

# Rewarding Prosecutors for Performance

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Prosecutorial discretion is a problem that most scholars attack from the outside. What forces should constrain or guide prosecutors to pursue the right numbers and types of cases, rank them well, treat them equally, behave ethically, invest appropriate effort, and seek fitting punishments? Most scholars favor external institutional solutions, such as *ex ante* legislation or *ex post* judicial and bar review of individual cases of misconduct. As I have argued elsewhere, at best these approaches can catch the very worst misconduct. They lack inside information and sustained oversight and cannot generate and enforce fine-grained rules to guide prosecutorial decision making.<sup>1</sup>

So what alternatives are there? There may be some underused external regulatory strategies, such as legislative oversight hearings. But the most promising alternatives work within prosecutors' offices. Prosecutorial discretion poses a principal-agent problem, which requires measures to align prosecutors' incentives with voters', victims', and defendants' interests. This is a two-step process: first, head prosecutors must have incentives to serve their principals' interests; second, head prosecutors must have tools to encourage their subordinates to do the same. I have previously discussed the importance of victim oversight, office culture, personnel practices, information sharing, and performance evaluation in this process.<sup>2</sup> In a series of works, Ronald Wright and Marc Miller have examined prosecutorial self-regulation through internal office policies.<sup>3</sup> In this symposium, Ronald Wright considers how well prosecutorial elections may discipline head prosecutors, aligning their self-interests in reelection with voters' desires.<sup>4</sup>

Here I will explore another neglected toolbox that head prosecutors can use to influence line prosecutors: compensation and other rewards. Rewards can both

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<sup>1</sup> Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

<sup>2</sup> *Id.*

<sup>3</sup> Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 61–66 (2003); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1031–34 (2005) [hereinafter Wright, *Prosecutorial Self-Regulation*]; Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1093–97 (2005) [hereinafter Wright, *Prosecutorial Guidelines*].

<sup>4</sup> Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

attract and retain the best candidates and also encourage those who are already prosecutors to perform better.

We take it for granted that most prosecutors receive flat, lockstep annual salaries tied to their years of seniority and experience, with civil-service protections.<sup>5</sup> Fixed, flat, seniority-based salaries have a few obvious bureaucratic benefits. They are how most prosecutors have historically been paid,<sup>6</sup> and for lawyers the precedential force of past practice is huge. They are administratively simple to administer, explain, and plan for in a budget. They avoid the need to specify and weight various performance metrics and measures. They reduce the hassle and frustration of haggling and the envious fear that someone else is getting a better deal. And they seem to guarantee a kind of formal equality and neutrality, preventing bias and favoritism in salary decisions.

Nevertheless, it is surprising that lockstep salaries have gone largely unchallenged. Recent management literature has emphasized the need to pay for performance, to attract and retain stars and to encourage quality performance and hard work. It is time to apply these insights to improve prosecution.

This essay starts to think through how best to structure prosecutorial pay and rewards. First, we need metrics of prosecutorial success to decide what traits and behavior to reward. Part I discusses possible metrics. Historically, prosecutors have focused on a few statistics such as conviction rates, but these numbers are manipulable and incomplete. Prosecutors' multiple constituencies and goals require subtler measures. A better solution is to collect and aggregate feedback from a variety of sources, including peer prosecutors, supervisors, judges, defense counsel, victims, defendants, and the public. This information, appropriately weighted and discounted, could better encourage prosecutors to serve all their constituencies.

Once we have metrics of success, the next step is to devise incentives to encourage success on these metrics. Part II surveys pay and reward systems designed to attract and retain good prosecutors and to encourage them to succeed. A first step is to offer variable salaries, raises, and promotions tied to the metrics of success. (Prosecutors' offices do some of this already, albeit informally and haphazardly.) More radical solutions could range from hourly rates to performance-based bonuses to contingency fees. While some of the more radical solutions, such as contingency fees, would be unwise or unworkable, other solutions are worth trying.

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<sup>5</sup> Some may be part-time prosecutors, but increasingly most prosecutors are full-time government employees. See STEVEN W. PERRY, U.S. DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 2005, at 2–3 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pse05.pdf> (reporting that almost 75% of head prosecutors, and 90% of all staff, were full-time; also reporting head prosecutors' annual salaries).

<sup>6</sup> See, e.g., GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 42–44 (2003) (reporting flat salaries paid to nineteenth-century Middlesex County, Massachusetts prosecutors).

I do not mean to suggest that prosecutors are money-grubbing materialists who care only for the bottom line. If they were driven only by short-term monetary considerations, most would have chosen more lucrative private-sector options. Many public-spirited prosecutors want to do justice and serve as officers of the court and also would like to gain trial experience and to feel the thrill of the chase. Nevertheless, economic considerations cannot help but influence people, at least at the margins. Prosecutors, like everyone else, have ordinary, human, material desires as well as civic-minded zeal.

### I. METRICS OF MERIT AND SUCCESS

Not all prosecutors are alike. Some come from criminal-defense backgrounds, which may reduce their temptation to prejudge guilt and blame. Some come in with significant courtroom experience, while others require more training. Some have stronger academic credentials, and some have stronger research and writing backgrounds, than others. Some come from well-regarded judicial clerkships or law firms that have already invested significant time in training. Unsurprisingly, then, some job candidates have more appealing private-sector job offers than others. Of course government agencies are not about to match private-sector salaries dollar for dollar. But to compete for the best talent, one would expect prosecutors' offices to adjust their offers to the market rate.

Likewise, prosecutors vary in their diligence, zeal, judgment, and experience. A prosecutor who regularly burns the midnight oil deserves to be paid more than one who leaves the office every day at 5 p.m. But lockstep raises leave the hard worker feeling unappreciated and send the message to others that it does not matter how hard you work. A prosecutor who shows excellent zeal, judgment, persistence, and discretion is a bigger asset than one who violates ethical rules and is too rigid or lackadaisical. But a lockstep salary system does nothing to encourage the talented star to stay or the dud to leave. And a prosecutor who has been in the office for a few years may have accumulated valuable wisdom, while one who has stayed too long may have become jaded and tired.<sup>7</sup> Yet seniority

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<sup>7</sup> See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 110–19 (1975) (reporting empirical evidence that many prosecutors, particularly more experienced prosecutors, manifest “conviction psychology” and presume guilt, and that this psychology “may cause the prosecutor to ignore his quasi-judicial role”); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 206 (1988) (noting that “conviction psychology” is a more powerful force than pressure to be fair); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 689–90 (noting that “conviction psychology” makes it harder for prosecutors to protect innocent defendants); see also Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 964 n.234 (1999) (quoting one former federal prosecutor as saying: “‘Career prosecutors are inevitably cynical about the human race . . . . Someone who has been a defense lawyer gets to see the person and is aware of the complexities and motivations, the ambiguities of acts and sees things from a different tactical perspective.’”).

raises automatically reward length of service instead of encouraging rotation in office and regular infusions of fresh blood.

The criteria above apply equally to most public officials. Many other problems are specific to prosecutors. The adversarial mindset tempts many prosecutors to excessive partisanship. Prosecutors are public officials sworn to do justice, not just convict, so we hold them to high ethical standards. Fighting hard is part of zealous advocacy, but partisanship tempts them to go further and hit below the belt.<sup>8</sup> For example, the conviction mindset tempts some prosecutors to overlook or withhold exculpatory or impeachment evidence. They may block DNA testing or obstinately defend convictions even after DNA tests confirm innocence.<sup>9</sup> They may threaten excessive charges, lie, or misrepresent facts to pressure or bluff defendants into plea bargains or cooperation deals. Prosecutors' powers to subpoena, bring or dismiss charges, and strike deals are vast yet not constrained.

How can head prosecutors measure merit and performance? They would have to use a series of performance reviews. In many corporations, supervisors rate their subordinates' performance each year.<sup>10</sup> One problem is that supervisory prosecutors have only partial information about line prosecutors' performance. While some kinds of experience are evident from one's résumé, it is harder to measure investigation, research, writing, diligence, zeal, judgment, ethics, and integrity. Putting all that power into a single pair of hands risks overemphasizing a few highly visible metrics, such as conviction or case-processing rates or wins in a few notable trials. It over-emphasizes trial performance at the expense of prosecutors' many lower-visibility responsibilities. Conversely, it may slight softer, less visible goods such as fairness, ethics, professionalism, and courtesy.

Many other actors in the system also have relevant information about prosecutors' performance: judges, defense counsel, defendants, and victims all see prosecutors in action. The ideal evaluation system would aggregate information from these actors across hundreds of cases. Rather than assigning fixed weights to performance criteria *ex ante*, it would let them bubble up from the shared sense of the local criminal justice community. These ratings would assess and aggregate zeal, investigation, research, rhetorical skill, professionalism, ethics, diligence, courtesy, respect, and satisfaction across a range of cases. Collective evaluation would thus be more subtle, reliable, and resistant to manipulation than a single statistic. This idea parallels the management trend toward 360-degree feedback,

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<sup>8</sup> The Supreme Court put this point most famously in *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.”).

<sup>9</sup> Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003, at A1.

<sup>10</sup> See, e.g., JACK WELCH WITH JOHN A. BYRNE, JACK: STRAIGHT FROM THE GUT 158–68 (2001) (describing General Electric's system of annually rating the top 20%, middle 70%, and bottom 10% of employees, rewarding top performers generously to retain them, and getting rid of the bottom ones).

aggregating feedback from supervisors, subordinates, peers, customers, suppliers, and even competitors.<sup>11</sup>

There is already some informal feedback, through the courthouse grapevine and judges' and defense counsel's occasional comments to head prosecutors and post-trial debriefings. Likewise, some local bar associations already question their members to evaluate judicial performance.<sup>12</sup> And some experiments with community prosecution ask victims or community leaders to evaluate particular prosecutors' performances.<sup>13</sup> But feedback is so important that it needs to be continual, systematic, and comprehensive.

One possible model for these reviews would be eBay's reputational feedback system. Pollsters would work with prosecutors to develop short evaluation forms, asking for quantitative and brief qualitative feedback on roughly ten dimensions. The pollsters would then license their forms to prosecutors' offices for a fee. Of course, designing the right survey tool would take work, to make it detailed enough to provide useful information yet brief enough that those surveyed would respond.

Prosecutors' offices would email these forms to victims and defendants right after each case, and to judges, defense counsel, and police every few months. Evaluators could also file follow-up reports to flag DNA or suppressed witness evidence that comes to light years later. A web-based survey tool, such as zoomerang.com or surveymonkey.com, could collect and tabulate responses anonymously. A computer algorithm could weed out or discount outlier responses.<sup>14</sup> The survey and algorithm could evolve to reflect the combined judgments and local intuitions of hundreds of dispersed actors.<sup>15</sup>

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<sup>11</sup> See generally THE HANDBOOK OF MULTISOURCE FEEDBACK (David W. Bracken, Carol W. Timmreck, & Allan H. Church eds., 2001); MICHAEL ARMSTRONG, A HANDBOOK OF HUMAN RESOURCE MANAGEMENT PRACTICE 521–29 (10th ed. 2006); PETER WARD, 360-DEGREE FEEDBACK (1997).

<sup>12</sup> See, e.g., Andrea R. Barter, *Massachusetts Judges Receive Report Cards from MBA Judicial Evaluation Participants*, MASS. BAR ASS'N LAW. J., Dec. 2005, at 1, available at <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2005/december/massachusetts-judges-receive-report-cards>; Corpus Christi Bar Association, 2005 Judicial Evaluation Poll, available at <http://www.ccbbar.com/images/CCJEP2005.pdf>.

<sup>13</sup> M. Elaine Nugent-Borakove & Patricia N. Fanflik, *Community Prosecution: Rhetoric or Reality?*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 219–20 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008). See also MICHAEL A. RAMOS, SAN BERNARDINO COUNTY DIST. ATTY'S OFF., INFORMATION ABOUT COMMUNITY PROSECUTION (2002), available at <http://www.sbcounty.gov/brochures/docs/95.pdf> (reporting that "continuous evaluation" is a component of San Bernardino County's neighborhood prosecution).

<sup>14</sup> eBay successfully uses such an algorithm to weight reputational feedback left by buyers and sellers. For literature that discusses the value of online feedback and ways to counteract unfair and discriminatory ratings, see, for example, Chrysanthos Dellarocas, *Building Trust Online: The Design of Robust Reputation Reporting Mechanisms for Online Trading Communities*, in SOCIAL AND ECONOMIC TRANSFORMATION IN THE DIGITAL ERA 95 (Georgios Doukidis et al. eds., 2004); Chrysanthos Dellarocas, *Immunizing Online Reputation Reporting Systems Against Unfair Ratings and Discriminatory Behavior*, in PROCEEDINGS OF THE 2ND ACM CONFERENCE ON ELECTRONIC

A supervisory prosecutor could also review the information with a critical eye. If a defendant or defense lawyer said simply that the prosecutor was too tough, without further explanation, the supervisory prosecutor would discount the source. Discounting would prevent threats of low ratings from becoming bargaining leverage or retaliation for appropriate toughness. (Algorithms likewise could discount feedback from sources who themselves have low feedback scores, who are outliers, or who complain about everyone.) If, on the other hand, defense counsel or defendants alleged specific ethical violations, and these complaints formed a pattern, supervisors would heed them. Even absent a pattern, a single serious allegation could trigger an internal investigation; a routine feedback system makes it easier to spot and probe these allegations. It can be hard to capture and code some of the most egregious events, such as suppression of evidence, but even a narrative alert would do much good. An imperfect effort to monitor misconduct and create a feedback loop is much better than none at all.

One advantage of this aggregation of information is that it is more subtle than traditional carrots and sticks. For example, judges can hold prosecutors in contempt for lying, and bar authorities can disbar them for withholding exculpatory evidence. In practice, however, contempt, disbarment, and suspension are vanishingly rare.<sup>16</sup> When judges or bar authorities find misconduct but refuse to suspend or disbar, supervisors can still use this information in deciding whom to reward and promote. Defense lawyers' feedback is especially important. One might fear that defense lawyers would simply reward leniency rather than competency, but on the whole they respect and do not blame tough but fair

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COMMERCE 150 (2000); Chrysanthos Dellarocas, *Reputation Mechanism Design in Online Trading Environments with Pure Moral Hazard*, 16 INFO. SYS. RES. 209 (2005); Chrysanthos Dellarocas, *The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms*, 49 MGMT. SCI. 1407 (2003); Cynthia G. McDonald & V. Carlos Slawson, Jr., *Reputation in an Internet Auction Market*, 40 ECON. INQUIRY 633 (2002).

<sup>15</sup> For a fascinating proposal to develop such a system of traffic enforcement, in which norms would emerge from the collective judgment of myriad drivers, see Lior Jacob Strahilevitz, "How's My Driving?" for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699 (2006).

<sup>16</sup> One empirical study found that out of hundreds of cases of egregious misconduct over nearly four decades, not a single prosecutor was disbarred or convicted of a crime. Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at 1; Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1. Another newspaper study reviewed 1500 allegations of prosecutorial misconduct over a ten-year period. Though the study turned up hundreds of discovery violations involving exculpatory or impeachment evidence, "[p]rosecutors who violated discovery rules were seldom punished. Many violated discovery rules over and over again." Bill Moushey, *Hiding the Facts: Discovery Violations Have Made Evidence-Gathering a Shell Game*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998, at A1. One recent exception, notable for its rarity, is the disbarment of prosecutor Mike Nifong, who withheld exculpatory evidence in prosecuting Duke lacrosse players for rape. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 257, 302-06 (2008) (discussing notorious prosecutor of Duke lacrosse players, who was disbarred after extensive publicity surrounding deeply flawed prosecution).

prosecutors.<sup>17</sup> While they do not always agree with prosecutors, they know best what prosecutors are doing because they interact with them regularly. Supervisors can discount obviously biased reviews while still heeding verifiable complaints. Public defenders, in particular, already discuss and share prosecutors' reputations within their office and can formally pass these impressions on to head prosecutors. And, as repeat players, they intuit violations of courthouse norms and are well-placed to spot patterns and trends. Privately retained counsel do not stand in the same position. On the other hand, many are former prosecutors who can compare observed behavior with the office's norms and ideals. Ex-prosecutors who maintain good relations with their former offices are likely to have balanced perspectives. Their complaints may thus be credible and weighty.

This information would be invaluable in setting raises. But it would also help to catch prosecutors in need of additional training, discipline, or firing, much like early-warning systems to catch police misconduct. In other words, management would use this information tool to spot and fix problems, even apart from any link to compensation. Monitoring also sends the message that performance matters and that prosecutors must view judges, defense counsel, defendants, victims, and the public as their constituents. Knowing that they were being evaluated, prosecutors would strive to serve their constituencies better, much as salesmen and customer-service representatives do. Incentives, rather than rules, would guide prosecutorial discretion.

Of course, evaluation and feedback systems are costly. Ratings take time, and surveys and algorithms cost money. Busy lawyers and judges resent more paperwork. On the other hand, judges and defense lawyers may welcome the chance to improve the lawyering they face and be flattered that supervisory prosecutors would listen. Victims and defendants may want to express their thoughts and feelings, particularly when they are dissatisfied with a prosecutor's performance. Moreover, the costs of rating may well be worth it; at the very least, they are worth trying out. Some of the most successful, profit-oriented companies, such as General Electric, invest lots of time and money in feedback, and other companies imitate their successes.<sup>18</sup> Surely that success testifies to the usefulness and value of the resulting feedback.

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<sup>17</sup> See, e.g., Ian Berry, *Waltz Prosecutor Called Tough, But Fair*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Sept. 19, 2005, at B1; Dan Eggen, *Second-in-Command at Justice to Depart: Comey Led Drives on Terrorism, Fraud*, WASH. POST, Apr. 21, 2005, at A21; *Morning Edition: Senate Panel Sets Deadline on Corruption Case* (NPR radio broadcast Apr. 13, 2007); Kirk Makin, *Morin Informant Named Dangerous Offender*, GLOBE & MAIL, Oct. 4, 2007, at A7; Shannon McCaffrey, *New No. 2 at Justice a 'Class Act' Known for Apolitical, Aggressive Style*, KNIGHT RIDDER/TRIBUNE NEWS SERV., Dec. 12, 2003, at K1794 (noting that not only did defense lawyers praise James Comey "as a tough but fair prosecutor's prosecutor," but even a mob assassin whom he was trying to imprison slipped him a note at trial that read "'You're a class act . . . No one deserves that [lawyer-of-the-year] award more than you do'").

<sup>18</sup> WELCH, *supra* note 10.

## II. SALARIES, BONUSES, AND OTHER REWARDS

Once head prosecutors develop metrics of success and survey relevant constituencies to evaluate prosecutors, they can use these data to set pay and non-monetary rewards. More flexible pay scales might allow head prosecutors to experiment to attract and retain top talent. For example, head prosecutors could receive a fixed budget but have considerable freedom in deciding how to allocate that budget. They could experiment with different schemes and see what works. They could pay star hires more and offer merit raises to reward and keep good talent. While one pool of money might fund cost-of-living raises for everyone, a second pool could fund discretionary raises or bonuses tied to performance reviews.<sup>19</sup> Even if civil-service protections prevent cutting prosecutors' salaries, head prosecutors could at least have flexibility in deciding whether and how much to increase them.

Top performers should receive rewards, which help to retain them and may teach everyone about good prosecutorial performance. Performance reviews can also help to weed out the weakest prosecutors. General Electric keeps improving its workforce by laying off the bottom ten percent of its workforce each year.<sup>20</sup> If civil-service protections make it impossible to fire poor performers, they should at least receive low salaries so that they leave on their own.<sup>21</sup>

Head prosecutors already do some of this through their promotions. Star performers may get promoted to supervisory or other plum jobs, which may carry more interesting work and higher salaries. This approach resembles Stephen Choi and Mitu Gulati's proposal for a tournament of judges, which would promote those who are most successful based on objective criteria.<sup>22</sup> Because current metrics are crude and feedback incomplete, however, these promotions reward merit only

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<sup>19</sup> Firms prefer bonuses to raises, as the former reserve flexibility and keep pay tied to continued performance. If one year's star becomes next year's slacker, he will continue to receive any raises but need not get any bonuses. See Erin White, *Employers Increasingly Favor Bonuses to Raises: Companies Aim to Motivate Workers, Lower Fixed Costs; Losing 'Entitlement' Notion*, WALL ST. J., Aug. 28, 2006, at B3.

<sup>20</sup> WELCH, *supra* note 10, at 158–67, 387–88 (“From my first days, I thought [ranking] was the key to building a great organization. . . . We used it relentlessly to push leaders to continually upgrade their teams. Year after year, forcing managers to weed out their worst performers was the best antidote for bureaucracy.”).

<sup>21</sup> See EDWARD E. LAWLER III, STRATEGIC PAY: ALIGNING ORGANIZATIONAL STRATEGIES AND PAY SYSTEMS 25 (1990) (noting that dissatisfaction with pay is a good way to encourage mediocre employees to leave).

One might fear that the low performers will stay on yet be demoralized and perform poorly. But that fear depends on the contradictory assumptions that the low performers could perform better than they do if they were compensated more, yet that compensation incentives will not in fact encourage them to perform better, and they would not leave their jobs despite such discontent. Poor performers who do stay on, in other words, would likely be poor performers regardless of how one paid them.

<sup>22</sup> See Stephen Choi & Mitu Gulati, Essay, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 299 (2004).

imperfectly. Moreover, there are only a handful of high-paying supervisory jobs in any one office. A broader merit-pay scheme can reward and encourage many more prosecutors. And if supervisors are staying in office too long, term limits and salary caps can encourage turnover to make room for the next generation.

The business world uses many kinds of incentives beyond annual salaries. Some companies pay employees by the hour or give hourly bonuses for hours worked beyond some minimum. Some offer end-of-year bonuses, which may be tied to meeting fixed performance goals. And lawyers sometimes work on contingency fees, receiving extra rewards if they win.

The one law professor to write in this area has suggested using contingency bonuses to discourage overcharging and charge bargaining. Tracey Meares proposed that prosecutors receive financial bonuses for securing convictions on the charges initially filed.<sup>23</sup> These rewards could counteract prosecutors' natural incentive to overcharge and hoard plea-bargaining chips, only to trade them away in exchange for plea agreements. She also proposed financial penalties for prosecutorial misconduct.<sup>24</sup> Though the idea makes sense in the abstract, it is probably unworkable. Sizable rewards could encourage prosecutors to undercharge and to strike overly generous plea bargains to avoid allegations of misconduct.<sup>25</sup> This example illustrates a broader problem with incentive pay schemes: they tend to rely on a few visible, objective, quantifiable statistics, at the expense of softer values.<sup>26</sup> Head prosecutors' performance goals likewise tend to depend on conviction statistics, which prosecutors can manipulate and inflate.<sup>27</sup> These objections do not invalidate Meares' idea, however; they simply require using more subtle metrics, of the sort discussed in Part I.

The same set of issues would bedevil any efforts to pay prosecutors contingency fees based on the outcome of particular cases. Rewarding prosecutors for convictions but not acquittals would bias their roles as officers of the court sworn to exonerate the innocent.<sup>28</sup> Moreover, contingent fees give prosecutors too

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<sup>23</sup> Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 873–77 (1995).

<sup>24</sup> *Id.* at 901–02.

<sup>25</sup> *Cf. id.* at 884–87, 916–17 (noting these difficulties but suggesting that they are minor or that other mechanisms could solve them).

<sup>26</sup> Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, in *ORGANIZATIONAL INFLUENCE PROCESSES* 142, 148 (Lyman W. Porter et al. eds., 2d ed. 2003); see also WELCH, *supra* note 10, at 387 (noting that General Electric sales contest produced enormous sales but no profit margin: “That’s the simplest example of a universal problem: What you measure is what you get—what you reward is what you get.”).

<sup>27</sup> *Cf.* MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 167, 233 n.10 (1980) (noting that when incentive pay rewarded Washington, D.C. police officers for reducing crime, officers manipulated statistics by misreporting burglaries as larcenies or under-reporting the dollar values involved).

<sup>28</sup> *Cf.* *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (holding that due process forbids quasi-judicial officer from receiving monetary reward for conviction but not for acquittal).

little incentive to distinguish among guilty defendants and to target only those most deserving of punishment.<sup>29</sup>

One might object that monetary rewards commodify and thus cheapen professional ethics and public interest. Monetary rewards might undercut the sense of community spirit and professional responsibility that drives many prosecutors.<sup>30</sup> But prosecuting is a paying job, not a family activity such as bearing and raising children, nor the sale of body parts or sex. Moreover, paying for performance sends a message recognizing and applauding ethical, dedicated work. It must be done in the right measure, supplementing but not supplanting ethical exhortation. In that way it is like gift-giving, an ancient practice in which the monetary value underscores the non-monetary thanks and appreciation. (Few people would object that a spouse's valuable gifts commodify the marriage. And valuable gifts at weddings, including money, signify friends' and families' love.) Failing to do so, and treating duds equally, can just as easily be seen as indifference to whether or not a prosecutor excels.

Another problem with monetary raises and bonuses is that most Americans expect their employers to keep their salaries confidential. Publishing salaries risks generating envy, particularly if salaries deviate from lockstep seniority raises. Thus, raises cannot easily send public messages about which prosecutors to emulate. There is no such expectation of secrecy for promotions and non-monetary rewards, however. These other rewards can thus confer status and prestige and teach lessons about how prosecutors should behave.

A reward can be as simple as a phone call. If a supervisor or judge telephones a line prosecutor and says, "You're doing a great job on X," the prosecutor will beam with pride. Conversely, every prosecutor dreads criticism from a supervisor or judge for making a big mistake. More frequent compliments and suggestions, with specific details, would cost nothing and greatly improve the feedback loop.

Another visible, cheap incentive involves giving awards and commendations. Simply handing a prosecutor a plaque or trophy, and holding a small ceremony to commemorate an important success, sends a message. Right now, these awards tend to come after major convictions at trial, which are only a fraction of a prosecutor's job. They also tend to be given by law-enforcement agencies. But coupled with evaluations and improved feedback, awards could easily recognize other notable behavior on behalf of other constituencies. For example, rewarding

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<sup>29</sup> Nicholas Parrillo, *The Rise of Non-Profit Government in America: An Overview and a Case Study* 43, 69–82, 110–36 (Jan. 20, 2008) (unpublished manuscript, on file with the author) (discussing why states that used to pay prosecutors rewards for convictions moved away from that approach toward flat salaries in the nineteenth century).

<sup>30</sup> Cf. RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 198 (1971) (arguing that compensating blood donors reduces the blood supply, as it saps altruistic donation). Both Titmuss' empirical and ethical arguments against commodifying blood are the subject of heated debate. See, e.g., Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343, 350–51 (1972) (finding no evidence for Titmuss' claim and no theory to back it up).

prosecutors for exonerating innocent convicts would underscore that the prosecutor's job is to do justice, not just secure convictions.

Even publishing statistics can recognize good performers and shame bad ones. When courts circulate lists of how many pending cases each judge has outstanding, judges hate to be on the slow end.<sup>31</sup> The same is true of some professors' concern for their students' course evaluations. Though life-tenured judges and tenured professors face no tangible consequences for mediocre performance, their desire for others' esteem drives them to do better. Of course, publishing a single statistic may overemphasize that goal at the expense of others, distorting performance. If the only goal is to dispose of cases, then prosecutors will plea-bargain too cheaply and not hang tough in cases that deserve to go to trial. But publishing an aggregate performance evaluation, including its components, could make the metric more reliable and less manipulable. Quite apart from their impact on promotions and rewards, evaluations can drive prosecutors' desire to do well in the eyes of others.

One can also play with more creative rewards. Imagine, for example, that the hardest and best workers earn vacations. Some might receive paid vacation time. Others could win free vacations to the Caribbean, especially if tour operators donated free trips. This kind of tangible reward can recognize and help to retain star performers as well as teach others whom and what to emulate.

### III. CONCLUSION

Prosecutors are not simply economic animals. Most want to do the right thing, to seek justice by convicting the guilty and freeing the innocent. Nevertheless, they are human too, so incentives matter. Prosecutors' offices first need to figure out the metrics of success they want to encourage in order to combat the sense that only conviction and case-processing rates matter. Doing so will also make them more accountable. Setting metrics could be part of a public, democratic dialogue, making prosecutors more responsive to the constituencies they supposedly represent. Then, prosecutor's offices need to tailor their salary schemes, bonuses, raises, and non-monetary perks to these metrics. Prosecuting is not a private business, but it can learn the best of what management experts have learned from their own field.

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<sup>31</sup> See, e.g., MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 144-47 (1981) (reporting interviews of judges who feel chastened by internal court memoranda summarizing backlog statistics).