Prosecutorial Guidelines and the New Terrain in New Jersey

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I. Introduction

The current legal map of criminal justice in the United States offers little detail about the prosecutor’s territory. This is not because prosecutors do not deserve the attention. The American prosecutor is the single most powerful figure on the landscape of the criminal courts. Nevertheless, the relevant legal boundaries on prosecutors are few, and many of us find it difficult to get beyond the observation that the prosecutor holds great discretion. For legal cartographers, the land of prosecutorial discretion is terra incognita.

The territory remains unknown because it presents so few of the familiar legal landmarks like judicial opinions or legislation. American criminal codes are written to give prosecutors wide selection among possible crimes when charging a case. Legislators only rarely attempt to regulate that discretion; over time they delegate to prosecutors more and more choices about the practical reach of the criminal law. Courts also hold back, routinely declaring that the prosecutor’s selection among charges, or indeed the decision to decline charges altogether, is none of their business.¹ No judicial review of the selection of charges is available except in the rare and difficult-to-prove case where a prosecutor intentionally discriminates on the basis of race or sex or some other constitutionally-protected category.²

Given the lack of legislative standards to control prosecutorial decisions, and the disinterest of the courts, legal scholarship has said relatively little about discretionary prosecutor choices (beyond lamenting

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the fact that they are discretionary). This is true even though the prosecutor's power is central to understanding criminal justice in this country. Where there is "no law to apply," there is no particular value for legal scholars to add.

But what if this mapping of the legal landscape is badly incomplete? What if we discover previously unknown features of this land, and some Meriwether Lewis or William Clark brings back a report that convinces us all to redraw the maps of prosecutor charging decisions? And what if this new legal territory looks like New Jersey?

This paper describes some distinctive legal doctrines that the New Jersey courts and legislature created over the last two decades to promote more uniform and accountable decisions from prosecutors in the state. Three features of these doctrines make them worth considering as a model elsewhere, as a way to scrutinize and regularize prosecutorial discretion all across the United States.

First, these prosecutor accountability doctrines were targeted to the charging decisions with the most direct effects on the traditional judicial functions in sentencing. New Jersey courts identified certain statutes that created a tight connection between the prosecutor's charging decision and the sentencing outcome (such as the use of mandatory minimum sentences). The courts interpreted this subset of criminal laws to require the attorney general to draft statewide charging guidelines to promote more uniform prosecutorial choices throughout the state.

Second, the doctrines promoted more transparency in prosecutorial decisions as the key strategy to more consistent and less arbitrary charging. Courts required New Jersey prosecutors in particular cases under these specialized statutes to submit a written explanation of how the prosecutor planned to apply the charging guidelines in the case at hand.

Third, the courts pushed the prosecutors to defend their charging policies periodically, both in particular cases and at the systemic level. The appellate courts read these statutes to empower the trial court to review the prosecutor's statement of reasons. This deferential review ensures that the charge and sentence in a particular case do not conflict with the charging policy and are not arbitrary. Moving to the systemic level, the New Jersey appellate courts periodically declared that existing prosecutorial guidelines were not sufficiently specific to create meaningfully uniform decisions. As a consequence, the courts

3. The phrase is drawn from Administrative Law, describing a class of administrative actions that are not subject to judicial review. See 5 U.S.C. § 701(a)(2). The courts interpret this standard of review narrowly, to preserve judicial involvement in a wide range of administrative decisions.
repeatedly called for improved guidelines that would match the changing priorities of criminal enforcement in the state.

This innovative doctrine could reorient our thinking about what is possible and desirable for the control of prosecutorial discretion. The judge-centered strategy of constitutional litigation to develop rules of criminal procedure, a strategy that transformed the practices of police departments during the middle of the twentieth century, is not a promising model for controlling the prosecutor. Likewise, the legislative controls that reshaped judicial sentencing discretion in many states are not going to reach the comparable discretionary power of the prosecutor. Instead, a recent school of legal scholarship has begun to explore an “internal” alternative, tracking the impact of prosecutorial office structures and policies on the consistency and accessibility of charging and dispositions.

Developments in New Jersey could contribute to this line of inquiry by showing how judicial opinions and legislation can promote more and better internal prosecutorial regulation. The legal doctrines developed in New Jersey also suggest that judges can enforce prosecutorial standards to make case processing more open and consistent, without violating separation of powers in theory or in fact. Even if judges and


5. See David Boerner, The Role of the Legislature in Guideline Sentencing in “The Other Washington,” 28 WAKE FOREST L. REV. 381 (1993). Although the legislative role for prosecutorial discretion will not prove as profound as it has been for sentencing, there are some promising parallels. For a related proposal, see Michael L. Seigel & Christopher Slobogin, Prosecuting Martha: The Use (and Abuse?) of Federal Prosecutorial Power, 109 PENN. ST. L. REV. 1107 (2005) (proposing a “common law of counts” modeled on U.S.S.G. Chapter 3D).


7. The fruit of this long process in New Jersey, the Brimage Guidelines, have not yet attracted academic attention beyond a note summarizing the holding and reasoning of one key case in the line. See Brian J. Waters, Survey of Recent Developments in New Jersey Law, 28 SETON HALL L. REV. 1429 (1998).

8. This is an objective more generally of administrative law. For a discussion of how the New Jersey “administrative law” experience might compare to other strategies
legislators cannot themselves set standards for prosecutors to follow, they can nudge the prosecutors toward meaningful self-regulation, and keep that pressure in place over time.

Part II of this essay traces the interesting case law and legislation in New Jersey that appears to promote prosecutor deliberation about how to charge certain offenses. Part III asks what litigation realities we must uncover before it is safe to conclude that the cases and statutes are having any meaningful impact. Part IV notes how this New Jersey experience changes the way we ordinarily evaluate the prospects for regulating prosecutorial discretion, making it harder to claim that prosecutorial discretion is not compatible with any generalized rules. Part IV also points the way to a modest but meaningful judicial role in reviewing some key prosecutorial charging decisions. The Conclusion reflects on whether rules for prosecutors are generally desirable in the context of American criminal justice today. Rules promote both consistency and visibility of prosecutorial decisions, and it is worth asking whether these qualities will lead to further severity in a system that is already plenty severe.

II. New Jersey Prosecutors and The Boss

Judges in New Jersey did not set out to regulate prosecutors; they hoped only to maintain some meaningful role in sentencing, and discovered along the way that the best defense is a good offense. As New Jersey statutes cut back on traditional sentencing discretion for judges, the efforts of judges to remain involved in sentencing led inevitably back to charging, and involvement in charging inevitably brought judges to the prosecutor’s door.

As in other states, the New Jersey judiciary traditionally played the central role in imposing sentences on convicted defendants. As an extension of that sentencing authority, the courts in the early 1970s helped create a pretrial intervention program (PTI). The court rule establishing these programs gave trial judges the authority to suspend prosecutions against eligible defendants. The judge would then assign the defendant to complete a rehabilitative program, lasting up to three months. After the defendant successfully completed the program the court would order dismissal of the charges. The PTI rules gave both the prosecutor and the trial judge the power to block the defendant’s request for responding to prosecutorial discretion, see Donald A. Dripps, Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies, 109 Penn. St. L. Rev. 1155 (2005).

to enter the program. Although the drafters of the court rule envisioned that defendants charged with any crime could be eligible for a PTI program, they also empowered local prosecutors to create further eligibility rules.\(^{10}\)

In *State v. Leonidis,\(^ {11}\)* the Bergen County Prosecutor denied admission to the PTI program to a defendant who was charged with possession with intent to sell marijuana. A county policy stated that defendants charged with sale of a controlled dangerous substance would "ordinarily" be excluded for the PTI program, and the program director for the county denied the application on that basis, without gathering further background information.

The New Jersey Supreme Court's opinion favored looser standards over stricter rules to guide the admissions decision.\(^ {12}\) The court held that the county-level policy excluding defendants charged with drug trafficking was inconsistent with the statewide court rule governing admissions to the program. The policy was inconsistent because the court rule embodied a "liberal" rehabilitative admission policy, and any "exclusionary criteria" at the county level should be "guidelines only and not . . . mandatory standards."\(^ {13}\) The court resolved the state-versus-local conflict in favor of more centralized control, declaring that "statewide PTI programs should be implemented according to uniform guidelines," in the form of revisions to Court Rule 3.28.\(^ {14}\) The rules that the court created soon after the release of the *Leonidis* opinion set out some relevant considerations, such as a defendant's "amenability to correction, responsiveness to rehabilitation and nature of the offense," but insisted that defendants "accused of *any* crime shall be eligible for admission."\(^ {15}\)

The *Leonidis* case also set two other important precedents. It declared the power of courts to admit a defendant to a PTI program without the prosecutor's consent, if the prosecutor was acting contrary to law in refusing to recommend the defendant. This power was not explicitly stated in the rule. The court also held (again, drawing an inference from the unclear language of the rule) that prosecutors had to state on the record their reasons for denying any defendant's application.

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10. The rule required the Assignment Judge to make the determination of entry to the program for defendants charged with specified serious crimes. N.J.R. Crim. Prac. Rule 33.28(a).
14. Id. at 340.
15. Id. (emphasis in original).
to a PTI program, as a way to facilitate the court's review and enforcement of its rules.\footnote{Id at 336 (the Court's "power to enforce court rules . . . necessarily includes the power to review decisions made pursuant to those rules. In order to facilitate such review, courts require a record setting forth reasons for the decision which is to be reviewed.").}

The state attorney general filed a petition for clarification, and the Supreme Court clarified with a vengeance. In Leonardis II,\footnote{State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (N.J. 1977).} the court reaffirmed its earlier decision and explored the separation of powers implications of the ruling. The judicial requirement that prosecutors submit a statement of reasons, together with judicial power to review the legality of a prosecutor's refusal to grant a defendant entry to a PTI program, were both consistent with the state's constitutional doctrine of separation of powers. According to the court, an inherent part of judicial power was "the judiciary's authority to fashion remedies," a proposition connected to the traditional view that "sentencing is a judicial function."\footnote{Id. at 612, n.5.} Because the decision to suspend prosecution of a case and admit a defendant to a PTI program is a "quasi-judicial decision," any separation of powers problem dissolved.

The court also invoked traditional administrative law practice. Even if the prosecutor's decision were viewed as purely executive, judges are "commonly called upon to review the rationality of decisions by other branches of government or agencies with special expertise."\footnote{Id. at 615. The court's examples included judicial review of Civil Service Commission and Parole Board decisions. See Monks v. New Jersey State Parole Board, 277 A.2d 193 (N.J. 1971) (ruling that the parole board must provide statement of reasons to inmates denied parole). The court was also quick to distinguish this control over prosecutor access to the PTI programs from any meddling with the prosecutor's charging power, because PTI programs use the power of the court to compel a defendant to submit to a correctional program. Leonardis, 375 A.2d at 617; see also People v. Super. Court of San Mateo, 520 P.2d 405 (Cal. 1974); Sledge v. Super. Ct. of San Diego, 520 P.2d 412 (Cal. 1974).} Finally, the court drew from the administrative law context to set the scope of review. A defendant must establish that the prosecutor's denial of admission was arbitrary and capricious,\footnote{Leonardis, 375 A.2d at 618. Guideline 8, issued by the Supreme Court during the period between Leonardis I and Leonardis II, invoked the arbitrary and capricious standard. The Court in Leonardis II emphasized the deferential nature of this standard: a defendant must "clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of his discretion." 375 A.2d at 618.} a familiar standard for courts reviewing the determinations of administrative agencies.\footnote{See 5 U.S.C. § 706 (2004).}
for 15 years, \(^{22}\) but in 1992 the New Jersey Supreme Court extended those early attempts to guide prosecutor decisions. In *State v. Lagares*\(^ {23}\) and *State v. Vasquez*,\(^ {24}\) the court interpreted two statutes that gave the prosecutor control over mandatory increases in sentences for drug crimes. One of those statutes provided that after a conviction for a narcotics crime, a defendant with a prior record of narcotics offenses “shall upon application of the prosecuting attorney be sentenced by the court to an extended term” of imprisonment.\(^ {25}\) The court held that the legislature’s preference for uniform sentences in drug cases, together with the state’s separation of powers doctrine, required prosecutors to follow general guidelines to assure uniform decisions when exercising this exceptional “delegated” sentencing power.\(^ {26}\)

While the court in *Leonardis* assigned itself drafting duties to create the guidelines for prosecutors to follow, the *Lagares* court instead delegated the drafting of guidelines to the state attorney general: “Because we are not familiar with all of the factors that law-enforcement agencies might consider significant in determining whether a defendant should be exempted from an extended sentence, we request that the Attorney General, in consultation with the various county prosecutors, adopt guidelines for use throughout the state.”\(^ {27}\)

The court also carried forward the *Leonardis* requirement that prosecutors state reasons in particular cases for a refusal to waive the sentence enhancement. Equally important, the court insisted that

\(^{22}\) *But see* *State v. Warren*, 558 A.2d 1312 (N.J. 1989) (prohibiting the use of plea agreements that result in a “negotiated sentence,” because it encroaches on the judicial responsibility in sentencing).


\(^{25}\) *N.J. STAT. ANN.* § 2C:43-6f (West 2004); *see also* *N.J. STAT. ANN.* § 2C:35-12 (West 2004) (providing that in the case of any person guilty of possessing drugs with intent to distribute within 1000 feet of a school, the court upon conviction “shall impose” the mandatory sentence “unless the defendant has pleaded guilty pursuant to a negotiated agreement . . . which provides for a lesser sentence”).

\(^{26}\) *Vasquez*, 609 A.2d at 37. Note that the court evolved from calling prosecutor guidelines constitutionally tolerable in *Leonardis* to calling them constitutionally required in *Lagares* and *Vasquez*.

separation of powers principles, and the traditional judicial role in sentencing, preserved a place for judicial review of the prosecutor’s decision. 28

The opinions in Lagares and Vasquez changed the Leonards principles in important ways. First, they extended the trio of consistency requirements—guidelines, a statement of reasons from the prosecutor, and judicial review—to a new setting. While Leonards dealt with prosecutor choices to block defendant entry to pre-trial programs, the 1992 cases addressed a point in the process closer to traditional plea bargaining. 29 Second, the opinions in the 1992 cases deferred more carefully to prosecutorial decisions regarding plea bargaining by asking the attorney general to generate internal guidance rather than imposing guidelines drafted by judges. By the same token, the Lagares and Vasquez cases described a somewhat more vigorous standard of review for the courts to use when checking on the prosecutor’s reasoning. 30

After this expansion of the consistency trio in 1992, New Jersey prosecutors responded by drafting statewide guidelines for sentence extensions in drug cases. 31 The courts quickly signaled a willingness to enforce those requirements; they remanded cases when prosecutors failed to file a statement of reasons. 32 For instance, when prosecutors in particular cases declared that defendants who failed to appear at trial proceedings would receive no prosecutorial waiver of the sentence extension, the courts noted that this “failure to appear” factor did not appear in the statewide guidelines: “If prosecutors intend to employ the

28. Lagares, 601 A.2d at 704-05.
29. Both of the statutes in these cases gave prosecutors two points of control: the decision to file the charge that makes the defendant eligible for an extended sentence, and the invocation of the extended sentence itself. The statute also makes the plea agreement regarding any reduced amount of an enhanced sentence binding on the court. Cf. State v. Oliver, 689 A.2d 876 (N.J. Super. Ct. Law Div. 1996) (distinguishing Lagares and Vasquez from filing of qualifying third “strike” felony under Three Strikes and You’re In statute).
30. Unlike the Leonards court, the opinions in Lagares and Vasquez did not emphasize the deferential nature of the arbitrary and capricious standard of review.
factor in the decision-making process, the factor will have to be incorporated in the guidelines.”

Further, the courts insisted that the statewide rules avoid automatic exclusions, and instead employ looser standards to guide the prosecutor’s decision. When prosecutors properly relied on guideline factors and explained their relevance in particular cases, however, courts readily affirmed their decisions on the mandatory sentence extensions.

The New Jersey Supreme Court ratcheted up its expectations for prosecutor guidelines a few years later when it insisted that the state attorney general, rather than the Prosecuting Attorneys for each county, keep effective control of the charging guidelines. In State v. Gerns, the court was asked whether a defendant fulfilled his obligations under a plea agreement calling for “cooperation” in an investigation by giving his best efforts in an unfruitful investigation. The court noted that various counties had different guidelines on this question, because the statewide guidelines encouraged county prosecutors to create their own guidelines, using the statewide version as a model. The court flagged these county variations as a threat to the uniformity required under the statutory scheme and the constitutional separation of powers. Rather than ordering changes to the county guidelines, the court asked the attorney general to review sentencing practices in the state and to report back to the court.


34. Shaw, 618 A.2d at 301 (“Not every violation of the waiver conditions by an accused defendant will result in automatic imposition of a mandatory sentence. The automatic imposition of enhanced punishment for a non-appearance without holding a hearing or considering an explanation would be unwarranted.”); see also State v. Jimenez, 630 A.2d 348, 353 (N.J. Super. Ct. App. Div. 1993) (upholding prosecutor guidelines calling for sentence extensions in absence of cooperation by defendant in normal cases, but “there may be situations in which a prosecutor’s rigid insistence upon the defendant’s assistance in ferreting out crime might so offend the interests of justice as to compel judicial intervention”).


37. Id. (“The issue of sentence disparity is most appropriately addressed on a comprehensive basis rather than considered and resolved in the narrow context and under the procedural constraints of an adversarial proceeding. Accordingly, we request the Attorney General to undertake a review of the state-wide sentencing practices and experience under the Attorney General Guidelines and to furnish the Court with the results of that review as well as any forthcoming recommendations.”).
The second shoe dropped almost two years later in *State v. Brimage*. The newly-revised guidelines no longer authorized county prosecutors to create their own guidelines using the state guidelines merely as a model. Instead, the new state guidelines set out a "base minimum plea offer" that prosecutors were allowed to make for various crimes, and authorized the county prosecutors to modify those guidelines by moving up from that base. That is, county guidelines could increase the lowest sentence that a prosecutor could offer in exchange for a guilty plea. Despite the changes to the guidelines, the defendant in *Brimage* objected that the Somerset County guidelines allowed prosecutors to offer a less favorable plea deal than he might have received in other counties. The New Jersey Supreme Court agreed that the revised drug charging guidelines still left too much room for variation from county to county.

As in prior cases, the court in *Brimage* emphasized that the prosecutor here was effectively making a sentencing decision. The prosecutor’s motion to request a mandatory sentence enhancement after conviction for the relevant drug crime was binding on the sentencing judge. Thus, both separation of powers principles and the legislative policy favoring uniform sentences in drug cases—both reasons already explored in *Lagares* and *Vasquez*—made it necessary for prosecutors to follow uniform statewide guidelines.

The *Brimage* court also added a new reason to support this outcome: any legal restrictions on the discretion of *sentencing judges* should apply equally to *prosecutors*. New Jersey sentencing statutes in many different areas were moving toward less discretionary sentencing. Because the law provided narrower permissible ranges and specific aggravating and mitigating factors for judges to consider at sentencing, it was also necessary to constrain the sentencing discretion of prosecutors. Legal restrictions on the power of judges and prosecutors to individualize sentences need not be identical, but they should be roughly symmetrical.

According to the *Brimage* court, the new statewide guidelines could account for different prosecutorial, judicial, and correctional resources available in each county. Nevertheless, any "flexibility on the basis of resources or local differences must be provided for and explicitly

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39. *Id.* at 1104-06; see also *State v. Rolex*, 747 A.2d 311, 315 (N.J. Super. Ct. App. Div. 2000) (finding that guideline allowing county prosecutors to determine whether to grant sentence benefit for defendants who fail to appear is overly vague; "the parties, including the Attorney General, should address the question whether it is feasible to devise more specific guidelines").
40. *Brimage*, 706 A.2d at 1106.
detailed within uniform, statewide guidelines.”\textsuperscript{41} The attorney general issued new guidelines soon after the court’s decision, now known as “\textit{Brimage} guidelines,” and reined in the available plea offers and limited the factors considered during plea negotiations across the state.\textsuperscript{42}

The New Jersey Supreme Court continues to reinforce and extend its trio of consistency devices: internal prosecutor guidelines, statements of reasons from individual prosecutors, and deferential review by courts for compliance with the guidelines. The court has extended this regime to certain collateral sanctions that turn on a prosecutorial recommendation.\textsuperscript{43} It has hinted that permissive joinder practices by prosecutors might ultimately require some uniform guidelines, because sentences under the state’s “Three Strikes” law depend so heavily on the number of previous separate convictions.\textsuperscript{44} A concurring justice has even suggested that prosecutorial charging and declinations more generally should now become subject to statewide attorney general guidelines to promote consistency across a broader range of cases.\textsuperscript{45}

This consistency strategy also finds favor outside the judiciary, as both the attorney general and the state legislature have used these techniques even when the state courts did not directly order them to do so. The New Jersey Attorney General created statewide prosecutor guidelines to regularize decisions about various collateral sanctions.\textsuperscript{46}

\begin{itemize}
\item \textsuperscript{41} Id. at 1107.
\item \textsuperscript{42} \textit{See} The \textit{Brimage} Revisions, N.J.L.J. Oct. 11, 2004, at 22.
\item \textsuperscript{43} \textit{See} Flagg v. Essex County Prosecutor, 561, 796 A.2d 182 (N.J. 2002) (extending \textit{Lagares} to statute allowing prosecutor to waive job forfeiture sanction for public employee who is convicted of a crime; court suggests 16 factors for Attorney General to consider in drafting guidelines).
\item \textsuperscript{44} State v. Livingston, 797 A.2d 153, 163 (N.J. 2002) (“We are unaware of any abuse occurring based on our permissive joinder practice. Should guidelines become necessary, we will consider asking the Attorney General to draft guidelines to aid prosecutors in the use of their discretion as we have in the past.”).
\item \textsuperscript{45} State v. D.A.V., 823 A.2d 34, 36-37 (N.J. 2003) (Albin, J., concurring) (urging Attorney General to promulgate guidelines to assist prosecutors in choosing whether to prosecute under one or the other statute in case involving prosecutor’s decision to charge defendant with second degree endangering the welfare of a child rather than fourth degree abuse or neglect of children).
\end{itemize}
The legislature also took the hint from the supreme court. When it revised the state laws regarding juvenile delinquency in 2000, the new legislation required the attorney general to create statewide guidelines to improve the consistency of the prosecutor's selection between the adult and juvenile systems. Of course, the appellate courts carried the legislature's move a step further, and interpreted the statute to allow judicial review of the prosecutor's decision in particular cases.47

Once the New Jersey Supreme Court started to characterize prosecutorial decisions as components of sentencing in the 1970s, the path to regulation became clear. The entire series of appellate cases promoted statutory coherence by applying some of the uniformity obligations that sentencing statutes imposed on judges to prosecutors. By prompting the prosecutors to create guidelines and by enforcing their use by individual prosecutors, the New Jersey courts forced a sharing of power over criminal sentencing, along with a sharing of the burdens of uniformity. The state legislature did nothing to reverse this new division of authority, and even enacted similar prosecutor guideline provisions of its own. The attorney general and the county prosecutors, by enacting and using the guidelines, reinforced the rule of law and, as we will see in Part III, proved that such internal guidance can have real effects.48

III. Ground-Level Effects of Prosecutor Guidelines

The cases described above are remarkable appellate decisions, offering a distinctive vision of the power of prosecutor guidelines and the prospects for judicial review of prosecutorial choices. But does the New Jersey case law bear any resemblance to the New Jersey reality? Here, as in the rest of the world, there can be profound differences between the world visible through the lens of appellate opinions and the world as it exists at the courthouse level.

My conclusions must remain tentative for now, but there are two

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48. For an exploration of the social benefits of transparent adherence to rule of law values, see Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 989 (2000) (noting that "the key to the effectiveness of legal authorities lies in creating and maintaining the public view that the authorities are functioning fairly"); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 363 (2001) (reviewing survey data showing that the effectiveness of police "lies in their ability to gain acceptance for their decisions among members of the public").
basic reasons to believe that the appellate cases surveyed here created real effects on the ground, for good and for ill. First, the content of the guidelines includes some concrete features that ought to influence actual practices. Second, the state's prosecutorial leadership has treated the guidelines as if they have real consequences; they revise the guidelines from time to time to effect policy changes.49

Consider first the type of content in these guidelines. Written guidelines for line prosecutors are quite common, particularly in larger offices where bureaucratic realities prevent the elected prosecutor from monitoring all the work of the office closely.50 The content of such guidelines falls into several different categories. Some of the guidelines contain procedural limitations, instructing the line prosecutor to obtain approval from supervisors for certain charges, dismissals, or sentence recommendations. Such guidelines may not place any substantive limits on the outcomes available to the prosecutor, but they promote deliberation and can reduce the idiosyncrasies of a single prosecutor.51

Guidelines may also give prosecutors loose substantive guidance, by listing factors for the prosecutor to consider in a given case.52 Such factor-list guidelines have weaker binding power, for the factors might simply restate the obvious without instructing a prosecutor how to weight the various factors.53 Still, even a factor-list guideline can influence practices if it creates a more uniform mental checklist for prosecutors to use in every case; if the list of factors purports to be exclusive, then it becomes most interesting to ask what is not included on the list.54

The guidelines that the New Jersey Attorney General issued after the judicial opinions canvassed in Part I include some elements of procedural policies. In addition, some sections of the guidelines include substantive limits that have more binding power than factor-list

49. See Judith A. Greene, New Jersey Sentencing and a Call for Reform 11 (2003), available at http://www.famm.org/pdfs/82750_NewJersey.pdf (last visited Feb. 5, 2005) (New Jersey defense attorneys "report that prosecutors generally follow the guidelines to the letter, taking advantage of every opportunity to wield a mandatory minimum or an extended prison term as a tool for plea bargaining in drug cases. Exceptions occur only in a few high-volume jurisdictions—Essex and Hudson counties.").


52. See NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS (2d ed. 1991).


54. The presence or absence of some considerations marks one of the important differences in Department of Justice policies between 1987 and the present. See NORA DEMLEITNER, ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 117-68 (2004).
guidelines. The Brimage Guidelines directly limit outcomes that prosecutors can reach during plea negotiations. In effect, they place price caps on the offers that a prosecutor can make.\footnote{Cf. N.Y. CRIM. PROC. LAW § 220.10 (McKinney); Colin Loftin, Milton Heumann, & David McDowall, Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control, 17 LAW & SOC’Y REV. 287 (1983) (evaluating a ban on plea bargains for targeted firearms crimes).


Generally speaking, charge bargains should be the first target for internal regulation because sentence bargains involve decisions where prosecutors must share authority with legislators and judges, while prosecutors operate more unilaterally when it comes to charge bargains. See Ronald F. Wright & Marc L. Miller, Honesty and Opacity in Charge Bargains, 55 STAN. L. REV. 1409, 1410-11 (2003). Nevertheless, the New Jersey strategy of promoting self-regulation in the arena of sentence bargains makes sense because the appellate cases target specialized statutes which give the prosecutor’s sentence recommendation binding effect, precisely where the power is not shared.
will allow. But the category of content in the New Jersey guidelines makes them more difficult for prosecutors to ignore or evade than would be the case with process or factor-list guidelines.

The second clue showing that these guidelines are more than window dressing is that the state Department of Law and Public Safety leaders treat them as if they matter. These leaders change the policies when they want to shift their emphasis or strategy in crime policy. For instance, Governor Christie Todd Whitman ordered changes to the drug charging guidelines in 1996 to make drug enforcement, particularly drug sales near school property, a more urgent priority for law enforcement officers and prosecutors. Further amendments to the guidelines appeared in 1999, 2000, and 2001.

More recently, Attorney General Peter Harvey issued revised Brimage Guidelines. Harvey was convinced, after an informal conversation with a trial judge, to reconsider drug enforcement in the state and he began consultations with the state's prosecutors, defense attorneys, judges, and others. The end result of this policy review was a lengthy (104-page) revised version of the guidelines.

The basic thrust of the revised guidelines was to make them depend less on the crime of conviction and to account for more specific offense characteristics, such as the amount of drugs and the presence of a weapon, and offender characteristics such as prior criminal record or gang membership. The revised drug charging guidelines were explicitly modeled on sentencing guidelines, allowing points for


aggravating and mitigating factors, and authorizing prosecutors to grant "downward departures" from the guidelines in cases where a defendant offers substantial assistance in the investigation or in cases where the government must depend on weak evidence. The revisions reduced the value of "authorized plea offers" available in cases involving defendants associated with gangs and those who carry weapons, while at the same time they made more lenient offers possible for other drug defendants. This re-scaling of plea practices was especially important for cases involving drug sales in school zones, because an urban-suburban divide was stark for these crimes. In most urban areas, virtually all drug sales happened within 1000 feet of a school, contributing to a huge racial imbalance in the prison populations.

Many practicing attorneys and legal scholars conclude that meaningful guidelines for prosecutors are impossible to draft. According to these scholars, the rules will either be phrased so generally that they will change no prosecutor choices, or they will be phrased too specifically and lead to improper outcomes in some cases because the rules cannot anticipate the complex reality of criminal charging.

The New Jersey experience, however, makes this critique less believable. Over time, prosecutors can draft guidelines on their own that promote some reasonable uniformity in case processing, while allowing

64. id. §§ 12, 13.
65. id. §§ 2, 6, 10, 11.
66. see gallagher, supra note 62; schuppe, supra note 62; seiderstein, supra note 62.
67. see arthur i. rosett & donald r. cressey, justice by consent: plea bargains in the american courthouse (1976) (argues for individualized justice, futility of efforts at prosecutorial consistency); pamela j. utz, settling the facts: discretion and negotiation in criminal courts (1978) (consistency must give way to individualized prosecutor decisions); kenneth j. melilli, prosecutorial discretion in an adversary system, 1992 byu l. rev. 669, 674-675 (only some aspects of prosecution, such as type of offense charged, lend themselves to categories that can be captured in rules); lloyd e. ohlin, surveying discretion by criminal justice decision makers, in discretion in criminal justice: the tension between individualization and uniformity i (lloyd ohlin & frank remington eds., 1993) (complexity is a fundamental attribute of the variety of problems in criminal justice; prosecutors must respond with flexibility); lief h. carter, the limits of order (1974); boerner, supra note 5 (reviewing reasons that prosecutor guidelines should not be enforceable); stanley z. fisher, in search of the virtuous prosecutor: a conceptual framework, 15 am. j. crim. l. 197 (1988); frank j. remington, the decision to charge, the decision to convict on a plea of guilty, and the impact of sentence structure on prosecution practices, in discretion in criminal justice: the tension between individualization and uniformity 73 (lloyd ohlin & frank remington eds., 1993) (we lack the knowledge necessary to decide how best to structure the charging decision so that it focuses on how best to achieve the social control objectives of criminal justice); but see david a. sklansky, starr, singleton, and the prosecutor's role, 26 fordham urb. l.j. 509, 532 (1999) (discussing the inevitable application of general principles to specific cases for prosecutors, even in absence of formalized guidelines).
for the variety that criminal justice makes necessary. Indeed, there are many parallels between this task and the maturing efforts to create sentencing guidelines that strike a useful balance between uniformity and individualization. The familiar sentencing concept of a favored “presumptive” outcome, coupled with potential “departures” from the norm that are discouraged by some degree of review and possible reversal, already exists in embryonic form in the Brimage guidelines for prosecutors. The successes and failures of sentencing guidelines over the last two decades have marked the path for the prosecutorial guidelines that might follow behind.

IV. Judges as Catalysts for Prosecutor Self-Regulation

The judgment that these guidelines can make a difference depends in no small part on the judicial review feature. These New Jersey courts not only required prosecutors to draft guidelines that could collect dust (or viruses) while sitting unused on prosecutors’ shelves (or hard drives). The decisions also announced that prosecutors must routinely explain their sentence “recommendations” with reference to the guidelines, and that trial judges would review those choices in particular cases. This judicial review creates some pressure for uniform application of the guidelines; it also creates ongoing pressure for adaptation of the guidelines in light of experience.

New Jersey courts made this review possible by turning the tables on traditional separation of powers arguments. While it is routine for courts to steer clear of prosecutor charging and plea bargaining practices because of concern about interfering with a core executive function, the opinions in New Jersey argued just the opposite. Because prosecutor charging decisions, particularly in connection with mandatory minimum sentencing, have sentencing implications, they encroach on judicial turf. Principles of separation of powers actually compel judges to prompt the creation of guidelines. Further, the statutes that impose obligations of uniformity on sentencing judges dictate the level of regulation that prosecutors must endure. More serious efforts by the legislature to force more uniform judicial sentencing would get passed along to prosecutors

68. See Steven Chainenson, The Next Era of Sentencing Reform, Emory L.J. (forthcoming 2005). Because the prosecutors themselves generate the guidelines perhaps the best parallel would be a state like Delaware or Virginia, in which judges themselves were integral to the creation of sentencing guidelines.


70. For another effort to reconcile limited judicial review of prosecutor charging decisions with separation of powers principles, see Wayne A. Logan, A Proposed Check on the Charging Discretion of Wisconsin Prosecutors, 1990 Wis. L. Rev. 1695.
as the courts shape the creation and enforcement of prosecutor uniformity guidelines.

While the New Jersey doctrine does use a creative reversal of old arguments, it also draws on familiar precedents to assure that judicial monitoring will not become disabling or distorting for prosecutors. The Brimage Guidelines embody a classic form of judicial review in administrative law, which empowers the court to overturn an agency action if it is “arbitrary and capricious.”71 The judge insists that the agency explain its reasoning at the time of the decision, finds some assurance that the agency considered the major alternatives, and looks for some reasonable connection between the facts that the agency believes to exist and the policy chosen.72 Experience has allowed the courts and various administrative agencies to form productive partnerships as the agency takes the lead in setting policy, while the courts enforce fidelity to law and a deliberative policy process.73 This productive, if not always friendly, relationship might be taking shape in New Jersey between prosecutors and judges on sentencing questions.

V. Conclusion—Are Consistent Prosecutors a Good Thing?

I close this brief case study with a question about one of its underlying assumptions. Granted, New Jersey courts might have succeeded to some degree in promoting more uniform application of legal standards by prosecutors in making their plea bargain choices. But is greater uniformity and accountability to law a desirable trait for American prosecutors? The answer remains in doubt, because in the United States today criminal defendants face extraordinarily severe sentences. Perhaps the only way to remove some of the severity is to allow prosecutors to operate quietly, dispensing mercy in a few cases, even if it is done inconsistently. Under this view, it may be better to have unequal justice for some than equal injustice for all.74

For now, however, I remain hopeful about the virtues of law and transparency, even in the prosecutor’s office—especially in the prosecutor’s office. The public routinely calls for disappointing and

71. In fact, the New Jersey courts have brought to life a venerable proposal of Kenneth Culp Davis that courts invoke the “required rulemaking” doctrine to force prosecutors and other criminal justice “administrators” to pass administrative rules to regulate their own discretion. See KENNETH C. DAVIS, DISCRETIONARY JUSTICE 57-59, 220-21 (1969).
73. Id. at 397-403.
74. Recall that New Jersey defense attorneys by and large opposed the application of the 1998 guidelines because they resulted overall in more severe sentences for drug defendants.
destructive policies in criminal justice, policies that tempt the professionals in the system to evade such unhappy outcomes, invisibly and inconsistently.\textsuperscript{75} Yet voters are also capable of learning about the full costs of abstract punishments when they apply not just to hypothetical worst-case defendants,\textsuperscript{76} but to a full range of men and women with families and lives, offenders whose sentences force the government to fund an expensive corrections program for the entire group. When prosecutors declare their plans openly and allow others to watch those plans unfold in particular cases, the public can better judge whether to change course. And if the public, despite full information about prosecutorial practices and correctional costs, endorses cruel and pointless policies, I will face a deeper dilemma about democracy.

