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Public Defender Elections and Popular Control over Criminal Justice

Ronald F. Wright*

Voters in the United States select some of the major actors in criminal justice, but not all of them. Among the major figures in the criminal courtroom, voters typically elect two of the three: the prosecutor and the judge, but not the public defender. Prosecutors in almost all states are elected at the local level. Judicial elections offer more of a mixed bag, but a strong majority of jurisdictions elect their judges in some form or other. Unlike prosecutors and most judges, however, the public defender is typically not an elected official, even though the defender is a public employee with important budgetary and policymaking authority over criminal justice. Why the difference? Do we believe that voters would behave markedly differently when electing public defenders? Or do we believe that public defenders themselves would respond to voter input in less desirable ways than other criminal justice officials? As it happens, we have some actual experience to draw upon in answering these questions because a few jurisdictions actually do elect their public defenders. Florida, Tennessee, and a few places in California and Nebraska elect their chief public defenders at the local level, and have done so for decades.¹

Part I of this Article reviews the existing evidence about the election of criminal justice officials and presents new evidence about the campaigns and outcomes in public defender elections. Voters respond to candidates for the public defender’s office much in the same way that they react to candidates for the prosecutor’s office: they choose the incumbent, even more often than they do for legislators and chief executives.² The candidates themselves also behave fairly similarly in public defender and prosecutor election campaigns. Both the prosecutor and the defender candidates spend a disappointing amount of time in their campaign speeches discussing the actions of attorneys in particular cases.

Part II explores why appointment remains the dominant method for selecting the public defender in the United States, despite the appeal of elections in terms of democratic theory. It is possible that the dominant pattern in the states – the election of prosecutors but not public defenders – simply reveals confusion or an incomplete evolution toward a more consistent ap-

* Professor of Law, Wake Forest University School of Law. I want to thank the participants in a faculty colloquium at the University of Arizona Rogers College of Law for their early insights about this project. Elizabeth Arnold, Jeffrey Kuykendall, Daniel Moews, and Sean Price offered invaluable research assistance.

¹. See infra Part I.C.1.
². See infra Part I.A.
proach to the selection of all criminal justice officials. Perhaps we should not elect any criminal justice actors — neither the prosecutor, judge, sheriff, police chief, nor the defense attorney. On the other hand, perhaps we should elect all of them, since all of these officials make decisions about spending taxpayer dollars and applying public morality.

I believe, however, that we will continue to elect some criminal justice officials and not others and that our inconsistent use of elections is attractive as a normative matter. Even though the elections of prosecutors and public defenders share many features, public defender elections present more reason for concern despite their similarities on the surface. Elections are easier to misuse when we select public defenders, because candidates who hope to appeal to voters often make promises that undermine the basic functions of the adversarial process.

The main difference between prosecutors and public defenders lies in the number of available controls over these two different public employees. Public defenders are bound at every turn by their professional responsibilities to their clients, the limited defenses available under criminal codes, and their limited budgets for investigations and factual development. Prosecutors, on the other hand, control many of the key outcomes in criminal justice without relying on other actors. Thus, voters directly monitor criminal justice actors when other controls over these officials are the least effective. Put another way, elections are a last resort for holding criminal justice actors accountable to the public. We need that last resort for prosecutors, but not for public defenders, because of the rich set of controls that already apply to public defender work.

Public defender elections also differ from prosecutor elections because they tempt voters to override the normal operation of the adversarial system of fact-finding in particular cases. In those states where voters choose the prosecutors but not the public defenders, elections allow voters to speak at a high level of generality about criminal justice policy. Voters can appropriately set the general direction and priorities of the system. Election of the public defender, on the other hand, tends to give the voters influence over the strategies and outcomes for particular cases, such as the techniques a defense attorney can use when cross-examining police officers at trial. This is a task that we normally do not trust voters to perform. Fortunately, we have created a system that recognizes some of our own limitations as voters.

I. THE VOTERS AND THEIR CRIMINAL JUSTICE OFFICIALS

Elections play some role in selecting the public employees who work in most leadership positions in criminal justice. That role is different, however, for the various actors in the system. The role of elections is pervasive for prosecutors. It takes a more attenuated form in the selection of law enforce-
ment leadership (police chiefs and sheriffs) and judges. Finally, when it comes to public defenders, elections are the exception rather than the rule.

This section reviews the empirical evidence about the election campaigns of these criminal justice officials and the behavior of voters. In many respects, the elections of prosecutors, judges, and public defenders operate similarly. Voters behave in reasonably similar ways when prosecutors, judges, law enforcement agents, and public defenders ask for their votes. In each case, the quality of guidance that the official receives from the public is diffuse and ineffective.

A. The Voters and Their Prosecutors

Virtually all prosecutors in state systems in the United States are elected. The highly visible federal system, which produces only a tiny portion of the country’s criminal convictions each year, is one of the few exceptions. The President appoints a U.S. Attorney as the chief prosecutor in each federal district. Exceptions also appear in Alaska, Connecticut, Delaware, New Jersey, Rhode Island, and the District of Columbia, where local prosecutors are appointed rather than elected. In all the other states, however, the voters at the local level (typically at the county level) select the area’s chief prosecutor.

Local chief prosecutors are responsible for applying the broad provisions of the state criminal code to fit the contours of local morality and deciding where to direct the limited state and local budget for criminal prosecutions. Given the extent of the prosecutor’s power, it is not surprising that American voters have treated the prosecutor position as an elected office since the first expansions of the democratic franchise in the early nineteenth century.

Furthermore, the election of prosecutors occurs in the context of weak controls from other sources. The tools available to promote consistent behav-

4. See infra Part I.C.
5. For a more complete treatment of the material summarized in Part I.A., see Ronald F. Wright, How Prosecutor Elections Fail Us, 6 OHIO ST. J. CRIM. L. 581 (2009).
8. See PERRY, supra note 7, at 2.
ior by prosecutors, guided by legal values, are extremely limited.\textsuperscript{10} In a constitutional order that celebrates both separation of powers and checks and balances, the separation matters far more than the balances in the daily reality of the local prosecutor. American state legislatures do not write criminal codes that constrain prosecutors to the same extent one finds in other industrialized democracies, and legislators do not actively monitor the work of criminal prosecutors to prevent them from misapplying their legal tools.\textsuperscript{11} Constitutional doctrines, such as the bar on bills of attainder or ex post facto laws, prevent the legislature from becoming involved in particular prosecutions.\textsuperscript{12}

The judicial and executive branches also do not control prosecutors in a systematic way. Judges give prosecutors wide berth when they decide which charges to file.\textsuperscript{13} While the judge has nominal power to dismiss filed charges, as a practical matter, judges defer to prosecutorial decisions about the dismissal or other resolution of charges because the prosecutor holds more information about the case at hand and about the relative importance of other cases that the prosecutor plans to file.\textsuperscript{14} Even within the executive branch, the local prosecutor is not a part of a tight statewide hierarchy of prosecutors. While he or she is technically the chief prosecutor in the state, the state’s attorney general usually only has statutory power to step into cases at the invitation of the elected local prosecutor and only offers resources to assist in specialized cases.\textsuperscript{15}

Given the extremely limited checks on prosecutors from the legislative and judicial branches or from higher up within the executive branch, there are limited methods available to hold prosecutors accountable to the public. Thus, state governments have placed lots of eggs in the election basket.\textsuperscript{16}


\textsuperscript{12} U.S. Const. art. I, §§ 9-10.


\textsuperscript{14} See Marc L. Miller & Ronald F. Wright, Criminal Procedures: Cases, Statutes and Executive Materials 885-976 (3d ed. 2007).


\textsuperscript{16} See Wright, supra note 5, at 581, 585-88.
Yet, there are reasons to be optimistic that local elections will keep prosecutors closely tethered to local priorities in the enforcement of criminal law. One would expect, for example, that prosecutors in urban areas hear different messages from voters in their jurisdiction than rural prosecutors would hear in theirs.

It is difficult, however, to find evidence that prosecutors respond to any messages that the voters deliver during the campaign or on election day. If voters were sending valuable information to prosecutors, observers would find that incumbents periodically misjudge the public mood and lose their reelection campaigns. It appears, however, that incumbent prosecutors win reelection at an extremely high rate (95% of the races they enter, and 71% of all races), even higher than the incumbency success rates for state legislators. Because incumbent prosecutors have more incentive to explain themselves to voters and listen more carefully to public priorities when they face competitive election challenges, such high rates of incumbent re-election indicate some weakness in this method of holding prosecutors accountable to public views about the application of the criminal law.

Even more discouraging, incumbent prosecutors rarely face challengers at all. As Table 1 indicates, 84% of prosecutor incumbents run unopposed, in both general elections and in primaries. State legislative incumbents, by comparison, run unopposed in only 35% of their elections. When challengers fail to appear on the scene, the incumbents never have to discuss or justify their office procedures or priorities to the public, and they receive no voter feedback in response.

17. See id. at 589-91.
18. See id. at 592-93. These figures are based on election outcomes between 1996 and 2008 in twelve states: California, Colorado, Florida, Georgia, Indiana, Idaho, Maine, Massachusetts, New Mexico, North Carolina, Texas, and Wisconsin. These states post election outcomes online, usually maintained by the Secretary of State. Details on the selection and collection of this data appear in Wright, supra note 5, although the database was updated for this Article to include additional states and electoral cycles.
20. See Peverill Squire, Uncontested Seats in State Legislative Elections, 25 LEGIS. STUD. Q. 131, 132-33 (2000) (35% percent of state legislative races were uncontested during elections from 1988 to 1996). The level of unopposed incumbent prosecutors goes down somewhat in larger jurisdictions. In those districts where more than 100,000 people cast votes, the incumbent prosecutor ran unopposed in 55% of the races, still a much higher rate than for state legislators. Wright, supra note 5, at 595.
Table 1: Opposition to Incumbents in Prosecutor Elections

<table>
<thead>
<tr>
<th></th>
<th>General Elections</th>
<th>Primary Elections</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Races</td>
<td>1788</td>
<td>1503</td>
</tr>
<tr>
<td>Incumbent Runs</td>
<td>1380 (77% of all races)</td>
<td>1085 (72% of all races)</td>
</tr>
<tr>
<td>Incumbent Unopposed</td>
<td>1154 (84% of incumbent races)</td>
<td>909 (84% of incumbent races)</td>
</tr>
<tr>
<td>Incumbent Wins</td>
<td>1318 (96% of incumbent races)</td>
<td>1022 (94% of incumbent races)</td>
</tr>
<tr>
<td>Incumbent Wins when</td>
<td>164 (73% of opposed incumbent races)</td>
<td>112 (64% of opposed incumbent races)</td>
</tr>
</tbody>
</table>

Based on my study of fifty-four contested elections across the United States, I found that challengers are difficult to recruit, perhaps because the pool of interested candidates is small and because challengers have a great deal to lose from an unsuccessful electoral bid. More than half of the challengers had prosecutorial experience, and about 20% of them worked in the incumbent’s office at the time of the election. Most of the other challengers worked as criminal defense attorneys. In this setting, a challenger who runs against the incumbent and loses will pay a price well beyond election day. The prosecutor who unsuccessfully tries to unseat the boss will likely have to leave the office and find new employment. For those few challengers who remain in the office, further promotions or plum assignments are not likely to materialize. Even criminal defense attorneys face difficulty in challenging incumbents because prosecutors after the election may be less cooperative in plea negotiations and other settings. Given these costs, it is a wonder that

21. The data sources for this table are discussed in note 18, supra.

22. Biographical features of the challengers are drawn from a random sample of 54 contested general elections in the states of California, Colorado, Florida, Georgia, Idaho, Indiana, Maine, Massachusetts, New Mexico, North Carolina, Texas, and Wisconsin, between 1996 and 2008. This sample constitutes roughly 25% of the contested elections involving incumbents during this time frame. My research assistants and I searched (1) newspaper articles in the LexisNexis and Westlaw databases and on Google news and (2) professional directory databases on Westlaw to learn about the professional careers of challengers in prosecutor elections, both before and after the election campaign. These sources allowed us to assemble, for most challengers, the following information: gender, race, law school, year of graduation, year of admission to the bar, number of years experience, number of years of prosecutorial experience, and the types of legal employment the challenger held before and after the election.
incumbents face challengers in as many as 16% of the elections after an incumbent decides to run.23

In those rare elections when challengers do do appear, the media and other voter intermediaries do not press the candidates to discuss the issues that would throw the most light on office priorities.24 The candidates tend to discuss a handful of recent prominent criminal trials (known in the trade as "heaters") or indicators of personal integrity, such as conflicts with office personnel.25 They rarely discuss any topics related to office management, such as the backlog of cases awaiting disposition in court or the practices of the office related to plea bargaining or screening of cases that the local police recommend for prosecution.26 The forest is lost for the trees.

All told, then, prosecutor elections do not provide voters with meaningful information to evaluate the work of the incumbent. Unchallenged incumbents remain silent, and the few challenged incumbents avoid any substantive discussion of the future of local criminal enforcement simply by re-litigating a few prominent cases during the campaign without talking about office policies or priorities. Incumbent prosecutors might know about the values and priorities of their constituents, or they might not, but election campaigns do not contribute to the incumbents' knowledge. Elections are highly imperfect mechanisms to promote accountability in the enforcement of criminal law. The only thing working in favor of prosecutor elections is the anemia of all the other potential controls.

B. The Voters and Their Judges and Law Enforcement Officers

While states follow one dominant approach in their selection of prosecutors (local elections), they are divided on the selection method for trial judges and chief law enforcement officers. Some state and local governments use elections for trial judges and law enforcement leaders, while others do not. The mixed reliance on elections reflects ambivalence about whether these officials should respond to current public wishes or to some other set of values or insight.

State systems vary greatly in their methods for choosing and retaining trial judges. At the point of initial selection for trial judges, twenty states rely on appointment by the governor, legislature, or other judges; twelve states use partisan elections; and eighteen states employ nonpartisan elections, which list the candidates on the ballot without party affiliation.27 States also vary in their methods for determining whether to retain trial judges in office at the

23. See supra tbl.1.
24. See Wright, supra note 5, at 597.
25. Id. at 602-03.
26. Id. at 603.
end of the judge’s initial term in office. The most common method of deciding whether to retain the judge in office is the non-partisan election, currently used in twenty states. Another eleven states employ a retention election, presenting voters only with a “yes” or “no” vote on retaining the judge in office rather than presenting multiple candidates for the position. Eight states hold partisan elections to determine whether judges receive a second term, while another eight appoint their judges to second terms. There is slow movement away from partisan elections as the principal method of initial judicial selection toward more restricted forms of elections such as non-partisan elections and retention elections.

The re-election advantage of incumbency for appellate judges is quite strong. The empirical research is thin, however, when it comes to the incumbency effect in elections of trial court judges. If we extrapolate from the work on appellate judges, it appears that voter behavior in trial judge elections is quite similar to voter behavior in prosecutor elections. Many judges rarely face competition, and when they do, they typically retain the office regardless of their actual performance.

The persistent concern about judicial elections is not how voters will behave but how the judges themselves will respond to the discipline of the

28. Id. at 9 tbl.8.
29. Id.
30. Id.
31. Id.
ballot box. Some empirical studies tend to demonstrate that trial judges behave differently when they are about to face the voters. For instance, evidence shows that incumbent judges impose longer sentences on criminal defendants, all other things being equal, as their re-elections approach.

The current attenuated forms of elections for trial judges reflect a stable compromise between conflicting values and objectives. On one hand, judges give current meaning to the law by applying general principles to individual disputes. On the other hand, judges have a powerful influence on the operation of government and that, ultimately, democratic government must operate with the consent of the governed. Each of these beliefs makes a claim for supremacy, resulting in a stalemate. Despite persistent lobbying by attorneys against judicial elections, most judges in the United States must face the voters. At the same time, the various methods used to shield judges from regular challenges, typically from a candidate identified with a rival political party, amount to an acknowledgement that judges are different.

Like trial judges, chief law enforcement officers at the local level in the United States hold office based on a mix of selection methods. Sheriffs serve as the chief law enforcement official in most locations outside of incorporated municipalities, and typically earn the office by winning an election. Police chiefs, however, are typically appointed by elected officials in the city. They therefore answer to the mayor or city council, not directly to the voters. The reasons for the different selection methods are largely historic. Sheriffs date back to the earliest days of the nation, whereas police departments appeared as major law enforcement agencies during the early days of civil service and Progressive Era celebration of professionalism and expertise in government. The more urban quality of police work also may explain the dif-

ference in selection methods: sheriffs serve as the principal law enforcement officers in more rural jurisdictions with fewer competing centers of political power.40 The mixed methods of selection for law enforcement leaders indicate some indecision about whether these officials should take their guidance from current voter wishes, their expert judgment about how to address a technical problem, or some combination of the two.

C. The Voters and Their Public Defenders

Public defenders sit on the opposite end of the election spectrum from prosecutors, though judges and law enforcement leaders rest between the two poles. Public defenders face election in very few jurisdictions.41 Nevertheless, the handful of jurisdictions that do elect their public defenders offer a basis for understanding how public defender elections might operate on a wider scale. This section assembles and analyzes new evidence about voter and candidate behavior in public defender elections, drawn from two jurisdictions that have elected their public defenders for decades.

1. Current Selection Methods

Just as there is a powerful national consensus about how best to select prosecutors, state and local governments in the United States generally have decided to select their public defenders through various appointment techniques. The most common method of selection for chief public defenders in judicial districts, and the one used in almost half of the states, calls for appointment by a statewide public defense policy coordinating board.42 These boards consist of appointees of the governor or other elected state officials.43

40. Sheriffs' departments serving jurisdictions with populations under 100,000 amount to 82.8% of the total departments. HICKMAN & REAVES, supra note 37, at 3 tbl.3.
41. See infra Part I.C.1.
42. See infra note 43.
The next most common methods of selection involve appointment by the governor or some other state-level elected official or by county supervisors or other local elected officials. Each of these methods of selection prevails in about a half dozen states. Finally, a few jurisdictions rely on appointment by one or more trial judges or through some collaboration between trial judges and the public defense board.


45. ARIZ. REV. STAT. ANN. § 11-581 (2010); IDAHO CODE ANN. § 19-859 (2010) (appointed in most counties, method of indigent representation provided by board of county commissioners); N.Y. COUNTY LAW § 716 (2010); 16 PA. CONS. STAT. ANN. § 9960.4 (2001) (appointed by Board of County Commissioners); S.D. CODIFIED LAWS § 23A-40-7 (2010) (determined by Board of County Commissioners); UTAH CODE ANN. § 77-32-302 (West 2010); WASH. REV. CODE ANN. § 10.101.030 (West 2010). This was the method of appointment for the first chief public defender in 1913 in Los Angeles. See Barbara Allen Babcock, Inventing the Public Defender, 43 AM. CRIM. L. REV. 1267, 1274 (2006); see also Los Angeles County Public Defender Website, History of the Office, http://pd.co.la.ca.us/History.html (last visited July 7, 2010).

46. See supra notes 44-45.


48. ALA. CODE § 15-12-2 (2010) (appointment by majority of trial-level judges with “advice and consent” of indigent defense commission); ARK. CODE ANN. § 16-
There are four jurisdictions, however, which provide for local election of at least some public defenders. California provides for a mix of appointments and elections in the state, and the public defender in San Francisco has long been elected to office. In Nebraska, cities with populations of more than 100,000 may establish public defender offices, and the public defender "shall be elected." Lancaster County, which includes the city of Lincoln, has done so. In Tennessee, the Davidson County public defender office, established in 1962, elects its chief public defender. Other offices in the state followed that selection model when the system expanded statewide in 1989.

Florida has elected its chief public defenders since the dawn of the statewide system. Before 1963, only four judicial districts in Florida maintained public defender offices. Close on the heels of the 1963 U.S. Supreme Court decision in Gideon v. Wainwright, the Florida legislature created a statewide public defender system. Legislators from the four urban districts with pre-existing offices favored election rather than appointment by the governor because they preferred stability in their offices and feared that state-level officials would have too much influence over the appointments. The legislature responded favorably and revised the bill to select the district public defenders by general elections.

87-303 (2010) (nominated by Arkansas Public Defender Commission and selected by judges in each Judicial District); D.C. CODE § 2-1603 (2010) (provided by Public Defender Service, which is managed by Board of Trustees who are appointed by judges in the District).

49. See infra notes 50-60.

50. CAL. GOVT. CODE §§ 27703-04 (West 2010).


52. NEB. REV. STAT. § 23-3401(1) (2009) ("There is hereby created the office of public defender in counties that have or that attain a population in excess of one hundred thousand inhabitants and in other counties upon approval by the county board. The public defender shall be elected as provided in the Election Act.").


55. TENN. CODE ANN. § 8-14-202(b)(1)(A) (West 2010).


58. FLA. STAT. § 27.50 (2006).

59. See Witwer, supra note 56.

60. Id.
2. Election Outcomes

Voters in Tennessee and Florida have created a track record over the decades in public defender elections. Since 1996, the outcomes in these elections show the major advantages of incumbency in the election of public defenders, just as discussed previously in the case of chief prosecutor elections. As Table 2 indicates, the percentage of unopposed public defender incumbents is virtually identical to that of prosecutor incumbents (83% compared with 84%, respectively). In addition, the proportion of public defender incumbents who seek re-election and the number who ultimately succeed in their campaigns is even higher than among incumbent prosecutors: incumbent public defenders run in 86% of the races (compared to 75% among prosecutors), and they are re-elected in 86% of the opposed races (compared to 69% among prosecutors).

Table 2: Opposition to Incumbents in Public Defender Elections\(^6\)

<table>
<thead>
<tr>
<th></th>
<th>Prosecutors</th>
<th>All Public Defenders</th>
<th>Florida Defenders</th>
<th>Tennessee Defenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Races</td>
<td>3291</td>
<td>148</td>
<td>87</td>
<td>61</td>
</tr>
<tr>
<td>Incumbent Runs</td>
<td>2465 (75% of all races)</td>
<td>127 (86% of all races)</td>
<td>69 (79% of all races)</td>
<td>58 (95% of all races)</td>
</tr>
<tr>
<td>Incumbent Unopposed</td>
<td>2063 (84% of incumbent races)</td>
<td>106 (83% of incumbent races)</td>
<td>51 (74% of incumbent races)</td>
<td>55 (95% of incumbent races)</td>
</tr>
<tr>
<td>Incumbent Wins</td>
<td>2340 (95% of incumbent races)</td>
<td>124 (98% of incumbent races)</td>
<td>66 (96% of incumbent races)</td>
<td>58 (100% of incumbent races)</td>
</tr>
<tr>
<td>Incumbent Wins when Opposed</td>
<td>276 (69% of opposed incumbent races)</td>
<td>18 (86% of opposed incumbent races)</td>
<td>15 (83% of opposed incumbent races)</td>
<td>3 (100% of opposed incumbent races)</td>
</tr>
</tbody>
</table>

\(^6\) My research assistants and I searched news articles and election results posted on the internet sites of the secretaries of state to determine the outcomes of public defender elections in all electoral districts in Florida and Tennessee between 1996 and 2008 and to determine which candidates were incumbents. The Florida Department of State, Division of Elections, reports election results on the internet at http://elections.myflorida.com/elections/resultsarchive/Index.asp. We assembled Tennessee election results based on district-by-district news stories during each election cycle.
The incumbency advantage for public defenders in Florida has been somewhat different than the incumbency advantage in Tennessee. In Tennessee’s 61 local elections since 1994, 62 55 incumbents ran unopposed (95% of the elections when incumbents entered the race). When opposed, the incumbent won all three elections for an overall incumbent success rate of 100%; the only elections won by non-incumbents were three in which the incumbent did not run.

The incumbent’s advantage is weaker in Florida, which has conducted 87 elections for public defenders at the local level since 1996. In those elections, 51 incumbents ran unopposed (74% of races that incumbents entered), while 15 incumbents ran opposed and won the election, for a success rate of 96% in the races they entered. Only three incumbents ran for re-election and lost. In 18 elections, no incumbent ran at all. Although Florida’s incumbents do not hold the same advantage as those in Tennessee (perhaps because of the larger number of high-population districts in Florida), 63 they still succeed at about the same rate as prosecutor incumbents, as Table 2 shows.

These outcomes might come as a surprise. One might imagine that it would be extraordinarily easy to defeat an incumbent public defender simply by pointing out the aggressive defense tactics that defense attorneys used in prominent cases. Challengers also might criticize an incumbent based on the simple observation that attorneys in the office achieved some acquittals, perhaps more than the statewide average. A challenger might appeal to voters by promising less vigorous defense or lower expenditures in the office. In short, incumbent public defenders would appear to be extraordinarily vulnerable. And yet public defenders face opponents in a minority of election cycles, and they defeat challengers at rates even higher than incumbent prosecutors do.

3. Candidate Behavior

The outcomes of public defender elections tell us that voters behave similarly when they evaluate prosecutors and defenders. What about the candidates themselves? Do the incumbents and challengers in public defender elections invoke campaign themes similar to those in common usage among prosecutorial candidates? And do the winners in the defender elections respond to voter preferences in the same way elected prosecutors do?

It would be difficult to know the full range of statements candidates make during public defender election campaigns, or the prevalence of various

62. The database we assembled for this Article includes outcomes in all Tennessee districts between 1994 and 2006. See supra note 61. The public defenders serve eight-year terms.

63. Among prosecutors, only 55% of incumbents remain unchallenged in jurisdictions that reported more than 100,000 voters. Wright, supra note 5, at 595. For statistical background on population trends in the two states, see U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/ (last visited Aug. 28, 2010).
types of statements. A casual reading of news coverage of public defender election campaigns, however, does offer a glimpse of the claims that voters might hear. Campaign rhetoric ranges from anodyne promises of efficiency in the spending of taxpayer dollars, to specific plans to restrict coverage of certain categories of defendants, to more insidious promises to undermine the advocacy system by pursuing less vigorous defenses.

Some of the campaign rhetoric points to the personal characteristics—even the moral integrity—of the candidates, rather than the policies or operation of the office. This theme comes to the surface when the candidates spar over alleged violations of campaign finance laws. For instance, in Palm Beach County, Florida in 2000, Carey Haughwout successfully challenged the 28-year incumbent, Richard Jorandby. The deciding factor in the election was likely the fact that Jorandby threatened to fire two of his assistants unless they gave him $10,000 in campaign contributions.

Other discussions of personal characteristics of the candidates speak more directly to the operation of the office. Incumbents criticize challengers by saying that challengers lack the managerial skills needed to run the public defender’s office; challengers respond just as predictably that incumbents have “lost touch” by spending too much time on management and not enough in the courtroom and the representation of clients.

Along the same lines, challengers critique the incumbent’s relationships with other criminal justice players. In some cases, the challenger tries to show that the incumbent has an overly friendly or comfortable relationship


66. See id.; John Pacenti, New Public Defender Says Office Needs Time to Heal, PALM BEACH POST, Nov. 9, 2000, at 4D. The assistants reported the abuse of power to the state attorney’s office shortly before the election. Burstein, supra note 65. Jorandby eventually pleaded guilty to nine misdemeanors and was sentenced to a year of house arrest. See Jon Burstein, Ex-Public Defender Pleads Guilty to 9 Charges, ORLANDO SENTINEL, July 6, 2002, at B5.


68. See Burstein, supra note 65; Daphne Duret, Public Defender’s Contest Pits ‘Fresh’ Against Experience, PALM BEACH POST, Sept. 30, 2008, at 1B (challenger says, “I know what it’s like to be on the line with 300 cases”); Curtis Krueger, Jagger Loses 35-Year Office, ST. PETERSBURG TIMES, Sept. 4, 1996, at 1B; Levesque, supra note 64 (“complaints about the incumbent not personally trying cases”).
with local prosecutors, law enforcement officers, or judges. In other campaigns, the challenger points to a needless antagonism with these other actors or with attorneys within the public defender’s office.

The campaign rhetoric does not remain limited to the individual characteristics of the candidates; the candidates also engage in surprisingly substantive discussions about the priorities and policies of the public defender office. One common campaign theme among challengers is the generic claim that the current office does not use tax money efficiently. Incumbents make the corresponding claim that office efficiency has increased during their tenure in office, sometimes by noting an increase in staff members achieved without an increase in the budget.

These boilerplate claims about efficiency sometimes translate into more specific proposals by candidates about how to lower expenses for the office. These strategies include encouraging high turnover among the attorneys, leading to lower average salaries. The candidates also propose shifting the workload between senior and junior attorneys in the office. Incumbents whose offices rely less on outside counsel note this fact with pride.


70. See Sommer, supra note 67 (challenger “accused Dillinger of favoring a handful of supporters with high-paying jobs while burdening less-experienced lawyers with lower pay and more work”).

71. See Curtis Krueger, Public Defender, ST. PETERSBURG TIMES, Aug. 28, 1996, at 9G (challenger would hire an additional 10 or 12 lawyers without increasing the department’s overall budget; office should be “more efficient and cost effective”); Ludmilla Lelis, Public Defender Faces Primary Opponent, ORLANDO SENTINEL, Aug. 17, 2000, at D1 (challenger promises to “reduce caseloads, rearrange staff and bring in more technology to make the justice system run more efficiently”).

72. See Lelis, supra note 71 (incumbent “counts among his accomplishments the fact that in the late 1980s, he helped to streamline the judicial system and reduce the daily inmate population at the jail, saving taxpayers $78 million and ending the need to build a new jail”); Levesque, supra note 64 (incumbent “said he managed to hire about 24 additional employees in his office without significant increases to his budget”).

73. See Anthony Colarossi, 2 Wrangling in Struggle to Lead Criminal Defense Team, ORLANDO SENTINEL, Oct. 31, 2004, at K4 (incumbent “sees the office as a training ground for bright young lawyers” and encourages attorneys to leave after two to five years, saying “[g]ray hair is very expensive in a public law office”).

74. See Henri E. Cauvin, Public Defender’s Office Warhorse Challenged for First Time in 20 Years, MIAMI HERALD, Nov. 3, 1996, at 7B; Jay Weaver, Brummer Defeats Challenger Martin, MIAMI HERALD, Nov. 3, 2004, at 4B (“[I]f elected, he would have required senior lawyers to carry more cases and would have provided more training for younger attorneys.”).

75. See Christopher Goffard, Hillsborough Public Defender: Former Boss Challenged, ST. PETERSBURG TIMES, Oct. 26, 2004, at 14 (incumbent “curtailed the of-
Candidates sometimes debate the proper eligibility criteria for defenders who can receive services from the office. For instance, if the office faces a backlog of cases, some candidates propose to meet the challenge by narrowing the gate for new clients. The office could accomplish this by enforcing the indigency requirement more carefully.\textsuperscript{76} Earlier assignment of public defenders can also obtain earlier releases of defendants in less serious cases, decreasing jail costs for the county.\textsuperscript{77} The efficiency arguments sometimes focus on the “income” side of the ledger, with the challengers suggesting that the office should pursue recoupment of fees more aggressively from clients after the conclusion of the criminal case.\textsuperscript{78}

While cost savings and efficient use of tax dollars dominate the campaign rhetoric, the discussion sometimes runs in the opposite direction, calling for a greater range of services. Public defender candidates discuss new programs that the office should pursue, and incumbents point to additional

\textsuperscript{76} See Sue Carlton, \textit{Hillsborough Public Defender}, \textit{ST. PETERSBURG TIMES}, Oct. 30, 1996, at 18G (challenger says that “[t]he public defender’s office is basically a form of welfare for criminals who can’t afford representation,” and requires “a conservative watchdog”); Cauvin, supra note 74 (“[o]ffice also has counted among its clients dozens of people who owned luxury cars or fancy homes”); Molly Justice, 2 \textit{Candidates Running for Public Defender}, \textit{DAYTONA NEWS-JOURNAL}, Sept. 2, 2000, at 03C (challenger “plans to develop an attorney referral program for individuals who may be able to afford a legal defense at a reduced fee”); Nancy Klingener, \textit{Defender’s Race: Change Versus Continuity}, \textit{MIAMI HERALD}, Nov. 1, 1996 (candidate would encourage “the state to investigate whether clients are truly indigent before assigning them to the public defender’s office”); Jan Pudlow, \textit{Who Knows If Public Defenders’ Clients Are Indigent Or Not?}, \textit{FLORIDA BAR NEWS}, Jan. 15, 2010, at 1 (detailing efforts of Matthew Shirk to encourage judges to monitor indigency earlier in case).

\textsuperscript{77} See Goffard, supra note 75 (incumbent’s “efforts include an early-diversion program that steers clients away from jail and into less expensive programs, finding clients jobs and educational opportunities, and negotiating to pay experts less than their standard rates”); Pat LaMee, \textit{Watching Taxpayer Dollars Is Theme of Defender Race}, \textit{ORLANDO SENTINEL}, Oct. 27, 1996, at K1 (incumbent “was praised by the Volusia County Council in 1990 for saving taxpayers $78 million by reducing the daily population at the jail”); Ludmilla Lelis, \textit{Incumbent Gibson Squeaks Past Purdy to Win 7th Term: Because No Democrats are Running for the Office, Gibson Unofficially Gets the Job}, \textit{ORLANDO SENTINEL}, Sept. 6, 2000, at D4 (challenger proposed to “set up staff attorneys to do the first round of reviews for new criminal cases, to weed out minor cases that could be resolved with probation”).

\textsuperscript{78} See Pat LaMee, \textit{Gibson, Longtime Incumbent, Retains Public Defender Post}, \textit{ORLANDO SENTINEL}, Nov. 6, 1996, at D9 (incumbent criticized because office attorneys “didn’t ask for fees from clients to help cover the office’s expenses,” resulting in million-dollar losses; incumbent “maintained money had been collected from some clients since 1991”); Prohaska, supra note 69 (incumbent notes that “office has collected more than $4 million in public defender’s fees”).
programs in the office as signs of successful management. The representation of juvenile defendants and mentally ill defendants are two typical proposals. The candidates — incumbents and challengers alike — often discuss the need for effective training of assistant public defenders.

Some proposed office policies do not have an obvious fiscal component. The incumbent on occasion takes credit for influencing legislation designed to protect innocent defendants or to prevent crime. Challengers sometimes point out the poor track record of the incumbent in the area of hiring minority attorneys, a practice that the challengers say would increase the effectiveness and public acceptance of the office.

While efficient use of tax money and the range of services that the office should offer are common themes, the candidates in a few races discuss the performance of the public defender in a specific case in the recent past, typically a prominent prosecution of a serious offense. In a few cases, the incumbent points with pride to the vigorous and effective work of the defense attorneys in the case. The public prominence of wrongful convictions later

79. See Julianne Holt, Editorial, A Record of Accomplishment, ST. PETERSBURG TIMES, Oct. 21, 2004, at 12A (incumbent was “first public defender in the country to launch a ‘restorative justice’ program that links clients to jobs and services, enhancing their ability to pay restitution while reducing the likelihood of repeat offenses”).

80. See Duret, supra note 68 (incumbent claims she “helped reduce recidivism with programs like the mental health court and ex-offender reentry”); Jim Turner, Veteran Public Defender Faces a Rare Challenge, JUPITER COURIER, Oct. 25, 2000, at A1; Sommer, supra note 64 (incumbent “has pushed for drug abuse and mental health treatment as an alternative to the cycle of punishment and recidivism”); Susan Spencer-Wendel, Public Defender Faces First Challenge in 20 Years, PALM BEACH POST, Oct. 15, 2000, at 1C (challenger promised to “add social workers to the office to help clients identify their problems and keep them from getting rearrested;” she also promised to “address juveniles and their increasing prosecution as adults”).

81. See Susana Bellido, Insider Versus Outsider in Defender Race, MIAMI HERALD, Aug. 29, 1996; Molly Justice, Incumbent Defends Job Against Inter-Party Foe in Bid for 7th Term, DAYTONA NEWS-JOURNAL, Sept. 3, 2000, at 08I; Curtis Krueger, Race for Defender Pits New Versus Old, ST. PETERSBURG TIMES, Aug. 22, 1996, at 5; Levesque, supra note 67 (incumbent “founded a program, Defender College, to train assistant public defenders around the state”); Othon, supra note 67 (successful challenger “promised to increase training”).

82. See Sommer, supra note 64 (incumbent “credits his administration with pushing through a law granting public defenders access to a Florida Department of Law Enforcement criminal database and with blocking proposed get-tough-on-juvenile-crime laws”); Jay Weaver, Barbs Fly in Defender’s Race, MIAMI HERALD, Oct. 10, 2004, at 1B (incumbent lobbied for additional funding for defender positions).

83. See Editorial, Pinellas’ Partisan Defender, ST. PETERSBURG TIMES, Aug. 29, 1996, at 16A; Levesque, supra note 67 (incumbent criticized because he “hadn’t hired enough minority attorneys”).

84. See Levesque, supra note 64 (incumbent Dillinger campaigned on the “outcome of a first-degree murder case against a Pasco County resident. Prosecutors were
rectified through the use of DNA evidence seems to have created an avenue for public defenders to explain to the public the value of a vigorous defense.

Challengers are surprisingly circumspect about launching direct criticisms of vigorous defenses by incumbents in particular named cases.85 Nevertheless, challengers do criticize particular techniques used in past cases by attorneys from the public defender’s office. Challengers might, for instance, criticize the incumbent for allowing plea bargains in too many cases, based on the notion that the public dislikes plea bargains, yet this discussion is detached from any benefits for clients.86

Most troubling, challengers have promised the voters that attorneys in the office will refrain from using particular defense techniques in future cases. In one striking example, Matthew Shirk successfully challenged incumbent Bill White in the 2008 race in the Jacksonville area. Shirk pledged that if he were elected to the office, the attorneys in the office would never accuse any police officer of lying.87 The subtext of Shirk’s remarks referred back to a prominent recent murder case that resulted in an acquittal, which turned on defense claims that the investigating officers were lying.88 The Fraternal Order of Police contributed to Shirk’s election campaign.89

85. See Jay Weaver, Incumbent, Former Staffer Face Off, MIAMI HERALD, Oct. 17, 2004, at 3L (supporter of challenger accused incumbent “of stalling a high-profile case involving the unpopular defense of 9-year-old Jimmy Ryce’s killer in the mid-1990s because of an impending election”); Weaver, supra note 82 (supporter of challenger accused incumbent of employing private appellate counsel rather than appellate expert within office in effort to avoid political ramifications for defending unpopular defendant).

86. See Carlton, supra note 76 (unsuccesful challenger “vowed to discourage plea bargaining, especially for career criminals”); Turner, supra note 80 (challenger says that “plea bargains are becoming a convenient tool of lawyers and judges at the expense of the people going through the systems”).


What is the connection between campaign rhetoric and the actual conduct of business in the public defender’s office? One unsettling possibility would be a “race to the bottom,” with each challenger promising less assertive defense practices and greater stretching of office resources, only to be replaced after one term in office by the next challenger who promises even less. The result would be a dwindling base of resources and collection of defense techniques. If the actions of the elected public defender amounted to an order to attorneys in the office not to provide a zealous defense for a client, ethics charges against the chief and the line attorney might be possible. If the winning candidate were more subtle, however, he or she might successfully carry out campaign promises of this sort.

The results of the elections in Florida and Tennessee offer some reason to believe that a race to the bottom is not happening. If it were easy for challengers to win office by promising voters to use less money and to hold back on the use of some defense techniques, we would likely see more incumbents losing elections. As Table 2 indicates, incumbents win just as many elections on the public defender side as they do on the prosecution side. The campaign rhetoric shows a reasonably responsible debate about the best uses of tax dollars and the appropriate range of clients and services that the office should try to cover. Although prosecutor elections feature discussions of recent prosecutions in prominent cases, the public defender campaigns hold the focus more consistently on general policies. The exceptions, such as the Matthew Shirk campaign in Jacksonville, show the corrosive possibilities, but most voters have not faced such a prospect.

The more realistic possibility – and one that would be quite difficult to confirm – is that incumbents arrange the work in public defender offices to avoid the most provocative or aggressive defense techniques. The public defender who pulls punches during the years between elections might quietly prevent effective electoral challenges.

90. Under the Model Rules, Shirk might be sanctioned for committing the office to a failure to pursue competent representation. See MODEL RULES OF PROF’L CONDUCT R. 5.1 (1983). Although the campaign claim itself might not amount to a breach of the lawyer’s duty, Shirk might be disciplined if he were to fire or discipline a public defender for accusing an officer of lying, and the attorney demonstrated that the charge was necessary as part of a zealous defense.
II. LIMITS ON POPULAR CONTROL THROUGH THE BALLOT BOX

The behavior of voters and the behavior of candidates are reasonably similar in prosecutor and public defender elections. Why, then, do the states depend so heavily on elections for one of these public employees, while rejecting elections so overwhelmingly for the other? This inconsistent use of elections, in my view, reflects a nuanced and appealing view about the role of public preferences in the design of criminal justice policy in a democracy.

In this Part, we explore three different orientations toward popular control over criminal justice. Each orientation suggests a different set of limits on voter input into criminal justice and on the accountability of key public figures to the people who pay their salaries. Each builds on different examples from elsewhere in government; each proceeds from different assumptions about the capacity of the voting public; and each perceives elections working in tandem with different alternative or supplemental forms of regulation.

A. Elect None of Them

One orientation to popular input for criminal justice questions would limit it at every turn. In this view, neither public defenders, judges, law enforcement leaders, nor prosecutors should be elected, and other forms of popular input into criminal justice should be filtered heavily.

The experience of jurisdictions outside the United States is particularly instructive from this vantage point. Prosecutors in Japan, Germany, and most other places in the world join a bureaucracy at the beginning of their careers and advance through the ranks based on seniority and merit as defined through professional standards. The same holds true for judges. The public receives criminal justice outcomes informed by expertise, and on that basis the outcomes earn public acceptance.

Some areas of public policy in the United States follow such an expertise-heavy model without controversy. Consider the field of public health, which carries enormous consequences for the well-being of the public and sometimes turns on questions of moral values. Despite the enormous consequences at stake, voter input into public health administration remains at a fairly high level of abstraction. This mainly occurs because of the adoption of legislation that defines guiding principles and budgets and also sets some outlines for implementation. As a result, voters do not generally elect public

health officials or select the means necessary for them to achieve broad public goals.92

These limits on public input are based on two beliefs about the capacities of the public. First, many of the questions involved are fact-based scientific realities that are not usefully subjected to opinion polls. Either the earth is flat or it is not, and the range of public opinion on the question simply should not drive public policy that flows from this fact. Second, the advocates of this perspective assert that the public behaves irrationally when it comes to potential crime.93 One might conclude that the public is markedly less rational about matters of crime because they affect such primal matters as personal safety. While the voters might be able to appreciate rational arguments about taxes or highway construction, they are prone to overreact when the public conversation turns to matters of crime. The doubts about voters might even go a step further. One might limit the use of elections in criminal justice as part of a broader rejection of voter abilities to address any topic rationally.

This perspective also builds on the confidence that elections are not the only method to promote wise outcomes, consistent with the rule of law. Criminal justice systems that select their judges, prosecutors, and defense attorneys based on meritocratic methods (that is, most criminal justice systems around the globe) depend on intensive training throughout an employee's career to create consistent outcomes. Articulated general guidelines also provide ex ante controls on prosecutor choices, making the ex post control exerted by voters less crucial. And regular internal audits and reviews of the application of general policy in particular cases narrows the distance between declared policies and the actual behavior of line prosecutors.94

B. Elect All of Them

A second perspective on popular control looks for the greatest feasible public participation; election of all the key figures in criminal justice would be beneficial, all other things being equal. Criminal justice involves matters of immediate — even primal — importance to citizens, speaking to their greatest fears and their strongest moral commitments. The system also involves large amounts of government spending at the state and local levels. When public officials execute such pivotal choices for the people in a system that calls itself a democracy, close monitoring is to be expected. Perhaps the best

example from the criminal arena might be the prosecuting attorney who declares that domestic violence cases will become a low priority (or a high priority) for the office. The voting public should have something to say about such choices of enforcement priorities.

This perspective can draw on examples of direct public control over many affairs in administrative government, including some topics that include technical or expert-oriented components. For instance, some states present voters with a “long ballot,” allowing them to elect a wide array of public officials, including the Insurance Commissioner, the Secretary of Labor, and the Attorney General.\(^9\) In such a political culture, criminal justice certainly qualifies as a matter worthy of public monitoring and direction.

Several core beliefs about the capacity of voters lie at the foundation of this orientation. As a general matter, the public attaches more legitimacy to government action if they feel as if they were consulted in formulating and executing policy. Political scientists and psychologists point to evidence that elections strengthen the perceived legitimacy of collective action.\(^{96}\) In addition, elections based at the local level (as most criminal justice elections are) preserve local variation in values. The endorsers of this perspective see voters as educable, or capable of making sound choices in their own long-term interests if given the proper information and context for processing that information. If voters are indeed capable of rational processing of arguments about crime policy, and if prosecutors will continue to be elected, then the public might benefit from hearing defense-oriented arguments alongside the claims of the candidates for the prosecutor’s office.

As for alternative techniques to promote sound and lawful decisions, people holding this orientation note that expert-based controls are not necessary – and may prove futile – because the public already controls many of the important tools of criminal enforcement. The public elects legislators who define the criminal code, the available defenses, and the rules of evidence. Legislative bodies (whether statewide or local) also define the budget available for criminal defense, within loose boundaries that the courts set through constitutional rulings.\(^{97}\) The public also occasionally votes directly on referenda regarding the funding and organization of criminal defense. If voters can control the budget and the legal tools available to the defense attorneys, it


is hard to understand why they should not select the officials who will administer that budget.

C. Elect Some and Not Others

There is a third possibility. While there are coherent reasons to favor either the election of all the major actors in criminal justice, or on the other hand, to remove the selection of criminal justice leaders from any direct voter input, state and local governments in the United States have overwhelmingly decided to split the difference. Elections dominate in the selection of state prosecutors. States show more reluctance to subject judges to voters, adopting a variety of methods to blunt the ordinary effects of elections, while keeping some periodic voter input. Meanwhile, they have stayed away from elections as a method of monitoring public defenders. Why do we find decreasing enthusiasm for elections as we move from prosecutors, to judges, to defenders? What views about the capacities of voters undergird this compromise position in the United States?

One answer is that these publicly paid agents actually answer to different principals. The prosecutor, of course, represents the public in criminal proceedings and in promoting public safety. Judges represent the public in the resolution of criminal charges, but they are expected to promote public interests as perceived over a longer time frame and set at a higher level of principle.

The public defender, on the other hand, does not exactly serve as an agent for the public. While the public pays the public defender to provide the constitutionally required defense that can support a valid conviction, the attorney represents the client. The taxpayer functions much like the insurance company who selects and compensates the defense attorney in a tort suit. As the Model Rules of Professional Conduct make clear, even when a third party pays for representation, the attorney owes duties of competence, loyalty, and confidentiality to the client and not to the person who pays. Moreover, the voter is not likely to understand the priorities of a criminal defendant. Voters tend to be older, richer, and whiter than most criminal defendants, leading to

98. Rule 1.8(f) provides:
A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.


Rule 5.4(c) provides: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Id. at R. 5.4(c).
a mismatch between the voters who select the defense attorneys and the clients who control the objectives of the representation.  

As a result, the public has appropriate authority to control different issues for each of these officials. When it comes to the work of the prosecutor, the public can evaluate the quality of outcomes in particular cases. Suppose, for instance, that a crusading district attorney – call him Ira Knight – brings corruption charges against a member of the city council. The voters can appropriately use that decision for insight into Knight’s priorities. If they believe the case reveals his determination to apply the law equally, even to those in powerful positions, they might vote for his re-election. If they conclude, however, that the investigation and charge against the local official shows vindictiveness or a poor sense of priorities through devoting major resources to prove a minor offense, the voters could take the one case as a window into Knight’s management style. The voting public, who are also the clients of the public prosecutor, can evaluate the individual cases that the prosecutor brought in their name.

For the public defender, however, the voters’ authority extends only to the general resource levels they will provide (choosing from the range of funding options allowed under the constitution or other sources of law) and the organizational choices of the leadership. They cannot properly punish the public defender for the means employed to defend a client in a particular case. The adversarial system directs all the benefits of the lawyer’s zealous representation to the client, not to the people who pay for the lawyer.

This compromise perspective on elections modifies the working assumptions of the “elect all of them” orientation. In the compromise view, the public is educable and capable of rational processing of information about questions of crime, but only when the questions are phrased at an abstract or system-wide level. The voters operate on two tracks: their commitment to higher principles of fairness and accuracy of outcomes comes to the forefront when talking about the overall design and objectives of the system, but the more immediate concerns about safety start to dominate when the focus shifts to particular criminal suspects.

The selection methods for public defenders in most jurisdictions reflect this two-track behavior by the voting public. Most leaders of particular public defender offices are chosen by public officials who combine expertise in criminal adjudication with accountability to voters: the public defender is typically appointed by elected judges, or an elected official such as a governor, or by statewide policy board members who are themselves chosen by such elected officials.


100. Cf. Bruce Ackerman, We the People: Foundations (1991) (describes citizens operating at level of ordinary politics and at separate level during constitutional moments).

101. See supra notes 42-48 and accompanying text.
the policies and priorities of the public defense system rather than the tactics that defense attorneys might follow in a particular case.

ELECTING public defenders is also inferior because there are excellent alternative methods of constraining their choices ex ante. The external constraints on public defenders are vibrant even without input from voters. The limited availability of effective defenses built into the criminal code combined with overall funding limits both profoundly shape the work of public defenders. Traditional conceptions of the objectives of criminal defense, conveyed through legal education and professional ethics standards, also promote a regular level of quality in representation. With restraints like these on public defenders, input from voters would be gilding the lily.

By contrast, the external constraints on prosecutor choices are anemic. Criminal codes offer broad and deep options, and judges generally do not second-guess the charge selections of the prosecutors. Election campaigns, however flawed they might be as a signal about public priorities, remain one of the more meaningful external influences on prosecutor decisions. Bureaucratic traditions in other countries might deliver the regularity and reasoned decisions that we expect from prosecutors who operate within the rule of law, but elections still hold an important place in the toolbox of democracy in the United States.

When it comes to prosecutors, there are reasons to worry that the voters send too little information to prosecutors about how to prioritize among the possible areas of emphasis, including the treatment of victims and other office practices. A better outcome would supplement elections with other methods of assuring a responsive office, prosecution that responds to current local public priorities about criminal law enforcement, such as the best response to public order offenses like panhandling. Community prosecution initiatives, which parallel the community policing initiatives of an earlier generation, hold some promise on this score.

When it comes to public defenders, the best outcome redirects public attention from the means employed in a given public defender’s office and toward the objectives of the office framed at a higher level of abstraction. While the public ultimately chooses among different levels of funding, its greatest input should remain in selecting the legal resources (i.e. possible defenses under the criminal code) that it makes available to those accused of crimes.

This does not mean, however, that the public defender’s office can afford to drift too far from public sentiment. The leadership of the organization will be more effective if it engages the public through methods other than election campaigns. It must connect with the practicing bar, highlight the stories of exonerees, and pursue an active public relations strategy. Ultimately, the public defender leadership must do its part to cultivate the public commitment to a fair and accurate system, without expecting the public to approve of the necessary tactics for individual cases.
III. CONCLUSION

The tradeoff between expertise and responsiveness to public preferences is a storied dilemma in democratic governance. In many areas, government institutions search for the proper blend of current voter preferences and long-term public interests as mediated through expertise and other devices meant to inform actual public opinion or simulate a more informed public opinion. The rarity of public defender elections in this country may simply be an unreflective historical oddity. But the systems we now use may reflect more than a happy accident: the appointment system for public defenders, standing alongside an election system for prosecutors, shows remarkable sophistication about the proper tradeoffs between expertise and public input.