl.1 (describing the method of selection for local prosecutors in each state and identifying those states that do not elect their local prosecutors).

80. *Id.* at 1553–54 & 1550 tbl.1 (identifying states that consolidate counties).

81. *See* Bibas, *supra* note 9, at 969–75 (describing the lack of judicial review).

82. *Id.* at 991 (stating that “in a democracy, voters are prosecutors’ principals” and thus voters “have the right to influence prosecutorial policy in their locale”); Gold, *supra* note 39, at 71 (“Because prosecutors act on the public’s behalf, their decisions should reflect their constituents’ preferences.”).

83. As a general matter, democratic accountability is seen as conferring legitimacy on institutions and decisions, *see* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 494 (2001), while democratic deficits are seen as hurdles to legitimacy, *see* David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1471 (2013). *But see* Kenneth S. Klein, *Weighing Democracy and Judicial Legitimacy in Judicial Selection*, 23 TEX. REV. L. & POL. 269, 292–94 (2018) (arguing that, when it comes to judges, elections and politicization actually undermine legitimacy).

The second objective of prosecutor elections is local control. Letting a county or a district select its own prosecutor allows local communities to help shape prosecutorial policies.⁸⁴ For example, a community that wants more aggressive prosecution of drug crimes can elect a prosecutor who promises to more actively pursue such cases. And a community that wants to rely on treatment rather than prison for drug users can elect a prosecutor who promises to establish diversion programs and other alternatives.

To be clear, local control of criminal justice policy is limited. Most obviously, in all states, the state legislature determines what qualifies as a felony for every prosecutorial district. Some states further limit local control by centralizing all criminal appeals⁸⁵ or by providing a mechanism for state officials to remove particular cases from the local prosecutor.⁸⁶ But even in those states, the vast majority of charging and plea-bargaining decisions are made by the local prosecutor, who is answerable only to her constituents.

Democratic accountability and local control may be the objectives of electing local prosecutors, but it is not clear that local elections actually accomplish either of those objectives in a meaningful way. In order for local communities to have input, they must have a choice in their prosecutor election. Yet the majority of local prosecutor elections are uncontested. According to a recent national study, only thirty percent of elected prosecutors faced a challenger in either their primary or their general election.⁸⁷ The rest were elected without voters ever having any choice in the matter.

Even when voters have a choice in an election, they may not have sufficient information to cast an informed ballot. Many charging and bargaining decisions are made outside of the public's view.⁸⁸ And historically, the media coverage of prosecutor elections has tended to focus on topics other than office policies about how to wield prosecutorial discretion.⁸⁹

84. See generally Murray, *supra* note 51 (arguing that local elections provide democratic legitimacy for prosecutorial nonenforcement decisions).

85. For example, in New Mexico, the “appellate section of the attorney general office represents the state in all criminal appeals.” Thomas B. Marvell, *Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar*, 75 JUDICATURE 86, 87 (1991). See also Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 24 (1993) (“In many states, the majority of criminal investigation and prosecution through trial is carried out at the local government level with the state attorney general’s office handling most of the criminal appeals.”).

86. See Tyler Quinn Yeargain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 110–26 (2018) (describing different approaches in various states).

87. Hessick & Morse, *supra* note 3, at 1563 tbl.5.

88. See Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1084–1107 (2022) (cataloguing key prosecutorial decisions that are made in secrecy).

89. Bibas, *supra* note 9, at 984–87; Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 597–603 (2009).

Media coverage of prosecutor elections may have improved in recent years—especially in races featuring a reform candidate.⁹⁰ The rate of contested elections may also have increased—at least in larger jurisdictions—but it remains quite low.⁹¹ And the rate of competitive elections is lower still.⁹²

The lack of contested and competitive elections means that voters have few opportunities to act as a check on the enormous power that their local prosecutors yield. The check that voters provide is not merely theoretical: previous studies of U.S. congressional elections and state judicial elections establish that electoral contestation and competition create clear links between citizens and their government.⁹³ Numerous studies show that competitive elections make legislators more likely to defer to constituent opinion when casting votes.⁹⁴ And there is evidence that competitive elections make state court justices less likely to dissent on key issues like the death penalty.⁹⁵ The reason for this responsiveness is simple—if elected officials fail to account for constituent opinion, they risk defeat at the ballot box.⁹⁶

There is also evidence that uncontested and uncompetitive elections negatively impact both the performance of elected officials and the relationship between those officials and their constituents. For example, state legislators who are not challenged in elections are more likely to miss roll call votes and less likely to

90. For examples of recent, substantive coverage, see Larry Altman, *Los Angeles DA Candidates Lacey, Gascon Clash on Police Racism, Death Penalty at Debate*, L.A. DAILY NEWS (Oct. 4, 2020), <https://www.dailynews.com/2020/10/04/los-angeles-da-candidates-lacey-gascon-swap-barbs-at-debate/>; Noah Goldberg, *Queens DA Candidates Spar over Experience, Policy at Eagle Forum*, QUEENS DAILY EAGLE (June 14, 2019), <https://queenseagle.com/all/queens-da-candidates-spar-over-experience-policy-at-eagle-forum>; Deanna Paul, *Manhattan District Attorney Election: A Guide to the Eight Democratic Candidates*, WALL ST. J. (May 17, 2021), <https://www.wsj.com/articles/manhattan-district-attorney-election-a-guide-to-the-eight-democratic-candidates-11621252802>; Michael Tanenbaum, *Philadelphia District Attorney Primary between Larry Krasner and Carlos Vega Puts Reform and Results on Trial*, PHILLY VOICE (May 14, 2021), <https://www.phillyvoice.com/2021-primary-philly-district-attorney-larry-krasner-carlos-vega-democrats/>.

91. See Wright et al., *supra* note 44, at 147 (“The elections in the years 2012–2015 left incumbents unopposed in 79% of the primaries and in 72% of their general elections. In the latest four years, 2017–2020, the percentage of incumbents who ran unopposed dropped to 70% in the primaries and 55% in the general elections.”).

92. See Hessick & Morse, *supra* note 3, at 1563 tbl.5.

93. See Robert S. Erikson, *Constituency Opinion and Congressional Behavior: A Reexamination of the Miller-Stokes Representation Data*, 22 AM. J. POL. SCI. 511, 532 (1978); Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RSCH. Q. 337, 346 (2003); Brandice Canes-Wrone, David W. Brady & John F. Cogan, *Out of Step, Out of Office: Electoral Accountability and House Members’ Voting*, 96 AM. POL. SCI. REV. 127, 137 (2002); Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45, 45 (1963).

94. E.g., Austin Bussing, Will Patton, Jason M. Roberts & Sarah A. Treul, *The Electoral Consequences of Roll Call Voting: Health Care and the 2018 Election*, 44 POL. BEHAV. 157, 160 (2020); cf. Brendan Nyhan, Eric McGhee, John Sides, Seth Masket & Steven Greene, *One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election*, 40 AM. POL. RSCH. 844, 844 (2012) (arguing that Congress members in 2010 whose votes are perceived as displaying ideological differences with constituents suffered heavy electoral damage as a result).

95. See, e.g., Melinda Gann Hall & Paul Brace, *Integrated Models of Judicial Dissent*, 55 J. POLITICS 914, 929 (1993) (“[T]he probability of a justice dissenting from a conservative decision of the court is a function of electoral politics and a concern with constituency preferences on the issue of the death penalty.”).

96. See, e.g., Canes-Wrone et al., *supra* note 93, at 137; Bussing et al., *supra* note 94, at 160.

introduce bills.⁹⁷ In Congress, those members who are not contested at the ballot box are less effective than their colleagues who are challenged.⁹⁸ Additionally, even research that argues in favor of noncompetitive elections finds that voters hold less favorable views of incumbents when they are elected in uncontested elections.⁹⁹

In sum, prosecutors wield enormous power in the criminal justice system. Elections are one of the few checks on that power. And so, it is important to understand why so few prosecutors run unopposed. That is the task taken up in the remaining Parts of this Article.

II. LESSONS FROM THE POLITICAL SCIENCE LITERATURE

Although the academic literature on prosecutor elections is quite thin,¹⁰⁰ elections more generally have long been a subject of academic study. There is a rich political science literature on what leads to contested and competitive elections. The vast majority of that literature focuses on federal elections, but state legislatures and state judicial elections have also garnered a share of the attention. The findings from that literature, which are described more fully below, helped inform the hypotheses and analyses of prosecutor elections presented in Part III.

Contestation and competition are related but distinct concepts. We define an uncontested race as one in which the winning candidate was the only candidate on the ballot. In uncontested elections, the result is known even before a single ballot is cast. An uncompetitive election, on the other hand, is one in which there is technically a choice—that is to say, there were at least two candidates on the ballot—but the losing candidate offered only token opposition to the winner. All uncontested races are, by definition, uncompetitive. But a contested election in which the losing candidate receives less than twenty percent of votes cast is uncompetitive because the winning candidate’s victory was essentially assured.¹⁰¹

97. See, e.g., David M. Konisky & Michiko Ueda, *The Effects of Uncontested Elections on Legislator Performance*, 36 LEGIS. STUD. Q. 199, 200 (2011).

98. See, e.g., CRAIG VOLDEN & ALAN E. WISEMAN, LEGISLATIVE EFFECTIVENESS IN THE UNITED STATES CONGRESS: THE LAWMAKERS 44, 46 (2014).

99. See, e.g., Thomas L. Brunell & Justin Buchler, *Ideological Representation and Competitive Congressional Elections*, 28 ELECTORAL STUD. 448, 448, 454 (2009).

100. The legal empirical literature on the topic is limited to Hessick & Morse, *supra* note 3, which is based on a national dataset, Wright, *supra* note 11, which updated a 15-state dataset originally discussed in Wright, *supra* note 89, and Wright et al., *supra* note 44, which examines the largest 200 jurisdictions, some for multiple election cycles. In addition, there is a distinct, but related non-legal literature on the behavior of prosecutors in the time period preceding elections. See, e.g., *supra* note 4.

101. Literature in political science suggests contested races can be classified as uncompetitive if the losing candidate captures less than ten to twenty-five percent of the vote. See, e.g., Barry C. Burden, *Candidate Positioning in US Congressional Elections*, 34 BRIT. J. POL. SCI. 211, 221 (2004) (suggesting less than ten percent is uncompetitive); Caitlin E. Jewitt & Sarah A. Treul, *Ideological Primaries and Their Influence in Congress*, in ROUTLEDGE HANDBOOK OF PRIMARY ELECTIONS 214 (Robert G. Boatright ed., 2018) [hereinafter *Ideological Primaries*] (suggesting less than twenty-five percent is uncompetitive); see also Caitlin E. Jewitt & Sarah A. Treul, *Competitive Primaries and Party Division in Congressional Elections*, 35 ELECTORAL STUD.

Contestation and competition are frequent topics of study in political science because a lack of meaningful choice at the ballot box is seen as normatively concerning. When elections are uncontested or uncompetitive, they no longer serve as a democratic accountability mechanism. A large number of uncontested elections might suggest that constituents do not have a means by which to express their preferences or to influence the direction of policy and government more generally. As Cain notes, “[a]t a minimum, democracy requires contestation for critical offices, meaning that voters get a choice and can hold office holders accountable for their actions and decisions by voting them out of office.”¹⁰²

As the rest of this Part explains, the political science literature has identified a strong advantage for incumbents and strategic entry behavior by potential candidates as major explanations for the lack of contestation or competition in elections. The strategic behavior of potential challengers leads them to wait for elections when incumbents appear weak or—better yet—when there is no incumbent in the race. These strategic entry decisions limit both contestation and competition, as the best candidates wait to make a bid for office. State judicial races suggest that other factors, including the supply of viable candidates, such as the number of lawyers in the jurisdiction, may also play a role.

A. *Brief Note on the Incumbency Advantage*

Any discussion of the empirical literature on elections must be understood against the backdrop of the incumbency advantage. The incumbency advantage is the well-documented edge that incumbents who are running for reelection hold over their challengers. The incumbency advantage has been documented across many different types of elections and across different time periods.

At the federal level, incumbents are often challenged, but many of these challengers do not have a realistic chance of unseating the incumbent. As noted above, the best challengers typically wait to run until an incumbent steps down. When it comes to congressional elections, incumbency may be the number one predictor of candidate success.¹⁰³ For the last two decades, incumbent reelection rates in congressional elections have exceeded ninety percent in all but the year 2010, when

140, 143 (2014) (defining competitiveness in terms of margin of victory). For more on thresholds and why we selected twenty percent, see *infra* note 207.

102. Bruce E. Cain, *More or Less: Searching for Regulatory Balance*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 263, 266 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011).

103. See, e.g., Jamie L. Carson, Erik J. Engstrom & Jason M. Roberts, *Candidate Quality, the Personal Vote, and the Incumbency Advantage in Congress*, 101 AM. POL. SCI. REV. 289, 297 (2007); Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 AM. J. POL. SCI. 478, 478 (1996); Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234, 1244 (1972); David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295, 313 (1974).

the reelection rate was eighty-five percent.¹⁰⁴ Recognizing this, a voluminous literature developed to measure and understand the reasons for the incumbency advantage.

Initially, scholars attributed the incumbency advantage to institutional features such as mailings, staff, and salary;¹⁰⁵ legislative casework;¹⁰⁶ and redistricting.¹⁰⁷ Other work suggests the advantage results from the member's home style—her behavior back home in the district,¹⁰⁸ the strategic entry and exit decisions of candidates,¹⁰⁹ and the personal vote.¹¹⁰ Whatever the precise reasons for the incumbency advantage, the experience of running for and holding office clearly matters to electoral success.

For non-incumbents, the number one predictor of electoral success has been previous experience in elective office.¹¹¹ These “quality candidates” have several attributes that contribute to their success: they know how to raise funds and run a successful campaign;¹¹² they are adept at choosing when to seek office,¹¹³ and they start most races with a high level of name recognition.¹¹⁴ Although defeating an incumbent is rare, the combination of strategic entry decisions and campaign acumen has traditionally given such candidates the best chance to knock off vulnerable incumbents or emerge successful in open seat contests.

In some sense, the attributes of these quality candidates reinforce the incumbency advantage theory. These candidates may not already hold the office for which they are running, but they have previously held another elected office. That

104. See GARY C. JACOBSON & JAMIE L. CARSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 37 (10th ed. 2019).

105. Albert D. Cover, *One Good Term Deserves Another: The Advantage of Incumbency in Congressional Elections*, 21 AM. J. POL. SCI. 523, 536–37 (1977).

106. Morris P. Fiorina, *The Case of the Vanishing Marginals: The Bureaucracy Did It*, 71 AM. POL. SCI. REV. 177, 179 (1977).

107. Erikson, *supra* note 103, at 1244; Cover, *supra* note 105, at 528.

108. Richard F. Fenno, Jr., *U.S. House Members in Their Constituencies: An Exploration*, 71 AM. POL. SCI. REV. 883, 890 (1978). The “home style” refers to incumbents spending time in the district—how they present themselves to and connect with constituents, how often they travel to the district, and how they remind voters of the good they are doing for the district in Washington.

109. Cox & Katz, *supra* note 103, at 478. Cox & Katz argue that one reason incumbents do not lose elections is that when it appears likely they will lose, they no longer run for reelection.

110. Carson et al., *supra* note 103, at 291. The personal vote refers to voters' willingness to support incumbents—perhaps even of a different political party—because of the good they are doing for the district. This could be casework (i.e., helping constituents navigate the bureaucracy) or it could be getting money and things for the district through the legislative process.

111. Gary C. Jacobson, *Strategic Politicians and the Dynamics of U.S. House Elections, 1946–86*, 83 AM. POL. SCI. REV. 773, 781–82 (1989).

112. Alan I. Abramowitz, *Incumbency, Campaign Spending, and the Decline of Competition in U.S. House Elections*, 53 J. POLITICS 34, 37 (1991); Cox & Katz, *supra* note 103, at 483; see also Janet M. Box-Steffensmeier, *A Dynamic Analysis of the Role of War Chests in Campaign Strategy*, 40 AM. J. POL. SCI. 352, 359 n.9 (1996) (mentioning the treatment of political experience in the literature).

113. Jacobson, *supra* note 111, at 776.

114. Gary C. Jacobson, *Incumbents' Advantages in the 1978 U.S. Congressional Elections*, 6 LEGIS. STUD. Q. 183, 187 (1981).

prior experience gives them both name recognition and political insights of the type ordinarily enjoyed by incumbents.

B. *Uncontested Elections*

The number of uncontested elections has been decreasing as of late in the U.S. Congress, but state legislatures are seeing an increase in the number of uncontested elections.¹¹⁵ Uncontested election rates in the U.S. House have fallen to around five percent, whereas uncontested election rates in the lower chambers of state legislatures have risen to over thirty percent.¹¹⁶ This divergent pattern suggests that, despite frequent complaints about an unresponsive and unrepresentative Congress, federal elections appear to be healthier than those at the state-level—at least as measured by contested elections. Of course, this says nothing of the true level of *competition* in those elections, which is discussed below.

The literature on uncontested elections in the U.S. Congress tends to focus on the emergence decisions of challengers.¹¹⁷ This scholarship examines when “quality” candidates decide to run for office.¹¹⁸ There is good reason for the focus on quality candidates: these experienced candidates are the ones most likely to run a competitive campaign and therefore are the most likely to unseat an incumbent. Research on quality candidates finds they are strategic about when they stand for election—typically choosing not to challenge an incumbent, but rather waiting for an open seat.¹¹⁹ Scholarship also finds that non-quality (i.e., inexperienced) candidates are also strategic in their entry decisions. The best opportunity for non-quality candidates to emerge is when quality challengers do not run.¹²⁰ This research

115. Barry C. Burden & Rochelle Snyder, *Explaining Uncontested Seats in Congress and State Legislatures*, 49 AM. POL. RSCH. 247, 250 (2021).

116. *Id.* at 255.

117. See, e.g., Jamie L. Carson, *Strategic Interaction and Candidate Competition in U.S. House Elections: Empirical Applications of Probit and Strategic Probit Models*, 11 POL. ANALYSIS 368, 369 (2003); Robert E. Hogan, *Challenger Emergence, Incumbent Success, and Electoral Accountability in State Legislative Elections*, 66 J. POLITICS 1283, 1283–84 (2004); Cherie D. Maestas, Sarah Fulton, L. Sandy Maisel & Walter J. Stone, *When to Risk It? Institutions, Ambitions, and the Decision to Run for the U.S. House*, 100 AM. POL. SCI. REV. 195, 206 (2006). An “emergence decision” is the decision whether and when to run for office.

118. As indicated above, political science uses the term “quality” candidates to refer to those candidates who have previous experience in elective office. See *supra* notes 111–114 and accompanying text. It is a dichotomous measure. This means that if a candidate for elective office has previously won another elected position, she is considered a quality candidate henceforth. For example, if a candidate is running for the U.S. Congress and previously had been elected mayor of her town, she would be classified as a quality candidate. If a candidate was running for state legislature and had previously won an election to school board, she would be classified as a quality candidate. If, however, a candidate was running for the U.S. Congress and had previously been appointed to a position, but never elected, she would not be a quality candidate. For example, former senator Kelly Loeffler was not a quality candidate when she ran for the U.S. Senate in 2020 despite serving in the U.S. Senate at the time. She only held that position because she had been appointed in 2019 by Georgia governor Brian Kemp.

119. See, e.g., JACOBSON & CARSON, *supra* note 104, at 37; Jacobson, *supra* note 111, at 778.

120. Jeffrey S. Banks & D. Roderick Kiewiet, *Explaining Patterns of Candidate Competition in Congressional Elections*, 33 AM. J. POL. SCI. 997, 1000–02 (1989).

suggests that the incumbency advantage combined with strategic decision making by candidates explains why so many elections go uncontested.

Studies about state legislative elections show similarly strategic behavior. Jewell found that “quality candidates are more likely to run against incumbents who are perceived to be weak or to run for open seats. Strong, entrenched incumbents usually draw weak challengers, or none at all.”¹²¹ This is reinforced by Van Dunk, who found that “the likelihood of quality challengers running is related to the previous electoral appeal of the incumbent, the personal characteristics of the incumbent, state partisan conditions, and statewide economic conditions.”¹²² All of this leads to the conclusion that whether a challenger chooses to emerge is highly correlated with their perceived belief that they will be successful.

The political science scholarship has identified other outside factors that influence when and whether congressional candidates decide to run. These factors range from the political environment, including economic conditions and partisanship,¹²³ to the demanding nature of filing requirements and campaign finance law.¹²⁴ Incumbent “war chests” can also deter challengers from emerging.¹²⁵

While most political science studies have treated the question of contested elections as a discrete strategic choice by potential challengers, more recent work by Burden and Snyder sought to identify other factors that likely contribute to the relatively high rate of uncontested elections for state legislatures.¹²⁶ Their work suggests that factors such as regional differences, the professionalization of the legislature, redistricting, and the partisanship of the district all play a role in whether elections are contested.¹²⁷ Burden and Snyder conclude that how competitive the legislature is plays a big role in the rate of contested elections.¹²⁸ That is, when majority control of the legislature is on the line, candidates from both parties are more likely to run for office.

The literature on state supreme court elections reinforces these findings from congressional and state legislature elections.¹²⁹ Bonneau and Hall examined whether state supreme court races were contested, as well as whether any challenger who

121. Malcolm E. Jewell, *State Legislative Elections: What We Know and Don't Know*, 22 AM. POL. Q. 483, 488 (1994).

122. Emily Van Dunk, *Challenger Quality in State Legislative Elections*, 50 POL. RSCH. Q. 793, 798 (1997).

123. See, e.g., Greg D. Adams & Peverill Squire, *Incumbent Vulnerability and Challenger Emergence in Senate Elections*, 19 POL. BEHAV. 97, 100 (1997); Banks & Kiewiet, *supra* note 120, at 998–99; William T. Bianco, *Strategic Decisions on Candidacy in U.S. Congressional Districts*, 9 LEGIS. STUD. Q. 351, 351–53, 361–62 (1984); Jacobson, *supra* note 111, at 775, 778.

124. Stephen Ansolabehere & Alan Gerber, *The Effects of Filing Fees and Petition Requirements on U.S. House Elections*, 21 LEGIS. STUD. Q. 249, 250 (1996).

125. Robert E. Hogan, *Campaign War Chests and Challenger Emergence in State Legislative Elections*, 54 POL. RSCH. Q. 815, 815 (2001).

126. Burden & Snyder, *supra* note 115, at 247.

127. *Id.* at 248–49.

128. *Id.* at 255.

129. Bonneau & Hall, *supra* note 93, at 339, however, remarked that unlike legislative races, “data on judicial elections have not been gathered in any systemic fashion.”

emerged was a quality challenger.¹³⁰ Of the state supreme court elections which were contested, only half of them attracted quality challengers.¹³¹ One noteworthy difference between state legislative and state court elections is that some state court elections are partisan while others are not.¹³² Bonneau and Hall found that partisan elections attract much higher levels of contestation and competition than do non-partisan elections.

Bonneau and Hall also examined what types of incumbent justices were more likely to attract a challenger, as well as whether the challenger that they drew was viewed as a “quality” challenger. Generally, they find that about half of the contested races for state supreme courts attract quality challengers.¹³³ They found that incumbents who were appointed and are now seeking their first electoral victory are more likely to encounter a challenge.¹³⁴ Somewhat surprisingly, they also found that the probability of drawing any challenger is not related to an ideological mismatch between the incumbent and the electorate.¹³⁵ This differs from work on congressional and state legislative elections, in which incumbents elected from districts populated with voters of the opposite party were more likely to draw a quality challenger.¹³⁶

Although their findings on partisan mismatch were different than the literature on legislative elections, the other factors that Bonneau and Hall identified were consistent with the legislative literature. They found that the state political climate influenced the likelihood of drawing a challenge.¹³⁷ They found that overall partisan composition of the state and the size of the pool of lawyers available have an effect on whether the incumbent draws a challenger.¹³⁸ They also found that institutional factors like the attractiveness of the job, including higher salaries and longer tenure, lead to more contested elections.¹³⁹

To date, prosecutor elections have not been the subject of sustained political science study. A small number of law review articles have examined prosecutor elections. Those articles have reported that, when incumbent prosecutors seek reelection, they win about ninety-four percent of the time.¹⁴⁰ This is consistent with the political science literature on federal and state legislative elections.¹⁴¹ But unlike those legislative elections, open seat elections for prosecutors—that is, elections in which there is no incumbent on the ballot—were also often uncontested

130. *Id.* at 340.

131. *Id.* at 343.

132. *Id.* at 341.

133. *Id.* at 343.

134. *Id.* at 344.

135. *Id.* at 343–44.

136. *See, e.g.*, Jacobson, *supra* note 111, at 778.

137. Bonneau & Hall, *supra* note 93, at 344.

138. *Id.* at 344.

139. *Id.*

140. Hessick & Morse, *supra* note 3, at 1544; Wright, *supra* note 89, at 600.

141. *See, e.g.*, JACOBSON & CARSON, *supra* note 104, at 37; Jacobson, *supra* note 111, at 778.

with only a single candidate running for the office.¹⁴² In legislative elections, open seats tend to be some of the most contested.¹⁴³

When prosecutor elections are contested, there are similar reasons for challenger emergence. Hessick and Morse found that larger jurisdictions are more likely to have contested elections, fitting with previous literature on this question.¹⁴⁴ They also find that there are certain types of prosecutorial districts that are likely to have contested elections, including suburban or urban areas.¹⁴⁵ They suggest one of the reasons for this might be that there simply are not enough potential candidates in some of the more rural areas. Similar to the scholarship on state supreme court elections,¹⁴⁶ they hypothesize that the increased likelihood of contested elections in suburban and urban areas might be because the pool of attorneys to draw from is greater in these areas.¹⁴⁷

C. Competitive Elections

Although elections to the U.S. Congress tend to be contested, those elections are often not competitive, especially when an incumbent is on the ballot.¹⁴⁸ Noncompetitive elections are also more likely when legislative districts have been gerrymandered to ensure the victory of a political party, or when a challenger without resources or name recognition offers only token opposition. It matters whether elections are competitive, and not merely contested, because uncompetitive elections do not provide voters with a meaningful opportunity to hold their officials accountable, and the officials in turn need not worry about losing their position.

Competition in elections for the U.S. House of Representatives has been declining for well over fifty years.¹⁴⁹ One simple measure of competition in elections to the U.S. Congress is the incumbent reelection rate. The incumbent reelection rate in the House of Representatives from 1946 to 1950 was 87%; it increased to 94% from 1952 to 1980; and then it increased again to over 97% from 1982 to 2004.¹⁵⁰ The rate has declined somewhat in the past few election cycles,¹⁵¹ averaging 92% from 2008 to 2020.¹⁵²

142. Hessick & Morse, *supra* note 3, at 1544.

143. JACOBSON & CARSON, *supra* note 104, at 145.

144. Hessick & Morse, *supra* note 3, at 1545, 1571.

145. *Id.* at 1545.

146. *See, e.g.*, Bonneau & Hall, *supra* note 93.

147. Hessick & Morse, *supra* note 3, at 1545.

148. *See, e.g.*, Jacobson, *supra* note 114, at 183 (“During the past three decades, more than [ninety] percent of the House incumbents sought reelection; fewer than two percent lost primary contests; and only six percent were defeated in general elections.”).

149. Alan I. Abramowitz, Brad Alexander & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POLITICS 75, 75 (2006).

150. *Id.*

151. Gary C. Jacobson, *It's Nothing Personal: The Decline of the Incumbency Advantage in US House Elections*, 77 J. POLITICS 861, 861 (2015).

152. JACOBSON & CARSON, *supra* note 104, at 37.

As noted above, part of the reason for these high reelection rates is that the quality challengers (i.e., those with prior experience in elective office) wait to run until there is an open seat.¹⁵³ Research on the incumbency advantage and its effect on competition suggests that very few incumbents face tough competition even in those districts where the partisan makeup of their constituency could make them vulnerable. One of the reasons for this is that potential, competitive challengers cannot compete with the financial resources of the incumbent.¹⁵⁴ Notably, the cost of running a viable congressional campaign has more than doubled in the last three decades.¹⁵⁵ Furthermore, congressional redistricting can make challenging an incumbent tough, as state legislators routinely try to draw lines that favor their party's House candidates.¹⁵⁶ By drawing safe districts, state legislatures stifle competition in US congressional elections. For example, on the heels of a 2010 census and a 2010 midterm election that was a resounding victory for Republicans in state legislatures across many states, Republican legislators shored up some of their more marginal congressional districts by adding Republican voters to those districts.¹⁵⁷

State legislative elections are not much better when it comes to competition. According to Richard Forgette et al., the average margin of victory in a state legislative election during the years 1968 to 2002 was over twenty-five percentage points.¹⁵⁸ State legislative research, like research on congressional races, suggests that statutorily-defined redistricting processes affect the level of competition.¹⁵⁹ That is, the drawing of district maps is shown to be at least a part of the reason for the lack of competition at the state legislative level.¹⁶⁰

Another factor affecting the lack of competition at the state level is legislative professionalism—that is, “the extent to which a house provides the resources and tasks to make legislating a full-time job.”¹⁶¹ Studies analyzing professionalism show mixed results. Greater professionalism increased competition in some studies of state legislative elections,¹⁶² and brought out more challengers in recent

153. See Jacobson, *supra* note 111, at 778 (“Unopposed candidates for open seats naturally win every time, and high-quality candidates are most common in these races.”); cf. Alan I. Abramowitz, *Explaining Senate Election Outcomes*, 82 AM. POL. SCI. REV. 385, 390 (1988) (“[C]andidates’ qualifications and financial resources may have a stronger impact on the outcome of a contest for an open seat than . . . on the outcome of a contest involving an incumbent.”).

154. Abramowitz et al., *supra* note 149, at 82.

155. JACOBSON & CARSON, *supra* note 104, at 90.

156. *Id.* at 13.

157. *Id.* at 14.

158. Richard Forgette, Andrew Garner & John Winkle, *Do Redistricting Principles and Practices Affect U.S. State Legislative Electoral Competition?*, 9 STATE POL. & POL’Y Q. 151, 156 (2009).

159. *Id.* at 166.

160. *Id.*

161. THAD KOUSSER, TERM LIMITS AND THE DISMANTLING OF STATE LEGISLATIVE PROFESSIONALISM 12 (2005).

162. See Hogan, *supra* note 125, at 827; Hogan, *supra* note 117, at 1292–93.

elections.¹⁶³ But another study showed no statistically significant correlation between professionalism and margin of victory.¹⁶⁴

In addition to legislative professionalism, studies have shown some effects of other external factors on competition, including national forces such as the state of the economy, presidential popularity,¹⁶⁵ and the competitiveness (or perceived competitiveness) of parties at the state level.¹⁶⁶ There is also limited evidence that district population or term limits influence competition in legislative elections.¹⁶⁷

Turning to state judicial elections, Hall and Bonneau found that, unlike legislative elections, the probability of competition is not related to ideological differences between the incumbent and the electorate.¹⁶⁸ Ideological differences seemed especially unimportant when past electoral performance of the incumbent was accounted for because it proved to be a better indicator of incumbent vulnerability.¹⁶⁹ Additionally, and similar to findings on contested elections, the size of the candidate pool (i.e., the number of lawyers in the constituency) affects whether there is competition.¹⁷⁰ The institutional arrangement of the position also has an effect on competition; if the job is more attractive, competition is more likely. More specifically, higher salaries and longer terms increase the likelihood of competition in state supreme court elections.¹⁷¹

Research on open-seat elections for state supreme courts finds that the winner is typically a candidate with judicial experience and the one who has spent more money.¹⁷² Also worth noting is that institutional arrangements matter in that district-based elections are more competitive than their statewide counterparts,¹⁷³ and the longer the term on the court, the less competitive an open-seat election is.¹⁷⁴

The existing literature on prosecutorial elections follows some of these same trends. Hessick and Morse provided the first look at competitiveness in prosecutorial elections.¹⁷⁵ A few of their findings stand out: first, the larger the jurisdiction, the more likely there is to be competition; second, urban and suburban districts are more likely to draw competition; and third, those places with high incarceration rates are less likely to have competitive prosecutorial elections.¹⁷⁶ Each of these

163. Steven Rogers, *Accountability in American Legislatures* 34 (2021) (unpublished manuscript), <http://www.stevenmrogers.com/www/bookproject.html>.

164. Forgette et al., *supra* note 158, at 164.

165. Rogers, *supra* note 163, at 43.

166. Burden & Snyder, *supra* note 115, at 255–56; Rogers, *supra* note 163, at 47.

167. Burden & Snyder, *supra* note 115, at 248.

168. Bonneau & Hall, *supra* note 93, at 343–44.

169. *Id.* at 343.

170. *Id.* at 344.

171. *Id.*

172. Chris W. Bonneau, *Vacancies on the Bench: Open-Seat Elections for State Supreme Courts*, 27 *JUST. Sys. J.* 143, 143 (2006).

173. *Id.* at 156.

174. *Id.*

175. Hessick & Morse, *supra* note 3, at 1545.

176. *See id.* at 1566–67, 1573–74.

findings is normatively concerning, as they suggest that there might be a dearth of qualified candidates in those places most in need of electoral choices. In particular, those jurisdictions with the fewest attorneys—and thus the fewest possible candidates for prosecutor—are least likely to have competitive or even contested elections. And the lack of competitive elections means that those communities likely are not having public debates about how to conduct their criminal justice policies.

Although Hessick and Morse provide a thorough discussion of prosecutorial elections utilizing national data,¹⁷⁷ they were unable to provide a systematic analysis of what leads to the lack of contestation and competition. Their analysis was purely descriptive and did not attempt to engage in a sophisticated statistical analysis of which factors were likely to lead to contested or competitive elections.

That is the task that we take up in the next Part.

III. A STATISTICAL ANALYSIS OF PROSECUTOR ELECTIONS

This Part identifies relevant variables that might affect prosecutor elections, describes our methodology, and summarizes our findings. Our main findings are that larger population and open races are the factors most likely to result in contested and competitive elections. Certain variations in state election law also affect the rate of contested elections. After presenting our main findings, this Part digs deeper into the question of whether the number of lawyers in a jurisdiction effects prosecutor elections, as well as whether crime rates and prison admissions on prosecutor elections have an effect.

A. Identifying Relevant Variables

In order to determine what causes contested and competitive elections, we must first identify the variables to study. Relying on the political science literature reviewed in the previous Part, as well as the hypotheses in the legal literature on prosecutor elections, we identified several factors that might help to explain why some prosecutor elections are meaningfully contested, while others are either uncontested or feature a candidate with no realistic chance of winning.

Those factors are as follows: whether the election features an incumbent or is for an open seat, whether the incumbent shares the party affiliation of the majority of voters in the district, how long the incumbent has been in office, factors that suggest greater “professionalization” (such as office budget and part-time status), the number of lawyers living in a district, various state election laws, and crime and prison admission trends. Each factor is described in more detail below.

177. That data set has been made available through the Prosecutors and Politics Project, a research initiative at the University of North Carolina at Chapel Hill. See *Local Prosecutor Elections, 2012–2017*, PROSECUTORS AND POLITICS PROJECT DATAVERSE, UNC DATAVERSE (Feb. 19, 2020), <https://dataverse.unc.edu/dataset.xhtml?persistentId=doi:10.15139/S3/ILI4LC>.

1. Open Seats

Both the political science literature and the legal literature suggest that contested and competitive elections are more likely in open-seat elections—that is, those elections in which there is no incumbent running for reelection. The political science literature on open-seat elections finds more contestation and competition.¹⁷⁸ It is also consistent with the descriptive observations of Hessick and Morse.¹⁷⁹ To test this variable, we must determine whether, all else being equal, an election without an incumbent is more likely to be both contested and competitive. If that is true, then it suggests would-be quality candidates strategically time their decision to run for office when there is no incumbent on the ballot.

2. Partisan Mismatch and General Elections

The political science literature suggests that, if the incumbent is not of the party that received the majority of votes in the recent presidential election, then contestation and competition are more likely in a general election.¹⁸⁰ So, for example, if the district attorney is a registered Democrat in a county that voted overwhelmingly for Donald Trump in 2016, then he should be more likely to face a challenger (all else being equal) than an incumbent who is a registered Republican. The theory is that these incumbents are likely to be seen as more vulnerable because their party affiliation does not match the partisan preference of their constituents. That vulnerability encourages quality candidates to run for the office.

3. Partisan Match and Primary Elections

The political science literature suggests that, if the incumbent is of the party that received the majority of votes in the recent presidential election, then contestation and competition are more likely in the primary election.¹⁸¹ For example, an incumbent district attorney in a county that voted for Hillary Clinton in 2016 is more likely to face a primary challenger if she is a Democrat than if she is a Republican, all else being equal.

This factor is similar to, but distinct from, the previous factor. It is similar to the previous factor in that it suggests an incumbent's party affiliation can predict when contested and competitive elections are more likely. Incumbents who share the political affiliation with most voters in their districts are more likely to be challenged in their primary election, whereas incumbents who do not share the political affiliation of the voters in their district are more likely to be challenged in the general election. But while a partisan mismatch suggests incumbent weakness, a partisan match obviously does not. Thus, the theory behind this factor is that potential

178. See, e.g., JACOBSON & CARSON, *supra* note 119, at 37; Jacobson, *supra* note 111, at 778.

179. See Hessick & Morse, *supra* note 3, at 1563 tbl.5.

180. See, e.g., Jacobson, *supra* note 111, at 778.

181. See, e.g., *id.*

challengers are more likely to run when their political affiliation that matches the preferences of most voters in their district because they assume the district is most likely to elect a candidate of that particular party.

4. Length of Incumbent Tenure

The legal literature suggests that incumbents who have served less time in office are more likely to face a challenger than incumbents who have served for a longer period of time. Specifically, Hessick and Morse found a correlation between an incumbent prosecutor serving five or fewer years in office and contested elections.¹⁸²

The political science literature arguably supports this factor as well. The literature finds that justices who had previously been appointed to their position were more likely to draw a challenger.¹⁸³ Appointments to an elective office ordinarily occur because of a vacancy part-way through a term—such as when the previous office holder resigns or dies while in office. As a result, those incumbents who have been appointed will ordinarily serve a shorter term than incumbents who have been elected to the office.

The theory behind this factor is that all else equal, incumbents who have served less time in office have less name recognition and have had less time to tout their accomplishments. These newer prosecutors are likely to be perceived as more vulnerable and less entrenched.

5. “Professionalization” of the Office and Attractiveness of Position

As noted above, the political science literature indicates that more professionalized institutions are likely to generate more contested and competitive elections, as are positions that are more attractive to candidates.¹⁸⁴ As a general matter, measures of professionalism attempt to capture the capacity of institutions and the constituent members of those institutions to perform their functions well. Legislative professionalism is generally measured by looking at factors such as member pay, number of staffers per legislator, and the number of days in session.¹⁸⁵ Attractiveness of the position is measured by higher salary and longer terms.¹⁸⁶

Assessing the professionalism and the attractiveness of a particular prosecutor position can be difficult. There is simply not enough variation in some of the traditional professionalism metrics. For example, for term length, forty of the forty-five states that elect their prosecutors have four-year terms for the office; one state has a shorter term, and four states have longer terms.¹⁸⁷

182. Hessick & Morse, *supra* note 3, at 1568 tbl.7.

183. *See supra* note 134 and accompanying text.

184. *See supra* note 162–63 and accompanying text.

185. Peverill Squire, *Legislative Professionalization and Membership Diversity in State Legislatures*, 17 LEGIS. STUD. Q. 69, 71 (1992).

186. *See supra* text accompanying note 161.

187. Hessick & Morse, *supra* note 3, at 1550 tbl.1, 1553.

However, when it comes to other measures of professionalization, there is more variation between districts. Specifically, we were able to collect data about whether an office is full-time or part-time, the salary of the elected prosecutor, the number of staff employed, and the size of the office budget.¹⁸⁸ We use these as a proxy for professionalization. It is possible that these factors may affect elections—specifically, that full-time offices with higher salaries, larger staffs, and larger budgets will be seen as more prestigious or more desirable, and thus that elections for those offices will have higher rates of contested and competitive elections, as they are more coveted positions.

6. Supply of Lawyers

There is support in both the political science literature and the legal literature for the idea that districts with more lawyers will have higher rates of contestation and competition as compared to districts with fewer lawyers. The state supreme court literature found a relationship between the number of lawyers and the rate of contested elections.¹⁸⁹ And Hessick and Morse found a correlation between the number of lawyers living in a district and the rate of contested elections—districts with a smaller supply of lawyers were less likely to have contested elections.¹⁹⁰

Unlike most other elected offices, there is a significant limitation on who may run as candidates for judicial or prosecutorial office: the candidate must be a lawyer. Thus, the number of lawyers in a district represents the total supply of possible candidates. Districts with more lawyers have a larger supply of potential candidates, as compared to districts with fewer lawyers.

7. Differences in Election Law

Although forty-five states elect their prosecutors, they do not necessarily use the same legal rules to conduct those elections. Some of those rules may affect when would-be candidates decide to enter a race or how well the candidates fare against one another.

First, some states exclude uncontested elections from their ballots;¹⁹¹ candidates who face no opponent simply do not have to stand for election. This practice could potentially result in fewer contested prosecutorial elections because voters (and

188. The Bureau of Justice Statistics has periodically conducted a census of state court prosecutors. We relied on the data from the most recent census, which was conducted in 2007. See generally STEVEN W. PERRY & DUREN BANKS, U.S. DEPARTMENT OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES (2011), <https://bjs.ojp.gov/content/pub/pdf/psc07st.pdf>. It is possible that some of the data changed between 2007 and the elections in our dataset, most of which were held in 2014 and 2016.

189. Bonneau & Hall, *supra* note 93, at 344.

190. Hessick & Morse, *supra* note 3, at 1574–81. Their observation was limited to ten states because those were the only states from which they collected lawyer residency data.

191. See *infra* tbl. 2.

potential challengers) are not reminded on election day that this is an elected office and that there is not much choice.¹⁹²

Second, while local prosecutor is a partisan office in the majority of states, a minority of states classify it as a non-partisan office, and they do not indicate the political party affiliation of prosecutorial candidates on the ballot. Five states hold non-partisan prosecutorial elections, and two additional states permit counties to determine whether to hold partisan or non-partisan elections.¹⁹³ The existing literature on prosecutor elections is split about whether this rule affects contested elections: Wright's study of prosecutor elections in fifteen states observed that states with non-partisan elections observed higher rates of contested elections.¹⁹⁴ Hessick and Morse did not observe a correlation between non-partisan elections and increased contestation.¹⁹⁵ The political science literature, on the other hand, has shown that non-partisan elections "feature even less competition, that voter turnout is substantially lower, that incumbents are safer and that there is no indication that candidates engage in any substantial policy competition."¹⁹⁶

Third, some states allow voters to vote the party, rather than the individual candidates that they wish to support across the entire ballot.¹⁹⁷ This so-called "straight ticket voting" has been shown to nudge voters to vote in a partisan manner in a general election.¹⁹⁸ Such a variable could have an effect on the competitiveness of general elections with a partisan mismatch: an incumbent's advantage could be undermined by voters who select this option since the majority of voters are from the opposing party. Therefore, a challenger may be more likely to emerge and a competitive election is more likely in a state that utilizes straight ticket voting *and* when there is a partisan mismatch. Put differently, in a district where the general election electorate's partisanship does not match that of the incumbent prosecutor, the incumbent might be at more of a disadvantage in the general election if those voters utilize the straight ticket voting option.

8. Crime and Prison Admission Trends

Since prosecutors' main role is to prosecute those who commit crimes, it seems logical that variables associated with crime could have an effect of prosecutor elections. There are two relatively easy to obtain statistics associated with crime: crime rates and prison admission rates. If crime rates go up, voters might blame their local prosecutor, prompting a challenger to declare her candidacy and thereby increasing the likelihood of the election being more competitive. Alternatively,

192. Hessick & Morse, *supra* note 3, at 1557.

193. *See id.* at 1552.

194. Wright, *supra* note 11, at 603 tbl. 3.

195. Hessick & Morse, *supra* note 3, at 1565–66.

196. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J. L. & POL. 419, 421 & n.13 (2007) (collecting sources).

197. *See infra* tbl. 2.

198. ERIK J. ENGSTROM & JASON M. ROBERTS, *THE POLITICS OF BALLOT DESIGN: HOW STATES SHAPE AMERICAN DEMOCRACY* 136 (2020).

voters could respond to the prison admission rate per crime, since this is a metric the prosecutor has more control over than the actual crime rate.¹⁹⁹ Voters might think that the prosecutor is sending too many or too few people to prison.

Of course, voters alone do not determine whether there is a challenger—because only lawyers can stand for election, a dissatisfied voter may not have a choice at the polls. But potential challengers might see crime rates or prison admission rates as a weakness for the incumbent prosecutor. In other words, these numbers might incentivize quality candidates to run for the office.

B. Description of Data and Summary Statistics

For this study, we rely on data collected by the Prosecutors and Politics Project.²⁰⁰ These data include vote share information about each candidate that ran in a district prosecutor election for forty-five states, each sampled in one year ranging from 2012–2017.²⁰¹ We combine these data with additional district-level information including presidential election results,²⁰² demographic information from the U.S. Census, prison admissions information from National Corrections Reporting Program through the National Archive of Criminal Justice Data,²⁰³ and information about the size, salary, budget, staff, and full- or part-time statuses of prosecutors' offices from the Bureau of Justice Statistics.²⁰⁴ We also included the various state election law rules discussed in the previous subsection.²⁰⁵

Here, a contested election is defined as a race with more than one candidate running for the office of prosecutor. A competitive race is defined in accordance with political science literature that suggests a competitive race is one in which there is more than “token opposition.”²⁰⁶ We code a race as competitive if the winning candidate received less than eighty percent of the vote in the election.²⁰⁷

199. The prosecutor's charging and plea bargaining decisions have a direct effect on how many people are admitted to prison, while crime rates depend on many variables, some of which are unknown. Cf. Bibas, *supra* note 9, at 986 (“Crime rates are often driven by exogenous factors, such as the crack-cocaine boom or increased police hiring, for which prosecutors deserve little credit or blame.”).

200. See *supra* note 177. For more information about how the data was collected, see Hessick & Morse, *supra* note 3, at 1558–61.

201. Different jurisdictions are sampled in different years because not all prosecutor elections are held in the same year.

202. MIT Election Data Science Lab, *County Presidential Election Returns*, HARVARD DATAVERSE, <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/VOQCHQ> (last visited Oct. 23, 2022).

203. Danielle Kaeble, Bureau of Justice Statistics, *National Corrections Reporting Program*, U.S. DEP'T OF JUST. (2019), <https://bjs.ojp.gov/data-collection/national-corrections-reporting-program-ncrp#publications-0>.

204. See Perry et al., *supra* note 188.

205. See *supra* notes 191–98 and accompanying text.

206. Burden, *supra* note 101, at 221.

207. Different studies use different thresholds. For example, Burden uses ninety percent as an indication of competitiveness, Burden, *supra* note 101, at 221, while Jewitt and Treul use seventy-five percent, *Ideological Primaries*, *supra* note 101, at 214. We use the eighty percent threshold as it allows us to capture more opposition than the seventy-five percent threshold and given low levels of contestation to start with, this allows us to classify as many elections as competitive, while still remaining within the bounds of what is considered acceptable in political science literature.

Table 1 presents summary statistics about the incidence of contestation and competition:

Table 1: Contestation and Competition in Prosecutorial Elections by Election Type

Type of Challenge	Contested	Competitive
General Election	17.78%	17.26%
Primary Election	13.85%	13.72%
Both Primary & General	3.45%	3.37%

Table 1 shows that 17.78% of general elections attract a challenger and 17.26% of general elections are competitive using the 80% standard discussed above. This indicates that almost all challengers in general elections offer more than token opposition. This is also the case for primary elections, where the gap between contestation and competition rates—13.85% and 13.72%, respectively—is even smaller.

The last row reflects the frequency with which an election is contested or competitive in *both* the primary and the general election. This is quite rare at less than 4% for both contested and competitive elections, which means that if an incumbent is going to face a competitive election, it is likely to be in the general or the primary stage, but not both.

To test the various factors identified, we fit two logistic regression models²⁰⁸ with state-level varying intercepts. This method allows us to estimate the individual effect of district-level characteristics—the independent variables—on the incidence of contestation or competition—the dependent variable.²⁰⁹ For example, regression analysis can tell us how district population (an independent variable) is related to the likelihood of a prosecutor's race being contested (the dependent variable), controlling for the effects of other independent variables.

To account for unobserved state-level variation, we estimate a multilevel model. This type of model allows us to assume that states may have different baseline levels of contestation and competition due to features that we cannot observe and therefore include in the model, but the independent variables in the model affect the individual states in a consistent way.²¹⁰

208. Logistic regression relies on a logistic distribution to model binary outcomes (dependent variables). They are used to predict the likelihood of one outcome happening opposed to the other based on certain factors (independent variables). For a detailed discussion of logistic regression, see ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS 79–86 (2006).

209. *Id.*

210. The precise specification of the multilevel mode is $Pr(y_i = 1) = \text{logit}^{-1}(X_i\beta + \alpha_{j[i]})$, for $i = 1, \dots, n$, where X is the matrix of individual level predictors (defined below), $j[i]$ indexes the state where district i is contained, y_i is 1 if the election was contested (or competitive) and 0 otherwise, and β is the vector of predictors of length i . The second part

We include a number of independent variables that we expect to be relevant to contestation and/or competition. At the state level, the model includes three variables that correspond to three different legal rules surrounding elections in different states. The first of those variables, *Exclude Uncontested*, refers to the practice in some states of excluding uncontested elections from their ballots. The second variable, *Partisan Election*, refers to those states that indicate the political party affiliation of prosecutorial candidates on the ballot. The third variable, *Straight Ticket Option*, refers to the practice of states allowing voters to vote for a party across the entire ballot.

In addition to these state-level variables, we also include multiple county-level variables. *Budget per Capita* reflects the dollars spent per person by the district's prosecutors' office. The variable *Partisan Mismatch* represents cases where the incumbent prosecutor is not representing the party that received the majority of votes in the 2016 presidential election. *Open Race* identifies cases where there is no incumbent running. *Incumbent Tenure* captures the number of years the incumbent has held the office of district prosecutor. To capture district level electoral context, the model also includes the percent change in the crime rate (*Change in Crime*) from four years preceding the election year to the election year²¹¹ as well as the district's *Prison Admissions* which show how many people from a district were admitted to prison in a given year.²¹² It also controls for the districts' *Population*. In later models, we capture the effects of lawyer supply by specifying models with an independent variable for *Number of Lawyers* as well as *Lawyers per Capita*.

Table 2 shows a description of each independent variable included in the model.

of the model is defined as: $a_j \sim N(U_j \gamma, \sigma_\alpha^2)$, for $j = 1, \dots, 44$. Where U is the matrix of state-level predictors, γ is the vector of coefficients for the state-level regression, and σ_α is the standard deviation of the unexplained state-level errors. See *id.* at 301–20.

211. We chose four years because that is overwhelmingly the most common term length for local prosecutors. See Hessick & Morse, *supra* note 3, at 1550.

212. See Josh Keller & Adam Pearce, *U.S. State Prison Admissions by County*, GITHUB.COM (Sept. 13, 2016), <https://github.com/TheUpshot/prison-admissions>.

Table 2: Descriptions of Variables

Independent Variable	Description
Straight Ticket Option	1 if the state has an option for party-based straight ticket voting
Multi-County District	1 if the prosecutorial district contains multiple counties
Exclude Uncontested	1 if the state does not include uncontested prosecutorial races on the ballot
Budget per Capita	Dollars in the 2007 prosecutorial budget per person in the district
Partisan Election	1 if the prosecutor is a partisan office
log(Population)	Natural log of the 2010 Census Population for the district
Partisan Mismatch	1 if the incumbent is not representing the party that received the majority of votes in the 2016 presidential election
Open Race	1 if the incumbent is not running for re-election
Incumbent Tenure	The number of years the incumbent has held the office of prosecutor
Number of Lawyers	Number of lawyers in the district
Lawyers per Capita	The number of lawyers in a district divided by the population of the district multiplied by 1000
Change in Crime	The change in crime rate for a district between four years prior to the election year and the election year
Prison Admissions	The number of people from a prosecutorial district admitted to prison in one year

Below, [Table 3](#) reports the results of four models. In all models the dependent variable is 1 if there was more than one candidate in the prosecutorial race. The results of our models for whether the election is competitive are included in the appendix below.²¹³ The results are largely similar.²¹⁴

213. See *infra* tbl. A.1.

214. Each statistically significant covariate in the contestation model is also significant and has the same sign in the competition model.

The first two models represent general elections and the last two represent primary elections. For each election type, we run one model for all races and one model that only includes races where an incumbent is running, which allows us to include the independent variables *Partisan Mismatch* and *Incumbent Tenure*. The leftmost column shows the various independent variables and other control variables that we are interested in. For each model and variable, Table 3 reports two statistics. In the first, it reports the model coefficient which represents the effect of a one-unit change of the independent variable on the input of the logistic function. Positive numbers indicate the independent variable increases the likelihood of contested elections while negative numbers indicate the variable decreases the likelihood of contested elections.

Each coefficient estimated has an amount of variation associated with it. This variation, called the standard error, is the second statistic reported in parentheses. The higher the error, the less confident we can be that the estimated coefficient is the true coefficient. Using the standard error, we are able to quantify how likely it is that the effect we detect is representative of a true effect rather than random noise. If a coefficient estimate is less than five percent likely to be found because of random noise,²¹⁵ it is designated as statistically significant with an asterisk ($p < .05$).

The last two rows of the table report the number of observations (prosecutorial races) used in the regression model and the Akaike Information Criterion, which represents how well the model fits the data;²¹⁶ lower values mean that the model is a better fit for the data than higher values.

In these first two models, open race, larger populations,²¹⁷ and partisan mismatch all have the effect of increasing the likelihood of both contestation and competition. In other words, these models show strong and consistent support for the conclusion that these factors have a significant effect on whether voters will have a choice at the polls and whether that choice will be meaningful.

Open seat races—that is, races without an incumbent—are almost three times as likely to have a contested election as those with an incumbent.²¹⁸ This finding is entirely consistent with the literature about the power that incumbents have to maintain their office if they desire.²¹⁹ Additionally, since this effect is similar across contestation and competition,²²⁰ this suggests that incumbents are successful in “scaring-off” not only quality challengers but also any potential challengers at all.

215. JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 124 (5th ed. 2013) (describing five percent confidence level as “the most popular choice” for regression).

216. GELMAN & HILL, *supra* note 208, at 525.

217. The variable population is included to capture the fact that there might be differences in contestation and competition based on the size of the prosecutorial district. We utilize the natural-logged form of this measure to standardize the units of measure and aid with interpretation. *See* WOOLDRIDGE, *supra* note 215, at 41–43.

218. This number comes from transforming the log-odds reported in Table 3 to an odds ratio by taking the inverse natural log: $e^{1.068} = 2.89$; $e^{1.091} = 2.98$.

219. *See supra* Part II.A.

220. *See infra* tbl. A.1.

Table 3: Contestation in Prosecutorial Elections

	<i>Dependent variable:</i> Any Challenger			
	General Elections		Primary Elections	
	All Races	Only Incumbents	All Races	Only Incumbents
Straight Ticket Option	-0.213 (0.293)	0.345 (0.442)	0.450 (0.240)	0.700 (0.393)
Multi-County District	-0.123 (0.226)	-0.439 (0.338)	0.142 (0.185)	0.268 (0.355)
Exclude Uncontested	0.097 (0.398)	0.394 (0.582)	-0.578* (0.236)	-0.831* (0.381)
Budget per Capita	0.071 (0.057)	0.149 (0.084)	0.012 (0.059)	-0.037 (0.129)
Partisan Election	1.080* (0.391)	1.337* (0.604)		
log(Population)	0.259* (0.047)	0.273* (0.064)	0.267* (0.046)	0.139 (0.086)
Open Race	1.068* (0.135)		1.091* (0.129)	
Partisan Mismatch		0.481* (0.189)		-0.804* (0.284)
Incumbent Tenure		-0.034 (0.085)		-0.075 (0.123)
Constant	-5.601* (0.620)	-6.119* (0.922)	-5.825* (0.534)	-3.510* (0.975)
Observations	2,316	1,277	4,307	1,013
Akaike Inf. Crit.	1,977.809	1,050.973	2,156.754	636.861
State-Level Random Effects?	Yes	Yes	Yes	Yes

Note: * p<.05.

Larger populations also encourage contested elections. This could indicate a preference among potential prosecutorial candidates for larger districts, which are generally accompanied by larger budgets, staff, and more responsibility.²²¹

221. However, as we note below, once we control for population, differences in budget (and, by inference, staff) show no detectable effect.

Alternatively, this could be evidence of a supply problem, wherein there are not enough interested, eligible candidates in small districts to challenge incumbents. The possibility of a supply problem is discussed in the next Part.

The incumbent's party also had the predicted effect on elections. In cases of a partisan mismatch—that is, districts in which the incumbent's party did not win the majority of the district's presidential vote—contested general elections were more likely. This suggests that shifting district-level party alignments can serve as a signal to potential challengers of the incumbent's electoral weakness, prompting more challengers.

When examining the effect of an incumbent's party in primary elections, we also see the expected result. Incumbents who come from the district's majority party are more likely to face a challenger in the primary election than those incumbents who are out of step with the partisan identification of the district. This suggests that potential candidates recognize the value of identifying with the party that gets the majority of district support in presidential elections.²²²

Of course, because the incumbent will either belong to the majority party or the minority party in her district, a partisan election will necessarily feature a partisan match or a partisan mismatch.²²³ Given this, what the models detect is actually *when* (i.e., what stage of the election) an election is likely to be contested—the primary election or the general election. It does not tell us *whether* there will be a contested election.

When comparing the contestation rates across elections with a partisan match and elections with a partisan mismatch—that is, the rate at which *either* the primary or the general election was contested—we do not see a meaningful difference. Nor do we find a relationship between the magnitude of the mismatch and challenger emergence in general elections when examining the size of the presidential vote share for a given district. (For example, Democratic incumbents in heavily Republican districts do not face more challenges than Democratic incumbents in slightly Republican districts.)

Interestingly, neither incumbent tenure nor any of the professionalism and desirability of position factors have a measurable impact on the predicted probability of a contested election. In other words, these factors do not have the expected effects.

It is unclear why incumbent tenure does not affect contestation.²²⁴ After all, recently elected incumbents have had less time to establish themselves within the

222. Presidential elections are frequently used to measure the partisanship of various electoral units because turnout is so high.

223. The one exception to this would occur if an incumbent prosecutor ran as a third-party candidate or was unaffiliated with a party. But that was relatively rare in our dataset. We identified only fifty-three incumbents who ran as Independents. See PROSECUTORS AND POLITICS PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS 59, 88, 93, 95, 100–11, 165, 183, 186, 203, 206, 217, 243, 258, 271–72, 274–75, 279–82, 314–28, 343, 350 (2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf>.

224. We report the regression results for the competition model in Table A.1, *infra*. For each variable of interest, the results are substantively similar.

local power structure and less time to build name recognition—some of the important benefits that incumbency is thought to confer. It is possible that an incumbent who more recently won her election may represent the district better ideologically, and the coalitions that mobilized to elect her are more likely to still exist. But when we adjusted the model to isolate only those incumbents who had served less than a term—that is, those incumbents who likely had been appointed to their position—there was still no detectable effect in our main model.²²⁵ This suggests that the incumbency advantage may be even stronger for prosecutors than for judges.²²⁶

As for the professionalism and desirability of office factors, it is hard to know whether these factors are simply irrelevant to potential candidates or whether the relationship between these factors and population obscures meaningful differences from the candidates' point of view. The size of the office staff and the overall size of the office budget fluctuate significantly based on the population of a district.²²⁷ It may be that, for example, potential candidates do not respond to funding relative to the population, but rather find offices with a higher level of absolute funding more attractive. Of course, the level of absolute funding is highly correlated with population (.902), since offices receive funding mostly commensurate with the number of cases that they will process. Given the high level of correlation, we are unable to conclude if it is larger populations or higher budgets and larger staffs that encourage contestation.

For our state-level variables, the *Straight Ticket Option* does not appear to have an effect on the likelihood of contestation.²²⁸ *Partisan Election*, however, does significantly increase the likelihood of a contested general election.²²⁹ Additionally, the practice of *Excluding Uncontested* from ballots does not appear to have an effect in general elections, but it *does* have an effect in primary elections. Those states that exclude uncontested elections from their primary ballots are less likely to have contested or competitive primary elections.²³⁰

225. We identified 217 incumbents who ran for reelection after serving less than a full term. Some of these candidates had obtained their position by running in special elections. But others were appointed to fill vacancies.

226. That is because, as noted, above, judges who have been previously appointed to the position were more likely to draw a challenger, *see supra* note 134 and accompanying text, but we do not observe a similar pattern for prosecutors.

227. There is also a clear relationship between full-time and part-time status. Part time offices are found only in small population districts.

228. At the time this data was collected, twelve states offered a straight ticket voting option. Those states are: Alabama, Indiana, Michigan, Kentucky, Oklahoma, South Carolina, Utah, Pennsylvania, Michigan, Iowa, and Texas. *See Straight Ticket Voting*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 11, 2022), <https://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx>.

229. This finding is contrary to the correlation that Wright observed, *see Wright, supra* note 11 at 603 tbl. 3, but it is consistent with the political science literature, *see supra* note 193–96 and accompanying text. The following states hold states nonpartisan prosecutor elections: Arkansas, California, Minnesota, North Dakota, and Oregon. Hessick & Morse, *supra* note 3, at 1550 tbl.1. In addition, Hawaii and Montana allow counties to decide whether the office is partisan or nonpartisan. *Id.* at 1552.

230. Six states exclude uncontested races from the general election ballot, and fifteen states exclude uncontested races from the primary ballot. Hessick & Morse, *supra* note 3, at 1554–55.

C. Lawyer Supply Hypothesis

This subsection addresses the supply of qualified candidates. Candidates for local prosecutor must not only satisfy any relevant residency requirements, but they must also be active members of the state bar in good standing.²³¹ Hessick and Morse show that there are less than five lawyers in many districts, and they suggest this constraint on the supply of candidates as a potential explanation for the lack of contested prosecutorial elections.²³² To investigate this question, we examine a sample of ten states²³³ and identify the number of lawyers living in each district.

Importantly, it is not a random sample. Half of the states in the sample were selected because they made their lawyer residency data easy to obtain; the other half were specifically chosen because they included districts that were unable to field even a single candidate for at least one prosecutor election.²³⁴ Because the sample is not random, it may not be representative.

We begin by presenting descriptive statistics below, in [Table 4](#):

Table 4: Summary Statistics for Number of Lawyers in a District

Min	0
Max	69,235
Median	31
Mean	643.22

Examining the data, it is glaringly obvious that many districts have significantly fewer eligible candidates for the office of prosecutor than is the case for almost any other office. This subsection empirically tests the claims of Hessick and Morse to see if this low supply does indeed result in fewer contested prosecutor elections.²³⁵

231. Many states require that an individual live in the particular county or district in which they run; but some states have relaxed those requirements and allow candidates from adjacent counties to run. As a result of that relaxation, some districts with no lawyers living within their boundaries may still have a candidate stand for election, rather than having to resort to appointment of a local prosecutor. See Hessick & Morse, *supra* note 3, at 1575–76, 1578 (discussing residency requirements).

232. *Id.* at 1574–78.

233. The states in our sample are Arizona, California, Kentucky, Missouri, Nebraska, New York, North Dakota, South Carolina, South Dakota, and Utah. These are the same states that Hessick and Morse used.

234. As they explained, they selected these ten states as follows:

Because this data was often not readily available, we collected it only for a subset of states. We made a special effort to obtain this data in the six states with districts that did not have a single candidate run for local prosecutor, and we were ultimately able to obtain it for five of those six states. We supplemented this data with data from an additional five states that made the information easy to obtain.

Hessick & Morse, *supra* note 3, at 1576.

235. For example, seventeen districts within Nebraska, North Dakota, and South Dakota have no lawyers. New York City's Manhattan prosecutorial district contains 69,235 lawyers.

Table 5 divides the districts in the ten states into quartiles based on how many lawyers live in the district.²³⁶ The first group of districts has the lowest number of lawyers residing in them (between zero and six lawyers), while the fourth group has the districts with the largest number of lawyers (between 120 and 69,235 lawyers). As expected, it shows that, without controls, contested elections are significantly less likely to occur in districts with a low number of lawyers than in districts with a large number of lawyers.

Table 5: Percent of Contested Races by Number of Lawyers in a District

Number of Lawyers (Quartiles)	% of Contested Races
1st	6.71
2nd	11.68
3rd	18.12
4th	18.98

However, **Table 5** does not establish that the number of lawyers, standing alone, explains why so many prosecutor elections are uncontested. Because the number of lawyers living in a district is correlated to that district's population,²³⁷ we must perform a regression analysis to isolate the effect of the supply of lawyers.

We employ the same logistic regression method detailed above, restricting the analysis to the ten states with lawyer residency data. The results are reported below in **Table 6**.

These results show that the number of lawyers is not a strong determinant of electoral contestation for prosecutorial elections.²³⁸ In other words, once we control for other variables, the number of lawyers in a jurisdiction does not appear to have a relationship with the likelihood of a contested election. While we cannot draw a definitive conclusion about the effect of lawyer supply given that ours is a nonrandom sample,²³⁹ these results suggest that population may have more influence on contestation and competition than lawyer supply.

D. Crime and Prison Admission Trends

As noted above, crime rates or prison trends might make an incumbent prosecutor appear vulnerable, and thus these trends might encourage strategic would-be

236. Quartiles for number of lawyers are: [0, 6] (6, 31] (31, 120] (120, 69,235].

237. The correlation between number of lawyers and population is 0.73.

238. The results do not change if we group districts into quartiles or quintiles. The number of lawyers still does not strongly predict contestation or competition.

239. As noted above, most states in the sample were specifically selected because they appeared to have a low supply of lawyers. *See supra* notes 233–34.

Table 6: Contestation in Prosecutorial Elections, including Number of Lawyers as a Predictor

	Any Challenger
	Number of Lawyers
Straight Ticket Option	−0.467 (0.712)
Multi-County Districts	−1.061 (0.827)
Exclude Uncontested	0.523 (0.802)
Budget per Capita	−0.012 (0.016)
Partisan Election	1.760* (0.790)
log(Population)	0.270* (0.114)
Partisan Mismatch	0.184 (0.354)
Open Race	0.808* (0.327)
Number of Lawyers	−0.074 (0.145)
Constant	−6.217* (1.500)
Observations	550
Akaike Inf. Crit.	396.833
State-Level Random Effects?	Yes

Note: * $p < .05$.

challengers to enter a race.²⁴⁰ Unfortunately, we do not have complete crime and prison admission data—we are missing crime data for nearly half of the jurisdictions,²⁴¹ and we are missing prison admission data from more than one-third of the jurisdictions.²⁴² That missing information limits our ability to draw firm conclusions about the effect of these trends on prosecutor elections. We find that both variables are weakly correlated with the number of competitive prosecutor elections, but the regression analysis cannot detect an effect, possibly due to a lack of data.

Table 7 presents summary statistics, without controls, that illustrate how election contestation rates vary across different levels of crime. It compares districts where, in the four years before the prosecutor election, crime decreased versus those where crime increased. We do observe an increase in

240. See *supra* note 199 and accompanying text.

241. We are missing data from 1064 districts, which represents 45.92% of all elections.

242. We are missing data from 35.56% of elections.

the percentage of contested prosecutor elections in districts where crime is higher in the election year than it was four years prior to the election. In other words, an increase in crime is correlated with a slightly increased likelihood of a contested election.

Table 7: Contestation Rate by Change in Crime Rate

4 Year Change in Crime	% of Contested Races
Decrease	18.89
Increase	19.79

Table 8 presents summary statistics using prison admission data. We calculated the number of prison admissions per crime committed for the year 2014. This can be viewed as a rough measure of prosecutorial harshness, where harsh prosecutors would have a higher ratio of admission to crimes than lenient prosecutors. We divided the range of possible values into four equally sized quartiles²⁴³ with the first quartile representing districts with the fewest prison admissions compared to crimes and fourth quartile representing districts with the most prison admissions compared to crimes.

Table 8 illustrates how rates of contested elections vary across those groups. It shows that districts with the lowest levels of admissions per crime have almost twice as many contested elections as districts with the highest levels of admissions per crime. Notably, but this relationship is not as strong for more marginal changes in the prison admission rate—the largest difference can be seen in those districts that send the fewest people to prison compared to their crime rate.

Table 8: Contestation Rate by Prison Admission/Crime

Prison Admissions/ Crimes (Quartiles)	% of Contested Races
1st	18.98
2nd	18.32
3rd	19.05
4th	11.31

243. Quartiles for prison admission rate are: [.0165, .114] (.114, .181] (.181, .296] (.296,1].

Tables 7 and 8 show that both change in crime rate and prison admission rate are weakly correlated with contestation in prosecutorial races.²⁴⁴ If this correlation were to stand up in a regression model, it would tell us that prosecutor elections are sensitive to crime and punishment—specifically, a prosecutor is more likely to face a challenger in an election if her district’s crime rate goes up and if her prison admission rate is low.

But, as Table 9 reflects, that is not what the regression models show.

Table 9: Crime Variables vs. Contestation in General Elections

Any Challenger	Change in Crime	Admissions per Crime
Straight Ticket Option	0.107 (0.318)	0.085 (0.370)
Multi-County Districts	0.139 (0.315)	0.070 (0.325)
Exclude Uncontested	0.206 (0.443)	0.008 (0.575)
Budget per Capita	0.005 (0.004)	0.008 (0.006)
Partisan Election	1.056* (0.422)	1.310* (0.509)
log(Population)	0.204* (0.058)	0.154* (0.074)
Open Race	1.006* (0.181)	1.021* (0.202)
Change in Crime	0.031 (0.114)	
Prison Admissions per Crime		−1.016 (0.688)
Constant	−5.062* (0.765)	−4.780* (0.994)
Observations	1,252	1,093
Akaike Inf. Crit.	1,154.168	921.874

Note: * $p < .05$.

It is possible that our model did not detect an effect due to lack of data. The missing data limits the number of observations the model can make, and it also limits the statistical power of our analysis.

But it is also possible that voters—and by extension, would-be challengers—do not use crime rates or prison admission data to evaluate their local prosecutors. Indeed, given the evidence showing that voters are often misinformed about the

244. Interestingly, we found no correlation between population and crime rate (.05) or prison admission rates (.04). Indeed, based on the limited data we have, the factors were almost perfectly uncorrelated—that is to say, there is essentially no relationship between population and either crime rate or prison admission rate.

crime rate,²⁴⁵ and the literature on the lack of voter knowledge generally,²⁴⁶ perhaps it should be unsurprising if the behavior of voters or potential candidates is unresponsive to changes in crime or crime policy.

CONCLUSION

Elections that fail to afford voters a choice are a danger to democracy because they prevent voters from deciding who represents them. When it comes to prosecutor elections, the large amount of discretionary power that prosecutors yield makes it important that voters have an opportunity to choose a prosecutor who shares their criminal justice policy preferences. Additionally, when prosecutors face no challenger, how they wield their discretion frequently goes unnoticed, leaving the public uninformed about some of the most consequential decisions in the criminal justice system.

Because elections are one of the few checks on prosecutor power,²⁴⁷ it is important to ensure that those elections are meaningful. Unfortunately, at present, the vast majority of prosecutor elections do not offer voters a choice. And so, it is important to determine what changes can be made to the status quo to ensure that elections offer voters an opportunity to hold their prosecutors accountable.

Consistent with the political science literature on other elected offices, our results indicate that when a seat is open (i.e., there is no incumbent) contestation and competition are significantly more likely. One of the frequently discussed options for creating more open seats in government is that of term limits. For prosecutorial elections, only the state of Colorado currently uses term limits, and even there the number of terms is inconsistent across districts because the state constitution allows individual districts to lengthen, shorten, or even eliminate them.²⁴⁸ Because the number of districts with term limits is so small—Colorado has only twenty-two prosecutorial districts—we could not systematically assess how term limits influence contestation or competition in prosecutor elections.

Even if term limits would create more open seats, it is not always clear whether the benefits of such a policy change outweigh the potential drawbacks. Advocates for term limits argue that they would improve the effectiveness of our political

245. See, e.g., Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 418–19 (2006).

246. See generally, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996); Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363 (2013); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004).

247. See Wright, *supra* note 11, at 595–98 (describing the limited sources of accountability for prosecutors); Wright, *supra* note 89, at 585–590 (same).

248. See COLO. CONST. art. XVIII, § 11(2); see also Hessick & Morse, *supra* note 3, at 1552 (“Only one state—Colorado—imposes term limits on its local prosecutors.”).

institutions, prevent elected officials from serving past their prime, and potentially bring in new policy ideas.²⁴⁹ Yet, skeptics of term limits argue that they too take power away from voters because they prevent some names from appearing on the ballot.²⁵⁰ Term limits also can decrease the quality of policy-making, as experience is thought to be an asset when it comes to making policy decisions (e.g., those with more criminal justice experience are likely to be better informed and thus better at making decisions about criminal justice issues).²⁵¹

Another method for increasing the number of open-seat elections would be to hold special elections when an office becomes vacant, rather than appointing someone to serve out the rest of the original term. It appears that a nontrivial number of incumbent prosecutors do not finish out their terms.²⁵² We found that prosecutors who take office part-way through a term are no more likely to face a challenger than any other incumbent. Thus, requiring a special election would create an open-seat election, which is more likely to offer voters a choice on the ballot.

Aside from attempting to create more open-seat elections, there appear to be a small number of legal changes that some states could adopt that would increase the rate of contested elections.²⁵³ We found that partisan elections had more contestation than non-partisan elections. And so, the five states that currently hold non-partisan prosecutor elections should consider making this a partisan office. Similarly, excluding uncontested races from the primary ballot decreases the number of contested elections. Fifteen states have adopted this practice, and they should change it. But there are limits on how much these election law changes can increase contestation in prosecutor elections. The majority of states already have these policies, so the benefits of partisan elections and including uncontested elections on the ballot are already reflected in their contestation rates, and there is no policy change for these states to adopt.

The most obvious policy change that states can adopt is to increase the population of their prosecutorial districts. We found that the larger the population within the district, the more likely that an election will be both contested and competitive. We cannot be certain why larger populations lead to greater contestation and

249. See e.g., Bruce E. Cain & Marc A. Levin, *Term Limits*, 2 ANNUAL REV. POL. SCI. 163, 167–72 (1999); Hendrik Hertzberg, *Twelve is Enough*, THE NEW REPUBLIC, May 14, 1990, at 23.

250. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995) (stating that a state-imposed term limit “is contrary to the ‘fundamental principle of our representative democracy,’ embodied in the Constitution, that ‘the people should choose whom they please to govern them’” (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969))).

251. Cain & Levin, *supra* note 249, at 177; Erik H. Corwin, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 602, 604 (1991).

252. See Hessick & Morse, *supra* note 3, at 1569 (observing that “about ten percent of local prosecutors resigned their office since the latest election”).

253. Cf. Schleicher, *supra* note 196, at 423 (observing that some lack of electoral competition “is likely not a ‘natural’ result of political forces, but is more likely the result of the legal regime and internal political party rules governing party competition” and thus “[t]he problem is *legal*, and not purely political”).

competition. It may be that these large populations increase the power and the profile of the prosecutorial office—the budgets and staff are larger, the caseload larger and more interesting, etc. And perhaps that increased profile and power are seen as a stepping stone to other government office.²⁵⁴ Whatever the reason, the finding suggests that, in order to ensure more contested and competitive elections, states should seek to increase the size of their prosecutorial districts.

The path to increasing the population size of districts is quite simple. Most states simply elect one prosecutor for each county; but more than a dozen states consolidate multiple counties into prosecutorial districts.²⁵⁵ More states could consolidate large numbers of low-population counties to create districts with large enough populations to increase contestation and competition.²⁵⁶

Prosecutors are very powerful actors in the criminal justice system, and so it is no surprise that reformers have sought to reverse mass incarceration trends by electing candidates who are committed to adopting progressive policies.²⁵⁷ But the urban and suburban areas that are electing reformers had already begun to reduce their reliance on incarceration—prison admissions in those areas have been falling for approximately the last decade. It is the rural areas of America—the areas that are least likely to have a contested or a competitive election—that continue to send large portions of their populations to prison.²⁵⁸

In order to ensure that prosecutors are accountable to their communities, it is important to ensure that voters actually have a choice in prosecutor elections. Our analysis suggests that the best way to ensure that choice would be to increase the population of prosecutorial districts.

It may seem like an esoteric policy change but consolidating rural counties into larger prosecutorial districts could ultimately have a significant effect on criminal justice reform. At a minimum, it would ensure that prosecutors could be held accountable for the incredible amount of discretion that they wield.

254. See, e.g., Jed Shugerman, “The Rise of the Prosecutor Politicians”: Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880-2017, SHUGERBLOG (July 7, 2017), <https://shugerblogger.com/2017/07/07/the-rise-of-the-prosecutor-politicians-database-of-prosecutorial-experience-for-justices-circuit-judges-governors-ags-and-senators-1880-2017/>.

255. See Hessick & Morse, *supra* note 3, at 1553.

256. See Hessick & Rodney, *supra* note 21 (suggesting that Nebraska move to a multi-county district model).

257. See *supra* text accompanying notes 37–41.

258. Hessick & Morse, *supra* note 3, at 1556–67 & tbl.6.

APPENDIX: SUPPLEMENTARY ANALYSIS

Table A.1: Competition in Prosecutorial Elections

	<i>Dependent variable:</i> Challenger Vote Share <80%			
	General Elections		Primary Elections	
	All Races	Only Incumbents	All Races	Only Incumbents
Straight Ticket Option	-0.217 (0.302)	0.367 (0.451)	0.451 (0.238)	0.700 (0.393)
Multi-County Districts	-0.071 (0.229)	-0.419 (0.340)	0.121 (0.185)	0.268 (0.355)
Exclude Uncontested	0.115 (0.408)	0.418 (0.592)	-0.566* (0.235)	-0.831* (0.381)
Budget per Capita	0.073 (0.058)	0.160 (0.085)	0.014 (0.058)	-0.037 (0.129)
Partisan Election	1.048* (0.401)	1.310* (0.614)		
log(Population)	0.260* (0.047)	0.272* (0.065)	0.273* (0.046)	0.139 (0.086)
Open Race	1.057* (0.136)		1.076* (0.130)	
Partisan Mismatch		0.518* (0.190)		-0.804* (0.284)
Incumbent Tenure		-0.029 (0.086)		-0.075 (0.123)
Constant	-5.633* (0.631)	-6.140* (0.933)	-5.889* (0.534)	-3.510* (0.975)
Observations	2,316	1,277	4,307	1,013
Akaike Inf. Crit.	1,940.902	1,036.058	2,143.946	636.861
State-Level Random Effects?	Yes	Yes	Yes	Yes

Note: * $p < .05$.