SENTENCING COMMISSIONS AS PROVOCATEURS OF PROSECUTORIAL SELF-REGULATION

*Ronald F. Wright**

This Essay examines potential efforts by sentencing commissions to influence the work of prosecutors, especially the charges they select and the plea bargains they enter. The practical objections to prosecutorial guidelines issued by a sentencing commission emphasize two problems: the linguistic impossibility of creating meaningful guidelines and the political impossibility of promulgating them. Experience in the states, however, casts doubt on each of these objections. Some states have codified preexisting prosecutorial guidelines generated by prosecutors themselves, while other states have prompted prosecutors to develop their own internal guidance.

Prompted self-regulation of prosecutors will prove most effective when the ambitions for guidelines are incremental and when the use of those guidelines is monitored from the outside. Working in tandem, commissions and courts can gradually shift back to prosecutors some of the regulatory burdens of producing uniform sentences, leaving more room for judges to dispense mercy. To reinforce this incremental development, the most important value that prosecutorial guidelines should embody is transparency for defendants and for voters.

INTRODUCTION

Regulation, it is said, changes the relations between competitors: Time and again, some competitors escape the reach of regulators while others must live with greater costs or lesser flexibility of the rules.[1] This insight from regulatory theory reveals something important about the world of criminal sentencing in the United States, where state and federal governments have created a body of new regulations over the last generation. One way to appreciate the accomplishments of state sentencing commissions and to see the limits they now face is to think about the current imbalance of regulatory burdens on different sentencing actors.

The new regulators—sentencing commissions—have adopted guidelines that limit the options available to only one set of regulated parties—sentencing judges. Meanwhile, the prosecutors, who compete with

* Professor of Law, Wake Forest University. I am grateful for insights and suggestions from Doug Berman, Frank Bowman, Jennifer Collins, Nora Demleitner, Marc Miller, Michael O'Hear, Sid Shapiro, Kate Stith, Michael Tonry, Frank Zimring, and the participants at the *Columbia Law Review* Symposium, *Sentencing: What's at Stake for the States?*

1. See Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air 44–45 (1981) (tracing creation of environmental rules with differential impact on coal producers in different regions); Geoffrey P. Miller, Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine, 77 Cal. L. Rev. 83, 86 (1989); Richard A. Posner, Taxation by Regulation, 2 Bell J. Econ. & Mgmt. Sci. 22, 41–42 (1971); George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3, 5 (1971); James Q. Wilson, The Politics of Regulation, *in* The Politics of Regulation 357, 367–72 (James Q. Wilson ed., 1980).

judges to influence the sentences imposed and served, remain outside the grasp of the regulators. They continue to select charges as before, drawing on the large collection of crimes available under the criminal code to apply to any given factual pattern.[2] They continue to bargain with defendants, encouraging them to give up trial rights in exchange for reduced charges or more generous sentence requests.[3]

Because the regulatory burden of sentencing guidelines now falls on judges rather than prosecutors, long-term trends in the law of sentencing have made prosecutors more powerful relative to judges.[4] Thus, sentencing guidelines have become one force among many that combine to give prosecutors extraordinary power—maybe unsurpassed power—in the

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2. See Paul H. Robinson & Michael T. Cahill, Can a Model Penal Code Second Save the States from Themselves?, 1 Ohio St. J. Crim. L. 169, 170–73 (2003); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 537–38 (2001).

3. Prosecutor requests for particular sentencing outcomes have been influential. See Deborah Dawes et al., N.C. Sentencing & Policy Advisory Comm'n, Sentencing Practices Under North Carolina's Structured Sentencing Laws 25 (2002), available at http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/disparityreportforweb.pdf (on file with the *Columbia Law Review*) (finding that North Carolina judges often agree to recommended type and length of sentence negotiated by prosecutor and defense attorney in plea agreement); John Gleeson, Sentence Bargaining Under the Guidelines, 8 Fed. Sent'g Rep. 314, 314 (1996) (responding to finding that prosecutors often "'manipulate'" facts in presentence reports to "'protect'" plea agreements, which are not binding on the court (citations omitted)).

4. An overwhelming number of academics, judges, and others (including prosecutors in private conversations) make this point. See, e.g., United States v. Boshell, 728 F. Supp. 632, 637 (E.D. Wash. 1990); United States v. Roberts, 726 F. Supp. 1359, 1366 (D.D.C. 1989); Linda Drazga Maxfield, U.S. Sentencing Comm'n, Survey of Article III Judges on the Federal Sentencing Guidelines 45 (2003), available at http://www.ussc.gov/judsurv/jsfull.pdf (on file with the *Columbia Law Review*); Albert W. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. Pa. L. Rev. 550, 563–64 (1978) [hereinafter Alschuler, Sentencing Reform]; Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681, 1713, 1723–24 (1992); William J. Powell & Michael T. Cimino, Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?, 97 W. Va. L. Rev. 373, 382, 389 (1995); Elizabeth A. Parsons, Note, Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines, 29 Val. U. L. Rev. 417, 452 (1994).

Criticism of this alleged increase in prosecutorial power emphasizes that prosecutors have always held the powers they now exercise under sentencing guidelines and that any increase in prosecutorial power only holds true in relative terms when judges lose some of their sentencing discretion. See David Boerner, Sentencing Guidelines and Prosecutorial Discretion, 78 Judicature 196, 197–98 (1995) (discussing increased prosecutorial discretion produced by sentencing guidelines and indicating that increase may be due to legislative design); Stephen Breyer, Justice Breyer: Federal Sentencing Guidelines Revisited, Crim. Just., Spring 1999, at 28, 31 (contending that prosecutors already possessed most of their sentencing powers before new sentencing statute); James B. Burns et al., We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution), 91 Nw. U. L. Rev. 1317, 1318–19 (1997) (suggesting that shift of power away from judges strengthened legislature more than prosecutors).

American criminal justice system.[5] Prosecutors have become more powerful through the potent combination of far-reaching and duplicative criminal codes, relatively few resources available for trial, and nondiscretionary sentencing laws. While judges now find themselves increasingly accountable to the law of sentencing, prosecutors have accumulated new powers and encounter no new regulation of their authority.[6]

Despite these powerful regulatory trends, sentencing commissions might have the will and the strength to swim against the current. Commissions could structure the choices of prosecutors, just as they have already shaped and limited the sentencing decisions of judges. Academics have pointed to the disequilibrium between prosecutors and judges and have looked optimistically to prosecutorial guidelines as the next frontier for sentencing commissions to explore.[7] A few state statutes that create sentencing commissions have invited such an effort by asking commis-

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5. See Albert W. Alschuler, Monarch, Lackey, or Judge, 64 U. Colo. L. Rev. 723, 723 (1993) [hereinafter Alschuler, Monarch] (noting that sentencing guidelines restrict discretion of judges, not discretion of prosecutors). This trend is particularly true in the federal system, where changes in sentencing law are one factor contributing to a long-term increase in the relative power of prosecutors. See Marc L. Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1252–59 (2004) (discussing increased power of federal prosecutors); Ronald F. Wright, Trial Distortion and the End of Innocence in Federal Criminal Justice 76–80 (Sept. 15, 2004) (unpublished manuscript, on file with the *Columbia Law Review*) (concluding that federal sentencing reforms have resulted in enhanced power of federal prosecutors to increase impact of guilty plea discount).

6. For one recent example of additional grants of power to prosecutors, consider the Feeney Amendment, which consolidated prosecutorial power over "acceptance of responsibility" discounts for federal offenders while restricting the power of judges to depart down from guideline sentence ranges without a prosecutor's motion. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 650, 671 (amending 28 U.S.C. 994); see also Stephanos Bibas, The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain, 94 J. Crim. L. & Criminology 295, 296–97 (2004).

My point here is not that prosecutors face no meaningful legal constraints. In addition to the loose and uneven control exerted by the structure of the criminal code, prosecutors face limits from grand juries, rules of evidence, and other sources. See, e.g., N.Y. Crim. Proc. Law § 190.75 (McKinney 1993) (requiring dismissal of indictment for insufficient evidence); Mass. R. Crim. P. 25(b)(2) (permitting judge to enter guilty verdict for lesser included offense after jury has returned guilty verdict for offense charged in indictment). My point instead is comparative: Compared to sentencing judges, prosecutors have less meaningful legal limits on their ability to influence sentences.

7. See Alschuler, Monarch, supra note 5, at 723 (arguing that "policy of restricting judicial but not prosecutorial discretion is incoherent"); Michael Tonry, Structuring Sentencing, 10 Crime & Just. 267, 311–15 (1988) (explaining that research finding lack of uniformity in charging decisions in Minnesota, Pennsylvania, and Washington validates need for prosecutorial guidelines); Michael Tonry, The Success of Judge Frankel's Sentencing Commission, 64 U. Colo. L. Rev. 713, 721 (1993) [hereinafter Tonry, Success] (suggesting that state sentencing commissions will have to "devise[ ] an adequate system for controlling plea bargaining under a sentencing guideline system").

sioners to consider "guidelines" for prosecutors to accompany the sentencing guidelines that already apply to judges.[8]

This Essay argues that sentencing commissions *already* hold the power and knowledge they need to begin equalizing the regulatory burden between prosecutors and judges. Prosecutorial accountability is within our reach. Sentencing commissions and other sentencing actors in some states have already taken the first steps in this direction, and the early state experience points to a promising strategy: self-regulation by prosecutors prompted by commissions and loosely enforced by judges. A sentencing commission can insist that prosecutors draft guidelines to govern their own charging and disposition choices, and then rely on judges to monitor the prosecutors' use of those guidelines. Based on experience with the earliest and least ambitious prosecutorial guidelines, the sentencing commission over time can prompt further rounds of increasingly meaningful self-regulation by prosecutors. The effort to bring more accountability and consistency to the work of prosecutors is momentous—perhaps there is no more ambitious agenda for criminal justice in our time—but sentencing commissions can begin the effort with small yet insistent steps.

A more balanced regulatory burden is not only possible; it could be desirable under the right conditions. Prosecutorial guidelines can produce more visible and consistent decisions within offices and to a lesser extent across offices in different jurisdictions. Admittedly, consistent rules for prosecutors might only give us more equal injustice for all, hamstringing prosecutors who might occasionally offer more favorable terms to some defendants. Stronger legal controls on prosecutors' choices, however, might leave more room for greater discretion of sentencing judges. Whether through broader guideline ranges or more permissive rules on departures, looser legal controls on judicial sentencing authority could be easier to justify in a world that monitors prosecutors more closely. As the regulatory balance between prosecutors and judges moves back into line, judges can once again exercise mercy.

Parts I and II of this Essay track the early efforts by sentencing commissions to regulate prosecutors' choices. For the most part, those efforts have been tentative, even timid. Legislatures have treated prosecutors' choices as a low priority for sentencing regulation, even though prosecutors present many of the same risks as other sentencing actors. In Kansas and elsewhere, the commissions briefly studied the issue of prosecutorial guidelines, but quickly backed away from the project.

There is no shortage of reasons for this timidity. Prosecutorial guidelines may be considered futile because the task of selecting and resolving criminal charges is so fact sensitive that general guidelines produce only meaningless bromides or substantively wrong answers. Further, such

8. See, e.g., Kan. Stat. Ann. § 74-9101(b)(10) (2002); Wash. Rev. Code Ann. § 9.94A.850(2)(b) (West 2003).

guidelines may be considered politically impossible because prosecutors command so much influence during the drafting and operation of guidelines.

State experience, however, tells us that prospects for prosecutorial guidelines are not so bleak. Part III reviews the work of states that have codified preexisting guidelines, originally created for internal use by prosecutors themselves. In Washington, the sentencing commission created a limited form of guidance, endorsed by the legislature, that codified some general principles of prosecution already in use in the largest prosecutor's office in the state. While this strategy produces only limited progress toward equalizing the regulatory burden between prosecutors and judges, it presents a viable starting point.

Part IV reviews surprising efforts in New Jersey to go a step further in the regulation of prosecutors. In this state, both judges and the legislature prompted prosecutors to develop their own internal guidance where none existed before. The ambitions for guidelines there were incremental, and judges monitored the prosecutors' use of their guidelines from the outside. Thus, a jurisdiction that until recently had no sentencing commission at all,[9] a state that had made no recent contributions to sentencing reform, put together the elements of the next generation of prosecutorial regulation.

Part IV goes on to consider how sentencing commissions might improve on the model that judges in New Jersey assembled. Although judges led the effort in New Jersey, sentencing commissions with established track records can add value that judges cannot, making New Jersey's insights about prosecutorial guidelines more pertinent and effective in many different jurisdictions. Working in tandem, commissions and courts can ratchet up the expectations for guidelines over time and spread the burdens of producing uniform sentences.

Finally, Part V of this Essay sketches the likely content of guidelines, drafted by prosecutors themselves but evaluated and orchestrated by sentencing commissions. To reinforce the ideal of incremental development, the most important value that prosecutorial guidelines should embody is transparency for defendants and for voters. At the beginning of a case, when defendants are deciding whether to exercise their trial rights, they should be able to anticipate what the prosecutor plans to charge and what range of sentences are realistic possibilities. Voters should be able to judge retrospectively whether the charges appropriately reflect defendants' conduct and local priorities in law enforcement. If prosecutors are accountable to the public for their work in particular cases, democratic

9. See N.J. Comm'n to Review Criminal Sentencing, First Interim Report to the Governor and the Legislature 2 (2005) (on file with the *Columbia Law Review*) [hereinafter N.J. First Interim Report] (noting that commission is in its first year of existence); Robert G. Seidenstein, Criminal Sentencing: A Hodge-Podge of Laws, N.J. Law., Feb. 2, 2004, at 1 [hereinafter Seidenstein, Criminal Sentencing] (noting establishment of New Jersey Commission to Review Criminal Sentencing).

control of criminal justice will be more regularized. Like sentencing guidelines for judges, guidelines for prosecutors vindicate the rule of law.

I. LEGISLATURES AND SELECTIVE REGULATION

When legislators began to remake the web of discretionary sentencing in the 1970s, many noted that all the strands were connected.[10] Both judges and prosecutors had some influence over the final sentences imposed, and both were unconstrained by meaningful legal limits. Parole boards also had much to say about the sentence actually served.[11] When legislators began to regulate more closely the roles of these different sentencing actors, they worried more about some types of discretion: Typically, they moved away from indeterminate and discretionary sentencing by eliminating parole boards entirely and establishing guidelines to cover judicial sentencing decisions.[12]

Judges fared better than parole boards under this new regulatory regime: Even though sentencing guidelines systems removed some judicial influence over the selection of the sentence announced after conviction, judges also gained more control over the actual time to be served by an offender.[13] Prosecutors, however, avoided regulation more effectively than the others; they emerged from the early generations of sentencing reform with much of their discretion still in hand. Although all three of these sentencing actors experimented with self-regulation in various forms,[14] legislatures imposed regulation only on parole authorities and

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10. See 1 Research on Sentencing: The Search for Reform 41–47 (Alfred Blumstein et al. eds., 1983); Franklin R. Zimring, Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform (Univ. of Chi. Law Sch., Occasional Papers No. 12, 1977).

11. See Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 11 (1976); see also Stephen J. Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733, 778–87 (1980) (arguing for judicial control of prosecutors through guidelines that allow only small incentive to plead guilty).

12. See Michael Tonry, Sentencing Commissions and Their Guidelines, 17 Crime & Just. 137, 139–41 (1993) [hereinafter Tonry, Sentencing Commissions] (describing evolution of sentencing reform in United States, from adoption of voluntary parole guidelines in 1970s to development of presumptive guidelines and sentencing commissions in 1980s). See generally Steven L. Chanenson, The Next Era of Sentencing Reform, 54 Emory L.J. (forthcoming Spring 2005) (manuscript at 6–10, on file with the *Columbia Law Review*) (explaining distinction between indeterminate and discretionary sentencing). Other states, like Pennsylvania, retained parole (and thus indeterminate sentencing) while using sentencing guidelines to reduce the discretionary nature of sentences. Id. (manuscript at 9 & n.33).

13. See Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Structures, 64 U. Colo. L. Rev. 679, 684–86 (1993) (describing adoption of "truth in sentencing" policies that serve to grant judges more control over time served by offenders).

14. See John C. Coffee, Jr., The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission, 66 Geo. L.J. 975, 1010–42 (1989) (discussing parole guidelines); Shari Seidman Diamond & Hans Zeisel, Sentencing Councils: A Study of Sentence Disparity and Its Reduction, 43 U. Chi. L. Rev. 109, 116–18 (1975) (discussing self-initiated regulation of judicial sentencing discretion);

judges. Sometimes the controls took the form of immediate statutory amendments to the available sentences (such as statutory minimum or presumptive sentences);[15] in other cases, legislatures created sentencing commissions with the ongoing power to create and amend sentencing guidelines.[16]

This pattern of regulatory burdens played out much the same in different states, regardless of the ideological makeup of the legislature. Whether Republican or Democrat, state legislators treated parole discretion and judicial sentencing discretion as greater concerns than prosecutorial discretion.[17] Perhaps the common perception that legislators share the same interest as prosecutors in the fight against crime explains such choices,[18] or perhaps the prosecutorial experience of some legislators explains why they saw no need to regulate prosecutors.[19]

Whatever reasons explain the outcome,[20] legislatures normally did not give much thought to prosecutors' choices when they began to re-

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Richard H. Kuh, Plea Bargaining: Guidelines for the Manhattan District Attorney's Office, 11 Crim. L. Bull. 55 (1975) (presenting self-initiated prosecutor office policy).

15. See, e.g., Cal. Penal Code § 1170 (West Supp. 2005); see also Andrew von Hirsch, The Sentencing Commission's Functions, *in* The Sentencing Commission and Its Guidelines 3, 5–7 (Andrew von Hirsch et al. eds., 1987) (describing legislative efforts at sentencing reform in 1970s).

16. See Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 Cal. L. Rev. 1471, 1505–16 (1993) (describing impact of substituting guidelines for judicial sentences).

17. See Richard S. Frase, The Uncertain Future of Sentencing Guidelines, 12 Law & Ineq. 1, 7–9 (1993) (describing bipartisan consensus for determinate sentencing).

18. See Boerner, supra note 4, at 198 ("[Another] reason for continued prosecutorial discretion is that legislators see prosecutors as their allies in achieving the substantive ends reforms are designed to produce."); Stuntz, supra note 2, at 534 (emphasizing that prosecutors and legislators share many goals and "[t]hus, legislators have good reason to listen when prosecutors urge some statutory change"); see also Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 762–64 (2005) [hereinafter Barkow, Administering Crime] (discussing membership features of Federal Sentencing Commission that "make it relatively slanted toward prosecutorial interests").

19. While it is true that prosecutors, like judges and parole board members, sometimes exercise their discretion to benefit criminal defendants, the most visible choices of prosecutors involve aggressive selection of charges and dramatic efforts in newsworthy trials. Sentencing judges make news when they impose an atypical sentence, typically less severe than the norm. Parole boards make headlines when they release an offender early.

20. Another possible reason legislators regulate parole boards most heavily, followed by judges and then prosecutors, is the political constituency that backs each of the three. Prosecutors and trial judges are elected in most jurisdictions and must develop local political support. Bureau of Justice Statistics, U.S. Dep't of Justice, State Court Organization 1998, at 34–49 tbl.7 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/sco9802.pdf (on file with the *Columbia Law Review*) (documenting that majority of state judges are elected); Carol J. DeFrances, U.S. Dep't of Justice, NCJ 193441, Prosecutors in State Courts, 2001, at 2 (2002), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf (on file with the *Columbia Law Review*) (noting that "[e]xcept for Alaska, Connecticut, the District of Columbia, and New Jersey, in 2001 chief prosecutors were elected"). Parole board members, on the other hand, are appointed and need not develop an electoral base. See Robyn L. Cohen, U.S. Dep't of Justice, NCJ 149076,

form discretionary sentencing laws. Ordinarily, statutes that restructured criminal sentencing remained silent about the various ways that prosecutors could change the bottom line. They did not create or authorize prosecutorial regulations, nor did they explicitly forbid such regulation.[21]

Nevertheless, prosecutorial discretion can present concerns that go to the heart of sentencing reform. Legislators say they worry about the certainty of the sentences that criminals will serve;[22] prosecutors' choices can make those sentences less certain. Legislators say they are concerned about the uniformity and proportionality of sentences to be imposed on comparable criminals who have committed similar crimes;[23] prosecutors' choices can make those sentences less uniform and proportional. Legislators hope to control the cost of correctional programs;[24] prosecutors can ask for more punishment than the voters are willing to fund.

Thus, despite the political power of prosecutors and the normally cooperative relationship between the legislature and prosecutors, occasionally a statute cuts against the grain and makes it possible for a sentencing commission to regulate prosecutors and judges alike. For instance, as the Kansas legislature debated a new package of sentencing guidelines for judges, it became clear that the law would increase the power of prosecutors relative to other sentencing actors, and the legisla-

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Probation and Parole Violators in State Prison, 1991, at 2 (1995), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ppvsp91.pdf (on file with the *Columbia Law Review*) (noting that parole release is "generally carried out by an appointed commission or board").

21. See, e.g., Mass. Gen. Laws Ann. ch. 211E, §§ 1–4 (Lexis 1999); Minn. Stat. Ann. § 244.09 (West 2003); N.C. Gen. Stat. §§ 164-35–164-47 (2003); Okla. Stat. Ann. tit. 22, §§ 1502–1518 (West 2003); Or. Rev. Stat. §§ 137.651–137.673 (2003); Jon Wool & Don Stemen, Vera Inst. of Justice, Changing Fortunes or Changing Attitudes?: Sentencing and Corrections Reforms in 2003, at 9 (2004) (describing mandate of sentencing commission in Alabama).

22. See David Boerner & Roxanne Lieb, Sentencing Reform in the Other Washington, 28 Crime & Just. 71, 84–85 (2001) (noting legislature's requirements for new guidelines stated, "All sentences were to be determinate; that is both the length and conditions were to be known 'with exactitude.'" (citation omitted)). More certain punishments might also contribute to the deterrent power of criminal sanctions.

23. See Richard S. Frase, Limiting Retributivism, *in* The Future of Imprisonment 83, 97–98 (Michael Tonry ed., 2004) [hereinafter Future of Imprisonment] (explaining that Minnesota legislature continues to provide strong support for state's guidelines system, which is based on principles of uniformity and proportionality); Richard S. Frase, The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines, 28 Wake Forest L. Rev. 345, 366 (1993) [hereinafter Frase, Role of the Legislature] ("The primary legislative purpose of the Guidelines was to reduce judicial discretion . . . without increasing either sentencing severity or prison populations.").

24. See Kathleen M. Bogan, Constructing Felony Sentencing Guidelines in an Already Crowded State: Oregon Breaks New Ground, 36 Crime & Delinq. 467, 469–70 (1990) (explaining that state sentencing reform is associated with legislative concerns about growth in prison population and increasing corrections expenditures); Richard S. Frase, Sentencing Guidelines in the States: Lessons for State and Federal Reformers, 6 Fed. Sent'g Rep. 123, 126 (1993) (same); Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980–2000, 29 Crime & Just. 39, 40 (2002) [hereinafter Wright, Counting the Cost] (same).

ture treated this as a concern worth further scrutiny.[25] As part of the guidelines package, the legislature passed a law that directed the sentencing commission to "develop prosecuting standards and guidelines to govern the conduct of prosecutors when charging persons with crimes and when engaging in plea bargaining."[26] The Washington legislature included a similar provision in its package of sentencing laws passed in 1981.[27] Although it does not happen routinely, legislatures can at times see the potential benefits of prosecutorial guidelines, benefits that largely parallel the effects of guidelines for judges.[28]

II. COMMISSIONS THAT WALK AWAY

How did commissions respond when a statute either compelled or allowed them to consider prosecutorial guidelines? In Kansas, after the passage of the statute in 1993 calling for the possible creation of prosecutorial guidelines, the commission duly assigned the task to a subcommittee. Gregory Waller, the elected prosecutor from the county including Wichita, the largest city in the state, was a member of the subcommittee.[29] The subcommittee carried out its statutory obligation, but without enthusiasm. It met several times, just long enough to collect a list of reasons why prosecutorial guidelines would never work.[30] The subcommittee recommended no further action, and the commission, which was preoccupied with many other challenges as it continued work on its guidelines, let the issue drop.[31]

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25. See David J. Gottlieb, A Review and Analysis of the Kansas Sentencing Guidelines, 39 U. Kan. L. Rev. 65, 80–82 (Criminal Procedure ed., 1991) (summarizing pending legislation and detailing problems with failure to regulate prosecutors along with judges).

26. Kan. Stat. Ann. § 74-9101(b)(10) (2002).

27. See 1981 Wash. Laws ch. 137, § 4(2)(b) (instructing commission to "devise recommended prosecuting standards in respect to charging of offenses and plea agreements").

28. These statutes represent another exception to the general rule that legislatures favor measures sought by law enforcement because in public choice terms criminal defendants have no effective lobby with the legislature. See, e.g., Ronald F. Wright, Parity of Resources for Defense Counsel and the Reach of Public Choice Theory, 90 Iowa L. Rev. 219, 219 (2004) (arguing that "[t]he odds that legislators will vote for [increased funding for indigent defense] are surprisingly good").

29. Interview with Richard Walker, former Chair, Kansas Sentencing Commission, and Chief Judge, Ninth Judicial District, Kansas, in Palo Alto, Cal. (Oct. 8, 2004) (on file with the *Columbia Law Review*).

30. See Interview with Paul Morrison, District Attorney, Johnson County, Kansas, in Santa Fe, N.M. (Aug. 16, 2004) (on file with the *Columbia Law Review*).

31. See David J. Gottlieb, Kansas Adopts Sentencing Guidelines, 6 Fed. Sent'g Rep. 158, 160 (1993) ("[T]here was no study of plea practice and no serious effort to consider binding or advisory plea guidelines. Now that the guidelines are in effect, the legislature has given the commission the power to suggest prosecutorial guidelines. None have been forthcoming as yet."); Interview with Barbara Tombs, Executive Director, Minnesota Sentencing Guidelines Commission, in Palo Alto, Cal. (Oct. 8, 2004) (on file with the *Columbia Law Review*).

The topic also attracted some attention in Minnesota, years after the initial adoption of sentencing guidelines for judges. The Minnesota Sentencing Guidelines Commission periodically takes stock of sentencing practices and plans its guidelines revisions to address the changing needs of the state.[32] During one such reevaluation in 2003, the Commission recognized that guidelines for prosecutors might advance many of the same objectives as sentencing guidelines for judges. Some commissioners asked whether prosecutorial guidelines should become an active part of the agenda for this politically mature commission. After several discussions, however, the Minnesota Commission tabled the issue and decided not to initiate prosecutorial guidelines.[33]

The commissions that walked away from efforts to create prosecutorial guidelines were convinced that they would not operate as well as sentencing guidelines for judges.[34] As key members explained to the rest of the Kansas subcommittee, prosecutorial gnidelines would either prove counterproductive (because they distort wise choices in particular cases) or meaningless (because they restate the obvious common wisdom).[35] The prosecutor's selection of charges and the resolution of those charges turn on countless facts, including the details of the crime, the quality of available evidence, the criminal record and other facts about the defendant, and the likelihood of prosecution by another agency.[36]

Standardized prosecutorial guidelines, it is said, may lead prosecutors to ignore relevant considerations or to place undue weight on some

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32. See Minn. Sentencing Guidelines Comm'n, Commission Meeting Minutes, at http://www.msgc.state.mn.us/meeting_minutes.htm (last visited Feb. 6, 2005) (on file with the *Columbia Law Review*) (listing agenda, which includes reviewing revisions and modifications of the guidelines, at past commission meetings); see also Richard S. Frase, Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota, 2 Cornell J.L. & Pub. Pol'y 279, 285–87, 290 (1993) (describing major commission modifications to guidelines).

33. Interview with Barbara Tombs, Executive Director, Minnesota Sentencing Guidelines Commission, in Washington, D.C. (Oct. 25, 2004) (on file with the *Columbia Law Review*); see also Richard S. Frase, Sentencing Guidelines in Minnesota, 1978–2003, 32 Crime & Just. 131, 133–34, 209 (2005) (noting that Minnesota's legislature never authorized commission to regulate plea bargaining and charging practices, and commission has never asked for such authority).

34. Perhaps state commissions were swayed by the discouraging experience in the federal system, where the more ambitious efforts under the "relevant conduct rules" to regulate prosecutors failed to show much progress. For a discussion of the negative example that the federal system provided to state commissions, see Dale G. Parent, What Did the United States Sentencing Commission Miss?, 101 Yale L.J. 1773, 1781–82 (1992) (contrasting Minnesota and federal approaches to use of uncharged conduct at sentencing).

35. Interview with Paul Morrison, supra note 30.

36. Nat'l Dist. Attorneys Ass'n, National Prosecution Standards § 42.3, at 125–26 (2d ed. 1991); cf. Mario Merola, Modern Prosecutorial Techniques, 16 Crim. L. Bull. 232, 237–38 (1980) (describing numerical scoring system embodied in Bronx district attorney's charging guidelines).

of the factors. Such "polycentric" decisions require the expertise of an insider to evaluate, and thus they should not be imposed by an outsider who may lack an appreciation for the shifting reality that determines the best answer in each case.[37] Courts often express a similar concern when they refuse, on separation of powers grounds, to second guess prosecutors' charging decisions.[38]

The converse danger for prosecutorial guidelines is also possible: Prosecutorial guidelines that account for the full range of factors that could be relevant, while giving prosecutors the flexibility to respond to a wide variety of factual settings, might prove meaningless.[39] They would

37. See Boerner & Lieb, supra note 22, at 122 ("The myriad factors that influence a judgment related to likely conviction of a particular crime . . . involve[ ] polycentric decision making not readily susceptible to judicial review."); see also Arthur Rosett & Donald R. Cressey, Justice by Consent: Plea Bargains in the American Courthouse 161–72 (1976) (arguing for individualized justice due to futility of efforts at prosecutorial consistency); Pamela J. Utz, Settling the Facts: Discretion and Negotiation in Criminal Court 106–08 (1978) (describing efficiency and fairness benefits of highly individualized prosecutorial decisions); Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 BYU L. Rev. 669, 674–75 (arguing that 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 1, 17–18 (Lloyd E. Ohlin & Frank J. Remington eds., 1993) [hereinafter Discretion] (explaining that complexity is fundamental attribute of criminal justice and thus prosecutors must respond with flexibility). This scholarship in criminal justice fits together with explorations in civil and administrative procedure regarding "polycentric" decisions. See, e.g., M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1421–22 (2004) (explaining that courts are reluctant to require agencies to justify discretionary decisions).

38. See United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); People v. Stewart, 55 P.3d 107, 118 (Colo. 2002) (recognizing prosecutor's "discretion to determine what charges to file when a defendant's conduct violates more than one statute"); Abraham S. Goldstein, The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea 53–58 (1981) ("Judicial resistance to supervision of prosecutorial discretion at any of its several stages probably stems more from concern about the difficulties of the task than from constitutional doctrine."). See generally Joan E. Jacoby, The American Prosecutor's Discretionary Power, The Prosecutor, Nov.–Dec. 1997, at 25 (outlining history of prosecutorial discretion in United States).

39. See Lief H. Carter, The Limits of Order 119–23 (1974) (describing ineffectiveness of comprehensive 150-page manual issued internally by one California district attorney's office); Boerner, supra note 4, at 198–99 (noting that there are no indications that Washington State's "detailed" prosecutorial guidelines have had any effect); Stanley Z. Fisher, In Search of the Virtuous Prosecutor: A Conceptual Framework, 15 Am. J. Crim. L. 197, 212 (1988) (finding that standards for prosecutorial decisionmaking "are framed so broadly that they offer prosecutors little concrete guidance"); 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, supra note 37, at 73, 100 ("We lack the knowledge necessary . . . to structure the charging decision so that it does focus on the substantive concern of how best to achieve the social control objectives of the criminal justice system."). But see David A. Sklansky, Starr, *Singleton*, and the Prosecutor's Role, 26 Fordham Urb. L.J. 509, 532 (1999) (discussing inevitable application of general principles to specific cases for prosecutors, even in absence of formalized guidelines).

not influence decisions in particular cases but would simply restate the obvious, urging prosecutors to account for "all relevant considerations."

Although these arguments usually carried the day with sentencing commissioners, such critiques of prosecutorial guidelines are overstated because the same arguments can be applied to judicial sentencing decisions.[40] A judge must consider many competing factors in selecting a sentence for a particular offender, and the choice involves allocation of resources among many competing cases. Yet sentencing guidelines for judges can set meaningful boundaries on judicial choices without forcing judges to ignore their own sense of justice or proportionality in particular cases.[41] Tradition may have created the false impression that these arguments applied with more strength to prosecutors than to judges: There is no viable tradition of regulation for prosecutors, while judicial discretion at sentencing waxed and waned over the years.[42]

The more lasting objections to prosecutorial guidelines relate not to their workability but to their political viability. Prosecutors, like anyone else, would prefer to avoid legal limits on how they do their jobs. As a result, they typically oppose any prosecutorial guidelines that a sentenc-

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40. See, e.g., Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Courts (1998) (arguing against federal sentencing guidelines and in favor of broad judicial sentencing discretion).

41. See Michael Tonry, Sentencing Matters 10 (1996) (noting consensus on success of some state sentencing guidelines); Frank O. Bowman, III, Fear of Law: Thoughts on *Fear of Judging* and the State of the Federal Sentencing Guidelines, 44 St. Louis U. L.J. 299, 300 (2000) (arguing that federal sentencing guidelines are "a notable improvement over the system they replaced"). There are still significant challenges, both practical and theoretical, to the consensus idea that sentencing guidelines can improve and sometimes have improved judicial sentencing practices under discretionary systems. See, e.g., Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901, 902, 918–24 (1991) [hereinafter Alschuler, Failure] (arguing that sentencing guidelines represent "backward step" in search for just criminal punishment); Kyron Huigens, Solving the *Apprendi* Puzzle, 90 Geo. L.J. 387, 391 & n.29 (2002) (encouraging retreat from federal sentencing guidelines); Christopher Slobogin, The Civilization of the Criminal Law, 58 Vand. L. Rev. (forthcoming Spring 2005) (manuscript at 8, on file with the *Columbia Law Review*) (advocating prevention-based sentencing regime to replace "harsh determinate sentencing based on desert principles").

42. Judicial choices among sentences were broad over long periods for some crimes, but in some eras and in some jurisdictions, judges also had to enforce sentencing laws that gave them no meaningful choices. See U.S. Sentencing Comm'n, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 6 (1991), available at http://www.ussc.gov/r_congress/manmin.pdf (on file with the *Columbia Law Review*) (noting that Congress established mandatory penalties for capital offenses in 1790 and minimum sentences for many minor offenses in nineteenth century); Ilene H. Nagel, Foreword: Structuring Sentencing Discretion: The New Federal Guidelines, 80 J. Crim. L. & Criminology 883, 892 (1990) ("[U]p through 1870, legislators retained most of the discretionary power over criminal sentencing. . . . Judges were given some sentencing discretion, but only within ranges that were narrow compared to later developments."); Ronald F. Wright, Rules for Sentencing Revolutions, 108 Yale L.J. 1355, 1358 (1999) (book review) (noting that in colonial period, legislatures imposed specific sentences significantly impairing judicial choice).

ing commission might consider, and in the American criminal justice system, opposition from prosecutors creates a political obstacle that most sentencing commissions cannot overcome. Even in the creation of sentencing guidelines for judges, opposition from prosecutors can shift the momentum against a legislative package.[43] Recently in Massachusetts, for example, opposition from the state's prosecutors was one of the most important forces blocking a new set of sentencing guidelines to govern the work of judges.[44]

If prosecutors can successfully block guidelines that largely govern the work of other sentencing actors, such as judges, imagine their political clout when the discussion turns to guidelines that govern their own work. Prosecutors have the expertise about how such guidelines would affect their work. Apart from their specialized knowledge, they also have significant political power—local voters know their elected district attorneys and trust them on questions of criminal justice.[45] A state legislator will think carefully before antagonizing one of the most powerful figures in local politics on the prosecutor's home turf.

III. COMMISSIONS THAT CO-OPT SELF-REGULATION

While the sentencing commissions in Kansas and Minnesota chose not to extend their regulations to prosecutors, experience from several other states reveals that it is possible to formulate meaningful prosecutorial guidelines. While sentencing commissions have only rarely been the source of these guidelines, prosecutorial guidelines have been

43. See Michael Tonry, Success, supra note 7, at 716–18 (noting that Judge Frankel's model failed to achieve "political insulation").

44. See Nonsensical Sentencing, Boston Globe, Aug. 14, 2001, at A14 (explaining that guidelines had not been enacted at that point because of "squabbling" between defense attorneys and prosecutors and noting that governor "worsen[ed] the situation" by advocating plan with harsher penalties supported by prosecutors); see also The Role of Parole, Boston Globe, Apr. 5, 2004, at A14 (discussing potential amendments to existing drug penalties in light of long-term impasse over sentencing guidelines opposed by "those who would impose harsher sentences"). Opposition from prosecutors was also partially responsible for the failure of the initial sentencing guidelines in Pennsylvania. See Susan E. Martin, Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania, 29 Vill. L. Rev. 21, 61–66 (1984) (discussing political opposition to Pennsylvania bill); Wright, Counting the Cost, supra note 24, at 76, 82 (describing continuing role of prosecutors in blocking changes to habitual felon sentencing law, despite support for changes from judges and sentencing commission).

45. Cf. Sanford C. Gordon & Gregory A. Huber, Citizen Oversight and the Electoral Incentives of Criminal Prosecutors, 46 Am. J. Pol. Sci. 334, 335, 346 (2002) (noting that conviction rates play prominent role in district attorney elections and finding that voter behavior rewarding high conviction rates "is an optimal strategy for even the most liberal of voters"); Gregory A. Huber & Sanford C. Gordon, Accountability and Coercion: Is Justice Blind When It Runs for Office?, 48 Am. J. Pol. Sci. 247, 248 (2004) (finding that Pennsylvania judges sentence more severely as they approach reelection). See generally Joan E. Jacoby, The American Prosecutor: From Appointive to Elective Status, The Prosecutor, Sept.–Oct. 1997, at 25, 28–29 (explaining that prosecutor's development from appointed position to locally elected official was "clear and irreversible" by 1850).

imposed from outside the prosecutor's office. Many of the political difficulties involved in regulating prosecutors become less intense when the content of the regulation simply codifies guidelines that elected prosecutors voluntarily impose on their own trial attorneys.

Washington State offers the leading example of prosecutorial guidelines, originating within prosecutors' offices and later codified by a sentencing commission and endorsed by the legislature. In the 1970s, Christopher Bayley, the elected prosecutor in King County, which includes Seattle, developed guidelines for his office to promote more consistency and deliberation among line prosecutors.[46] These guidelines, patterned in part on model guidelines developed by the American Bar Association, the National District Attorneys Association, and other organizations, addressed both the selection and disposition of charges.[47] They paralleled efforts by Washington's parole board and the Superior Court Judges Association to implement voluntary guidelines.[48] Thus, by the time the Washington legislature passed sentencing legislation in 1981 and created a sentencing commission,[49] many sentencing actors in the state were familiar with the concept of prosecutorial guidelines. They were already convinced that declarations of policy or practice could channel the work of prosecutors, just as rules could direct the work of sentencing judges.

The original package that the commission recommended to the legislature abolished parole and created guidelines for judges to follow in ordinary cases, while leaving prosecutors' decisions untouched. Nevertheless, the legislature recognized the imbalance and directed the commission to "devise recommended prosecuting standards in respect to charging of offenses and plea agreements."[50] The commission went to work right away, turning to several examples of guidelines generated by prosecutors themselves.[51] The guidelines used in King County (both by Christopher Bayley and his successor as District Attorney, Norm Maleng) were particularly influential.[52] Because Maleng and the other district at-

46. See Christopher T. Bayley, Plea Bargaining: An Offer a Prosecutor *Can* Refuse, 60 Judicature 229 (1976) (describing how King County prosecutor's office has rejected plea bargaining model); Christopher T. Bayley, Plea Bargaining: On Taming the Dragon, 32 Wash. State Bar News 12, 15–16 (1978) (same).

47. See Donald G. Gifford, Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal, 49 Geo. Wash. L. Rev. 659, 704–09 (1981) [hereinafter Gifford, Equal Protection] (describing charging guidelines of federal system, Washington, and California).

48. Boerner & Lieb, supra note 22, at 81–82.

49. Wash. Rev. Code Ann. § 9.94A.850 (West 2003). See generally Roxanne Lieb, Washington State: A Decade of Sentencing Reform, *in* Sentencing Reform in Overcrowded Times 20, 21 (Michael Tonry & Kathleen Hatlestad eds., 1997) (discussing creation of Washington Sentencing Guidelines Commission).

50. 1981 Wash. Laws ch. 137, § 4(2)(b).

51. See Boerner & Lieb, supra note 22, at 89 (noting that commission reviewed prosecutorial guidelines developed by various organizations, including California District Attorneys Association and United States Department of Justice).

52. Id. at 82.

torneys in the state favored statewide adoption of guidelines patterned on the ones they had drafted themselves, the legislature endorsed the package and they became part of the state code in 1984.[53]

The guidelines contained distinctive evidentiary standards for prosecutors to meet when deciding whether to file criminal charges: Prosecutors needed stronger evidence to file charges in property crimes, while the guidelines called for more aggressive charging of crimes against persons.[54] The guidelines then listed several conventional "nonevidentiary" reasons to decline criminal charges, including charges that "would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law."[55] Interestingly, a lack of resources, standing alone, did not qualify as a reason to decline charges.[56] The statutory standards also directed prosecutors on how to choose among the many available crimes, prohibiting any overcharging for purposes of bargaining leverage, while insisting that the total package of charges adequately reflect the seriousness of the incident.[57]

The legislation embodying these prosecutorial standards was an innovation, an unmatched effort to structure the work of prosecutors. That being said, the Washington guidelines had limited impact. Some of the content of the guidelines was vague, such as the nonevidentiary grounds for declining to file charges. The drafters of the guidelines also designed them largely to track current prosecutorial practices in the state. Most important, the guidelines explicitly barred any enforcement of the guidelines by actors outside the prosecutor's office: The guidelines created no judicially enforceable rights.[58] Compliance with the guidelines

53. See id. at 82–83 (explaining that sentencing reform legislation had stalled until Maleng and others participated in drafting guidelines).

54. See Wash. Rev. Code Ann. § 9.94A.411(2)(a).

55. Id. § 9.94A.411(1).

56. See id. § 9.94A.411(1)(f) (permitting high disproportionate cost of prosecution as reason not to prosecute only in minor cases).

57. Id. § 9.94A.411(2)(i)–(ii); Norm Maleng, Charging and Sentencing: Where Prosecutors' Guidelines Help Both Sides, Crim. Just., Winter 1987, at 6, 42.

58. State v. Lee, 847 P.2d 25, 26 (Wash. App. 1993) (holding prosecutorial guidelines not judicially enforceable); cf. United States v. Caceres, 440 U.S. 741, 749–57 (1979) (concluding that IRS violation of its own regulations did not warrant exclusion of evidence); United States v. Gillespie, 974 F.2d 796, 801 (7th Cir. 1992) (holding that prosecutor's violation of internal policy not basis for dismissal of charge); United States v. Harrison, 918 F.2d 469, 475 (9th Cir. 1990) (same); United States v. Patterson, 809 F.2d 244, 248 (5th Cir. 1987) (same). In this respect, the codified guidelines in Washington resemble the written internal prosecutorial guidelines from many jurisdictions, which routinely disclaim any creation of judicially enforceable rights. See William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 Ohio St. L.J. 1325, 1366–67 (1993) (discussing informal and official prosecutorial standards and explaining that prosecutors are reluctant to have guidelines turn into "litigation weapons").

was voluntary, and office practices varied considerably under these statutes.[59]

When a sentencing commission adopts guidelines that prosecutors originally drafted, it can reap easy political rewards in the short run. Such guidelines are more palatable to prosecutors and make it possible for sentencing commissions to overcome the political hurdles that otherwise might block the path. More specifically, resort to preexisting guidelines overcomes the objection that the standards fail to account for the practical realities of operating a prosecutor's office. It also allows the sentencing commission to avoid a paralyzing debate about the foundational principles of prosecution and, by implication, the purposes of criminal sanctions.[60] When facing such difficult choices, a commission can take comfort in choosing from a menu of policies already employed by working prosecutors.

Thus, reliance on preexisting prosecutorial guidelines shares some benefits with the parallel decision to base sentencing guidelines on past judicial sentencing practices. This strategy shaped the federal sentencing guidelines[61] and the "descriptive" guidelines enacted by several state sentencing commissions.[62] Such a starting point for guidelines helped to blunt political opposition from judges—not quite as potent a political group as prosecutors, but still an important constituency in launching a viable guidelines system.[63]

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59. See Boerner & Lieb, supra note 22, at 73 (discussing special nature of prosecutor's offices and stating that "outside scrutiny is unattainable").

60. There is an active debate about the role of purposes in drafting sentencing guidelines for judges. Many commentators argue that the legislature should make basic decisions about the purposes of guidelines, or failing a choice by the legislature, the commission should make such a choice. See von Hirsch, supra note 15, at 10–12 (arguing that commission must choose purpose before proceeding to later structural choices that flow from purposes). Whether building a system on a clear-cut choice of purposes is desirable, avoiding such a choice makes the early drafting more politically feasible. See Douglas A. Berman, A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking, 11 Stan. L. & Pol'y Rev. 93, 97 (1999) ("Congress only set forth the basic policy goals and broad parameters for a new sentencing system . . . and thus delegated the task of detailed sentencing lawmaking."); Ronald F. Wright, Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission, 79 Cal. L. Rev. 1, 9–10 (1991) (noting that Congress established sentencing commission in part to remove sentencing issues from heated debates in political arena).

61. See Marc L. Miller & Ronald F. Wright, Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice, 2 Buff. Crim. L. Rev. 723, 727 (1999) [hereinafter Miller & Wright, Your Cheatin' Heart(land)] (noting that commission claims it "'mirrored'" guidelines on past judicial practices). But see id. (arguing that substantial differences between preguidelines and postguidelines sentences suggest that "non-mirroring components" also influenced guidelines).

62. See Richard S. Frase, State Sentencing Guidelines: Still Going Strong, 78 Judicature 173, 175 (1995) (noting that "[a] few states have largely 'descriptive' guidelines designed to encourage judges to follow existing sentencing norms more consistently").

63. See Miller & Wright, Your Cheatin' Heart(land), supra note 61, at 728 (arguing that mirroring concept made federal guidelines more acceptable to judges and other

This regulatory strategy also holds advantages that endure after the initial drafting and passage of prosecutorial guidelines. Codification of existing guidelines calls for only modest changes in practice for most prosecutors once the guidelines take effect, resulting in smoother implementation. Also, codifying existing prosecutorial policies unifies practices among different prosecutors' offices around the state and draws in outliers. While a few states grant coordinating power to the state attorney general, most leave significant power with each elected district attorney at the local level.[64] Even if guidelines for a particular office succeed in creating a more uniform practice within an office, some decisions with a direct impact on sentences imposed (such as the filing of habitual felon charges) might vary from county to county in a given state, without a strong justification for such differences.[65] Prosecutorial guidelines adopted through a state agency, such as a sentencing commission, can counterbalance the most extreme local quirks with a statewide unifying influence.

Such standardizing effects often mark the earliest achievements of new regulatory agencies. Regulatory agencies that reach into new substantive areas can easily concentrate on the outliers among regulatory targets and unify practices in the industry around a collection of preexisting standards.[66] For instance, the first efforts by the National Highway Transportation and Safety Administration (NHTSA) to improve the safety of automobiles consisted of adopting existing industry codes calling for safety equipment such as seat belts.[67] Some manufacturers were already installing this equipment on some models, but the NHTSA regulations accelerated the universal adoption of these practices.[68] Such low-hang-

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constituencies); Sandra Shane-DuBow, Hybrid Guidelines: The Wisconsin Experience, 6 Fed. Sent'g Rep. 162, 162 (1993) (suggesting that Wisconsin guidelines reflect "strong judiciary"); cf. William J. Rich, Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue, 11 Kan. J.L. & Pub. Pol'y 693, 699 (2002) (explaining how Kansas guidelines passed over objections from sentencing judges and parole board).

64. See DeFrances, supra note 20, appx. at 11 (discussing increase in size and influence of prosecutors' offices).

65. See Bruce Cunningham, The Habitual Felon Act: The Prosecutor as Sentencer, Trial Briefs, Dec. 2003, at 22, 23 (noting that North Carolina's prosecutors have applied state's habitual offender statute inconsistently in different counties and arguing that this practice violates Equal Protection Clause). I do not call here for complete standardization within a state but for some movement toward a central norm for prosecutors in a single state. For a discussion of the values of local variation, see Michael M. O'Hear, Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure, 27 Hamline L. Rev. 358 (2004) (describing benefits of local variation in federal criminal law).

66. Indeed, because the unified practices are likely to mirror the existing practices of the largest firms in the industry, those larger players are likely to favor regulation as a way of imposing new costs on noncomplying competitors. See sources cited supra note 1.

67. Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety 69–72 (1990).

68. See id. at 10 (noting that NHTSA rules "have required already-developed technologies, many of which were already in widespread, if not universal, use in the automobile industry at the time of the standards' promulgation").

ing fruit for regulators is also within reach for sentencing commissions if they codify existing prosecutorial guidelines.

IV. PROVOCATEURS OF PROSECUTOR SELF-REGULATION

Although codification of existing prosecutorial guidelines might create some short-term success for a sentencing commission, the effects may not go very deep.[69] A stabilization of current practices could, in some instances, merely result in permanent injustice or inefficiency. Given the origins of these guidelines as internal directives created by prosecutors for prosecutors, they could miss some important public values.[70] In addition, self-imposed regulations might not demand much from prosecutors.[71]

Furthermore, prosecutorial practices must adapt to changing realities of the criminal justice system. Even if the guidelines initially serve public purposes, they can drift away from that ideal fit as time passes. As commissions have learned with judicial sentencing guidelines, prescriptive guidelines not only have a greater impact than descriptive guidelines, but they also remain functional for a longer time.[72]

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69. Elsewhere I have explored, along with Marc Miller, the power of internal prosecutor office guidelines to influence (for good or for bad) the charging and adjudication outcomes that flow from a system. See Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29, 61–66, 116 (2002) [hereinafter Wright & Miller, Screening/Bargaining Tradeoff] (describing New Orleans district attorney's office internal guidelines and concluding that application of those guidelines reduced plea bargaining). Although I consider in this Essay the value of guidelines induced from the outside but written from the inside of prosecutors' offices, there is still real value gained from internal guidelines operating without any external prompting or enforcement. For an appealing account of such internal "administrative" review for prosecutors, see Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2124–29 (1998).

70. For instance, for many years prosecutors placed a low priority on prosecuting routine domestic violence crimes. See Norman Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 1, 12 (1971) (listing "intra-family squabbling" among the crimes often eligible for declination). One can hope that democratic accountability will eventually convince prosecutors to amend their rules to align with public values. Initiation of new regulation from sentencing actors outside the prosecutor's office could similarly (and perhaps more quickly) move prosecutors to recognize these missing values.

71. See id. at 8 (explaining that internal policies to guide discretion are "usually of the most general and unsophisticated sort"); Norman Abrams, Prosecutorial Charge Decision Systems, 23 UCLA L. Rev. 1, 3 (1975) ("We lack . . . any accurate way to measure the quality of charge decisions; in fact we have not even defined the standard of measurement."); Ellen S. Podgor, Department of Justice Guidelines: Balancing "Discretionary Justice," 13 Cornell J.L. & Pub. Pol'y 167, 195–202 (2004) (noting lack of enforcement of federal gnidelines and proposing "soft" remedies such as shifting burden of proof to government to disprove claims of prosecutorial misconduct).

72. See Tonry, Sentencing Commissions, supra note 12, at 163–64 ("The effects of changes in sentencing patterns appear to vary with the abruptness of the new policies' departure from past practices. Where that change is modest . . . practices appear likely to revert to their prior patterns . . . .").

For reasons such as these, a sentencing commission might decide to move outside the safe zone of existing prosecutorial guidelines and demand more rigorous standards. When sentencing commissions choose to prescribe rather than describe prosecutorial functions, they need not give up the advantages of prosecutorial self-regulation. They can harness prosecutorial expertise by asking them to create guidelines where none existed before. Perhaps a commission could turn over the reins to prosecutors and simply mandate—with no specific instructions about the content—that prosecutors' offices around the state pass guidelines to govern charging and disposition decisions by attorneys in the office.[73] A commission might also select particular issues that raise unique concerns for sentencing and call for specialized prosecutorial guidelines related to those issues.[74] For instance, a statute in Florida directs prosecutors to create guidelines for the use of habitual offender statutes.[75] Although a commission cannot know beforehand the content of guidelines prosecutors may create in response to these open-ended instructions, a commission still may reasonably hope that the process of creating guidelines will promote deliberation among prosecutors about their priorities. Deliberation may result in some improved consistency in prosecutors' choices, at least those choices that most directly influence sentences.[76]

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73. Cf. Kim Banks Mayer, Comment, Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness?, 1996 Wis. L. Rev. 295, 297, 308 (proposing that advisory committee of district attorneys draft model guidelines, which are then adapted as needed by local prosecutors).

74. See Charles W. Thomas & W. Anthony Fitch, Prosecutorial Decision Making, 13 Am. Crim. L. Rev. 507, 517–22 (1976) (calling for development of written prosecutorial guidelines to govern charging decisions based on nature of alleged offense, personal characteristics of defendant, prosecutor's caseload, recommendation of other agencies, effect on law enforcement, and evidence sufficiency). It may be possible for a sentencing commission to employ data such as that assembled by Nancy King and her coauthors to identify particular contexts in which charge bargains carry excessive weight and therefore justify more efforts to promote transparency and consistency. See Nancy J. King et al., When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States, 105 Colum. L. Rev. 959, 986 (2005) (using data from five states to show that charge bargaining, rather than sentencing bargaining, is far more common in states with mandatory sentencing guidelines).

75. Fla. Stat. Ann. § 775.08401 (West 2000); see also id. § 741.2901(2) (directing that prosecutors "shall adopt a pro-prosecution policy for acts of domestic violence . . . over the objection of the victim, if necessary"); Marc Miller & Ronald Wright, Criminal Procedures: Cases, Statutes, and Executive Materials 838–40 (2d ed. 2003) (discussing political background of Florida statute); cf. Michael A. Simons, Prosecutorial Discretion and Prosecutor Guidelines: A Case Study in Controlling Federalization, 75 N.Y.U. L. Rev. 893, 936–55 (2000) (examining guidelines for federal prosecutors under Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2000)).

76. Cf. Leland E. Beck, The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy, 27 Am. U. L. Rev. 310, 322–27 (1978) (commenting on potentially positive impact of allowing administrative agencies to develop prosecutorial guidelines); Bruce A. Green & Fred C. Zacharias, Prosecutorial Neutrality, 2004 Wis. L. Rev. 837, 840 (asserting that "prosecutors should make decisions based on articulable principles or sub-principles that command broad societal acceptance"); Leslie C. Griffin,

A. *Unlikely Regulatory Leadership from New Jersey Judges*

A sentencing commission that aspires to drive the development of prosecutorial guidelines without losing the engine of prosecutorial self-regulation must create a new sort of vehicle. The model does not yet exist. Over twenty years after their passage, the prosecutorial guidelines in Washington, with their muted impact on prosecutorial practices and their limited capacity for growth, still represent the state of the art for sentencing commissions and the regulation of prosecutors.

Nevertheless, the blueprints for such a venture exist, and they come from an unlikely place: New Jersey.[77] The source of this insight is surprising because the sentencing system in New Jersey does not often receive plaudits for its innovations, its institutions, or the justice of its sentencing outcomes. On the institutional level, New Jersey only recently created a sentencing commission and now operates without sentencing guidelines.[78] The sentencing statutes in the state contain an unusually large number of mandatory minimum sentences.[79] New Jersey's experience suggests that worthwhile developments in sentencing can arise spontaneously—perhaps randomly—from a variety of environments, not just those states most consciously pursuing sentencing reform. A challenge for thoughtful sentencing reform is to spot the most promising variations wherever they first appear and to transplant them to other surroundings.

The Prudent Prosecutor, 14 Geo. J. Legal Ethics 259, 262 (2001) (advocating "for new, more specific standards [regarding exercise of prosecutorial discretion] . . . [and] better enforcement of those standards through supervision, oversight, and training"); Welsh S. White, A Proposal for Reform of the Plea Bargaining Process, 119 U. Pa. L. Rev. 439, 441 (1971) ("[I]t is important to formulate guidelines which retain the advantages yet minimize the undesirable consequences of [prosecutorial efforts to induce] plea bargaining.").

77. Valuable insights might be drawn from various types of prosecutorial guidelines at work in other countries. See, e.g., David T. Johnson, The Japanese Way of Justice: Prosecuting Crime in Japan 119–78 (2002) (dealing with role of written policy directives in hierarchy of prosecutorial decisionmaking); Allan Hoyano et al., A Study of the Impact of the Revised Code for Crown Prosecutors, 1997 Crim. L. Rev. 556 (detailing impact of prosecutorial guidelines on prosecutors' decisionmaking in England); Mark D. West, Note, Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion, 92 Colum. L. Rev. 684 (1992).

78. Seidenstein, Criminal Sentencing, supra note 9, at 1. Given the relative political strength of prosecutors compared to judges, one would expect a state legislature to create sentencing guidelines for judges before establishing such guidelines for prosecutors. New Jersey demonstrates, however, that this sequence of events is not always necessary. Roughly half the states operate now with no sentencing commission and no sentencing guidelines. See Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1195–96 (2005).

79. See N.J. Stat. Ann. § 2C:43-6 (West 1995); see also Judith A. Greene, New Jersey Sentencing and a Call for Reform 10–11 (2003), available at http://www.famm.org/pdfs/82750_NewJersey.pdf (on file with the *Columbia Law Review*) [hereinafter Greene, New Jersey Sentencing Reform] (providing examples of mandatory minimum sentences in drug prosecution context).

The New Jersey story offers insights both for the process of creating prosecutorial guidelines and for the possible content of such guidelines.

In New Jersey, before the sentencing commission arrived on the scene, the judiciary led the creation of prosecutorial regulations. Although prosecutors in New Jersey are responsible for drafting the guidelines that direct their own work, judges have periodically insisted that the guidelines reach new topics or apply more uniformly across the state. The judiciary has also assumed the responsibility of monitoring and enforcing the guidelines, thereby assuring that prosecutors explain their application of the rules in particular cases.[80]

1. *The Regulatory Burden on New Jersey Judges.* — Since 1978, New Jersey sentencing law has restricted the discretion of sentencing judges. The statutes designate presumptive sentences for ordinary cases within each offense class and direct judges to consider several specified aggravating and mitigating circumstances as potential grounds for adjusting a sentence up or down in an unusual case.[81]

Against this background of statutory controls on judicial sentencing power, the drug laws in the state grant exceptional authority to prosecutors. For several drug offenses, such as distribution of narcotics on or near school property, the law provides for an enhanced sentence.[82] Not only does the prosecutor decide whether to file the special enhanced drug crime rather than ordinary possession or distribution charges,[83] but the prosecutor also decides whether to trigger the enhanced sentence after conviction. After obtaining a conviction for the specialized offense, if the prosecutor files a request for an enhanced sentence, the judge "shall" impose the higher sentence.[84] The statute also allows the prosecutor to enter a plea bargain with the defendant that sets an enhancement lower than the amount specified in the statute; again, the statute says that the judge "shall" impose this lower renegotiated sentence.[85]

The New Jersey Supreme Court recognized that such prosecutorial power over mandatory minimum sentences, combined with statutory restrictions on judicial sentencing power, created a regulatory imbalance. In the court's view, this imbalance amounted to a violation of the state's separation of powers doctrine because it removed from judges any mean-

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80. For a more detailed account of the judicial role in developing guidelines in New Jersey, see Ronald F. Wright, Prosecutorial Guidelines and the New Terrain in New Jersey, 109 Penn. St. L. Rev. (forthcoming 2005) (on file with the *Columbia Law Review*) [hereinafter Wright, Prosecutorial Guidelines].

81. See N.J. Stat. Ann. §§ 2C:43-1 to :43-13.

82. N.J. Stat. Ann. §§ 2C:43-6f, :43-7a(5) (West 1995 & Supp. 2004).

83. See N.J. Stat. Ann. §§ 2C:35-1 to :35-14 (West 1995).

84. Id. § 2C:43-6f.

85. Id. § 2C:35-12 (requiring that court, upon finding defendant guilty of possessing drugs with intent to distribute within 1000 feet of school, "shall impose" mandatory sentence "unless the defendant has pleaded guilty pursuant to a negotiated agreement . . . which provides for a lesser sentence").

ingful part in sentencing, which is a traditional judicial function.[86] The unrestricted prosecutorial power to select an enhanced sentence, in the view of the court, also violated the legislature's overarching purpose to promote uniform sentences for comparable drug offenders.[87]

2. *Equalizing the Regulatory Burden on New Jersey Sentencing Actors.* — To promote a more coherent statutory scheme for sentencing narcotics offenders[88] and to avoid separation of powers problems with the enhanced penalty statutes, the New Jersey Supreme Court directed the state attorney general to create guidelines to govern prosecutors in the county district attorney offices.[89] Within months, the attorney general complied and issued guidelines instructing trial attorneys when to invoke an available enhancement for a drug offense. The guidelines also told prosecutors the maximum sentence discount to offer during plea negotiations for ordinary cases, along with several aggravating and mitigating circumstances that could lead to lesser or greater discounts.[90]

The judicial opinions directing the state attorney general to create prosecutorial guidelines also created a review function for trial judges. Prosecutors were obliged to explain in particular cases the reasons why they were invoking or not invoking the enhanced sentences under the drug laws.[91] Trial judges reviewed these reasons to assure that the prosecutors were following the guidelines, asking whether the application of the guidelines in the current case was "arbitrary and capricious" (a familiar standard of review from the administrative law context).[92]

This enforcement role gave sentencing judges perspective on the guidelines' operation in the daily reality of the New Jersey criminal courts. After a few years, this feedback mechanism revealed that the statewide guidelines provided only limited uniformity from county to county. The attorney general's statewide guidelines allowed the district attorney for each county to draft local guidelines, treating the statewide guidelines as a model. Within three years, the New Jersey Supreme Court started signaling that such differences among counties were troubling,[93] and in

86. State v. Lagares, 601 A.2d 698, 701–05 (N.J. 1992).

87. State v. Vasquez, 609 A.2d 29, 32–33 (N.J. 1992).

88. See William N. Eskridge, Jr. et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 1039–49 (3d ed. 2001) (giving examples of judicial efforts to promote coherence among statutes).

89. *Vasquez*, 609 A.2d at 32–33.

90. N.J. Dep't of Law & Pub. Safety, Attorney General Executive Directive No. 1996–03 (1996) (on file with the *Columbia Law Review*).

91. See, e.g., State v. Maldonado, 715 A.2d 996, 999 (N.J. Super. Ct. App. Div. 1998) (remanding because prosecutor did not file statement of reasons); State v. Perez, 701 A.2d 750, 753 (N.J. Super. Ct. App. Div. 1997) (same); State v. Press, 651 A.2d 1068, 1072 (N.J. Super. Ct. App. Div. 1995) (same).

92. State v. Leonardis, 375 A.2d 607, 618–19 (N.J. 1977); *Press*, 651 A.2d at 1071.

93. See State v. Gerns, 678 A.2d 634, 642 (N.J. 1996) ("[T]he indications of grave sentencing disparities are sufficient to engender . . . concern [that] must be addressed in light of the Code's overriding commitment to assuring uniformity in criminal sentencing.").

State v. Brimage (six years after first ordering the creation of statewide guidelines) the court ultimately directed the attorney general to issue new guidelines that allowed for less variation among counties.[94]

The attorney general promptly issued a sixty-four-page set of "*Brimage*" guidelines to comply with the new court order. The drafters patterned their prosecutorial guidelines after judicial sentencing guidelines, including a grid laying out the offense seriousness on a vertical axis and the defendant's criminal history on a horizontal axis. Each box of the grid showed three different plea agreements a prosecutor might offer, with more favorable outcomes going to those defendants accepting offers earlier before the start of trial.[95]

The attorney general amended these guidelines in small ways over the next few years.[96] During this first phase, the overall effect of the guidelines was probably an increase in the seriousness of drug charges that urban defendants faced. The more severe charging practices of the less urban counties became more standard across the state, and the guidelines left urban prosecutors less room to negotiate the initial filing of charges or the disposition of cases.[97]

In spite of the results in New Jersey, prosecutorial guidelines do not inevitably push sentence severity up. A building block concept from sentencing guidelines—presumptive outcomes for ordinary cases coupled with "departures" for atypical cases, based on publicly announced and debated reasons—can also operate in prosecutorial guidelines. Such a combination can reconcile the competing ideals of individualized and consistent sentencing outcomes.

Important changes in the *Brimage* Guidelines took effect in 2004, reflecting a greater reliance on the "departure" concept and a more basic shift in drug enforcement policy. Prompted by informal conversations with New Jersey judges about how the guidelines were operating in practice, Attorney General Peter Harvey consulted with county prosecutors,

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94. 706 A.2d 1096, 1107 (N.J. 1998).

95. N.J. Dep't of Law & Pub. Safety, Attorney General Directive No. 1998-1: Prosecuting Cases Under the Comprehensive Drug Reform Act (1998), available at http://www.state.nj.us/lps/dcj/pdfs/agdir.pdf (on file with the *Columbia Law Review*); N.J. Dep't of Law & Pub. Safety, Attorney General Guidelines for Negotiating Cases Under N.J.S.A. § 2C:35-12 (1998), available at http://www.state.nj.us/lps/dcj/pdfs/agguid.pdf (on file with the *Columbia Law Review*).

96. N.J. Dep't of Law & Pub. Safety, Application Notes to Attorney General Directive 1998-1 and Attorney General Guidelines for Negotiating Cases Under N.J.S.A. § 2C:35-12 (2000), available at http://www.state.nj.us/lps/dcj/pdfs/unfguid.pdf (on file with the *Columbia Law Review*).

97. See Interview with Bennett Baryl, Executive Director, N.J. Sentencing Comm'n, in New York, N.Y. (Jan. 1, 2005) (on file with the *Columbia Law Review*) (arguing that prosecutors in urban areas no longer have choice to deal with defendants more leniently, but noting that current level of enforcement by trial judges appears to be uneven, with more consistent enforcement in less busy, nonurban jurisdictions); Interview with Judith Greene, Criminal Justice Policy Analyst, Justice Strategies, in New York, N.Y. (Jan. 22, 2005) (on file with the *Columbia Law Review*) (same).

defense attorneys, judges, and others to create these major revisions.[98] A major feature of the revised guidelines (now expanded to 104 pages) is that they depend less on the crime of conviction. The plea agreements that prosecutors are now authorized to offer account for more specific offense characteristics (such as the amount of drugs and the presence of a weapon) and offender characteristics (such as gang membership or prior criminal record).[99]

The revisions also increase the minimum "authorized plea offers" available in cases involving defendants who carry or use weapons,[100] while at the same time making more lenient offers possible for other drug defendants with prior records,[101] or those who sold drugs near a school but presented no particular threat of violence.[102] Prosecutors can also "depart" from the presumptive charge or disposition that is preferred under the guidelines if the evidence in the case is weak or if the defendant offers cooperation in other cases.[103]

This rescaling of plea practices in 2004 was especially important for cases involving drug sales in school zones because an urban-suburban divide (and thus a racial divide) was stark for these crimes. In most urban areas, virtually all drug sales happened within 1000 feet of a school.[104]

3. *Incremental Expansion of Regulation.* — Prosecutorial guidelines in New Jersey developed incrementally. The guidelines started as a statement of general principles and a few exemplar plea outcomes and then became more ambitious, applying equally in all counties and accounting for more details about each crime and each criminal. Prosecutors drafted the terms of each new generation of guidelines, but judges demanded that the revisions meet higher goals.

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98. See The Brimage Revisions, N.J. L.J., Oct. 11, 2004, at 22; Mary P. Gallagher, Judges, Prosecutors Given More Flexibility in Drug Plea-Bargains, N.J. L.J., July 26, 2004, at 14; Robert G. Seidenstein, Drug Plea Revamp Cuts Minorities a Big Break, N.J. Lawyer, July 26, 2004, at 1 [hereinafter Seidenstein, Drug Plea Revamp]; see also Right Path on Drug Laws, Star-Ledger (Newark, N.J.), Oct. 6, 2004, at 16 (noting that state attorney general took steps to reform plea bargaining rules in drug cases); Jonathan Schuppe, State Offers New Rules in Drug Dealer Plea Deals, Star-Ledger (Newark, N.J.), July 21, 2004, at 27 (same).

99. N.J. Dep't of Law & Pub. Safety, *Brimage* Guidelines 2, at §§ 7.1–7.2, 8, 11.1 (2004), available at http://www.nj.gov/lps/dcj/agguide/directives/brimage_all.pdf (on file with the *Columbia Law Review*) [hereinafter *Brimage* Guidelines 2]. The Supreme Court's recent cases on the Sixth Amendment right to a jury trial make relevant conduct sentencing more difficult to accomplish through judicial sentencing guidelines. See Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004) ("[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."). However, this line of cases presents no problem for prosecutorial guidelines that move toward real offense sentencing and away from charge offense sentencing.

100. *Brimage* Guidelines 2, supra note 99, §§ 7.1, 11.4.

101. Id. § 3.13.

102. Id. § 6.5.

103. Id. § 3.5.

104. Gallagher, supra note 98, at 14; Schuppe, supra note 98, at 27; Seidenstein, Drug Plea Revamp, supra note 98, at 1.

Similarly, prosecutorial guidelines have gradually expanded over time to include more subjects. Guidelines in New Jersey first applied to prosecutors' decisions to admit defendants to pretrial diversion programs[105] and decisions to file for capital punishment.[106] The reach of prosecutorial guidelines expanded enormously when judges imposed them in drug cases because those cases covered a large portion of the felony docket in New Jersey.[107] More recently, the state legislature endorsed the idea of prosecutor-drafted guidelines for selected charging decisions. In 2000, the legislature passed a statute calling for prosecutors to create statewide guidance to govern the choice of whether to file charges in the juvenile system or the adult criminal courts.[108] The attorney general also took the initiative in some areas, creating guidelines for the prosecutor's decision to request certain collateral sanctions along with prison in specialized cases.[109]

4. *Essentials for Export.* — The essentials of the New Jersey story offer an intriguing model for other states to consider as a next step when moving beyond Washington-style codification of preexisting prosecutorial

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105. See State v. Leonardis, 375 A.2d 607, 618–19 (N.J. 1977); State v. Leonardis, 363 A.2d 321, 340 (N.J. 1976).

106. The court suggested in dicta in State v. Koedatich, 548 A.2d 939, 955–56 (N.J. 1988), that the attorney general and county prosecutors consult with public defenders to create guidelines for charging decisions in capital cases. The attorney general did issue such guidelines, and the courts proved willing to enforce the guidelines in individual cases. See State v. Jackson, 607 A.2d 974, 974 (N.J. 1992) (remanding case with direction to prosecutor to determine charging decision in accordance with attorney general's death penalty guidelines).

107. See Greene, New Jersey Sentencing Reform, supra note 79, at 10 (noting that drug violations accounted for 38% of New Jersey arrests in 2000).

108. See N.J. Stat. Ann. § 2A:4A-26(f) (West Supp. 2004–2005) (requiring attorney general to "develop for dissemination to the county prosecutors those guidelines or directives deemed necessary or appropriate to ensure the uniform application of [the juvenile waiver] section throughout the state"); see also State ex rel. R.C., 798 A.2d 111, 119 (N.J. Super. Ct. App. Div. 2002) (holding that prosecutor's decision to waive juvenile offender to adult court is subject to judicial review for "patent and gross abuse of discretion" and remedy for violation is remand for adequate explanation from prosecutor (internal quotation marks omitted)). For a survey of legal mechanisms for assigning cases between the juvenile and adult systems, see Howard N. Snyder et al., Juvenile Transfers to Criminal Court in the 1990's, at 39–41 (2000).

109. See Doe v. Poritz, 662 A.2d 367, 422–23 (N.J. 1995) (upholding constitutionality of attorney general's guidelines for implementation of convicted sex offender registration and notification statutes); Town Tobacconist v. Kimmelman, 462 A.2d 573, 591–93 (N.J. 1983) (noting that attorney general's creation of guidelines under Drug Paraphernalia Act "strengthened" constitutionality of statute); In re Carroll, 772 A.2d 45, 46–49, 53–54 (N.J. Super. Ct. App. Div. 2001) (upholding attorney general's guidelines on removal of police officers who refuse to cooperate in internal affairs investigations). Initially, the courts held that statewide guidelines were not compelled in this context. See State v. Lazarchick, 715 A.2d 365, 383 (N.J. Super. Ct. App. Div. 1998) (upholding lower court's decision "declining to review the acting prosecutor's decision not to seek a waiver of forfeiture"). For a discussion of the use of collateral sanctions as an integral part of criminal sentencing, see generally Nora V. Demleitner, Abusing State Power or Controlling Risk?: Sex Offender Commitment and *Sicherungverwahrung*, 30 Fordham Urb. L.J. 1621, 1621–24 (2003).

guidelines. First, outsiders help set the agenda while insiders still apply their expertise. Actors other than prosecutors initiated the guidelines, but prosecutors themselves drafted and continue to modify the standards.

Second, the development of guidelines moved incrementally once the project was begun. The guidelines started modestly, but became more ambitious in their uniformity, binding power, and subject-matter coverage over time.[110] Prosecutorial guidelines in other jurisdictions might also start modestly, reaching at first only the prosecutors' charging and disposition choices related to mandatory minimum sentences. Indeed, prosecutorial guidelines might operate as a procedural "tax" on habitual felon laws and other sentencing laws that have the most toxic effects on a consistent and humanely applied body of sentencing law: Where such laws exist, the extra explanation and recordkeeping required under prosecutorial guidelines might promote more economical and justifiable application of these laws by prosecutors. The earliest version of guidelines should emphasize the articulation of reasons to support these choices and recordkeeping to monitor the use of those reasons in practice.[111]

Third, a powerful component in New Jersey that is missing in Washington is the external enforcement mechanism. Because judges reviewed the reasons that prosecutors placed on the record to explain their decisions in particular cases, they prevented the guidelines from becoming a dead letter and obtained useful feedback about the operation of the guidelines that figured into periodic decisions to push for a new generation of revised guidelines.[112] Although prosecutorial guidelines created for internal office use are quite common in some parts of the country,[113] the lack of monitoring or enforcement by other actors reduces their

110. See Joseph S. Allerhand, Note, The Petite Policy: An Example of Enlightened Prosecutorial Discretion, 66 Geo. L.J. 1137, 1138–45 (1978) (tracking development of federal policy and criticizing Department of Justice for failure to reduce general principles to more specific guidance); see also Robert L. Glicksman & Sidney A. Shapiro, Improving Regulation Through Incremental Adjustment, 53 U. Kan. L. Rev. (forthcoming) (manuscript at 9–10, on file with the *Columbia Law Review*) (concluding that most provisions that allow for incremental "back-end" adjustments "should improve regulatory rationality").

111. Cf. Michael Edmund O'Neill, When Prosecutors Don't: Trends in Federal Prosecutorial Declinations, 79 Notre Dame L. Rev. 221, 226, 271–87 (2003) (discussing "need for written declination rules and mandatory record keeping . . . to permit Congress and the executive branch to more carefully marshal prosecutor[ial] resources").

112. The New Jersey Supreme Court's opinions referred to the reasons prosecutors gave in individual cases, so at least some trial judges did require prosecutors to comply with the record requirement. However, it is still unclear how widespread the practice has become. Interview with Bennett Baryl, supra note 97.

113. See Alissa Pollitz Worden, Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining, 73 Judicature 335, 338 (1990) (noting that fourteen of twenty-seven Georgia prosecutors in survey employed office policies limiting plea bargaining discretion). But cf. Darryl K. Brown, Third-Party Interests in Criminal Law, 80 Tex. L. Rev. 1383, 1392 n.45 (2002) (discussing informal survey of Virginia prosecutors that found little reliance on internal office policies).

value as a way to achieve consistency and accountability.[114] In New Jersey, prosecutors are responsible for drafting guidelines, but judges insist on a meaningful voice in the daily monitoring and long-term direction of those guidelines. Together, the sentencing actors in New Jersey may be creating a partnership that could thrive in many places.[115]

Fourth, the judges in New Jersey linked the proper level of prosecutorial regulation to the amount of discretion available to judges in drug sentencing. This linkage suggests a possible tradeoff between judicial and prosecutorial guidelines: The arrival of new prosecutorial guidelines might create more room for legitimate judicial discretion. Prosecutorial guidelines might lead to larger numbers of judicial departures, as prosecutors become less able or willing to adjust their charges and recommendations for unusual cases that do not fit the standard guidelines very well. Appellate courts might feel obliged to develop a more capacious doctrine of departures, leaving trial judges more flexibility to act according to their own discretion and recognizing that prosecutors now share the regulatory burden to produce fair sentencing outcomes. If criminal justice discretion is indeed "hydraulic," the law can force it to flow back to judges just as it once flowed away from them.[116]

B. *Leadership from Sentencing Commissions*

As with any exercise in comparative law, it could be unfruitful to graft New Jersey innovations onto other jurisdictions with distinct legal roots and cultures. New Jersey is unique because of two factors: its exceptionally creative (some might say activist) courts and the remarkable statutory role granted to its prosecutors for enhanced sentencing in drug cases. Nevertheless, sentencing commissions elsewhere might shape the

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114. Criticism of existing prosecutorial guidelines has repeatedly focused on the lack of viable external enforcement of standards. See Gifford, Equal Protection, supra note 47, at 704–09 (suggesting that adoption of written guidelines would bolster judicial enforcement of Equal Protection Clause and provide substantial check on prosecutorial discretion); Podgor, supra note 71, at 170 (advocating heightened review of violations of Department of Justice's internal guidelines for federal prosecutors); Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. Rev. 721, 765–73 (2001) (analyzing if and when increased discipline of prosecutors would be desirable to deter prosecutorial misconduct); Lesley E. Williams, Note, The Civil Regulation of Prosecutors, 67 Fordham L. Rev. 3441, 3442 (1999) (arguing that prosecutorial behavior is not adequately regulated and proposing several ways to fill regulatory void).

115. The equilibrium among sentencing actors in New Jersey will be tested in the near future because the New Jersey legislature has created a sentencing commission to consider new sentencing guidelines. See N.J. First Interim Report, supra note 9, at 2 (explaining reason for creation of New Jersey's Commission to Review Criminal Sentencing).

116. See Alschuler, Sentencing Reform, supra note 4, at 577 (providing early statement of displacement of discretion hypothesis). But see Terance D. Miethe, Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion, 78 J. Crim. L. & Criminology 155, 175–76 (1987) (examining empirical evidence for hydraulic hypothesis and concluding that various factors prevent displacement of discretion from being inevitable).

way that prosecutorial guidelines develop, converting the quirky New Jersey example into a more attractive model for other states to follow. A better division of labor is possible after a sentencing commission enters the scene.

1. *Commission Advantages over Judges.* — First, a sentencing commission could act with more clear-cut legitimacy than judges in forcing prosecutors to draft guidelines. The New Jersey decisions rested on an eccentric reading of separation of powers principles, along with a distinctive reading of an overarching legislative "purpose" embodied in the drug sentencing laws.[117] Courts in other jurisdictions might hesitate to rule on such grounds that prosecutors must create charge or plea bargain guidelines, particularly in light of the frequent judicial holdings that such prosecutors' choices remain completely beyond judicial reach.[118]

A commission, however, exercises delegated power from the legislature and leaves far less doubt about the proper basis for its efforts to promote and enforce prosecutor self-regulation. The delegation from the legislature might take the form of a statute explicitly calling on the commission to consider prosecutorial guidelines, similar to the statute enacted in Kansas in 1993.[119] A commission could also derive its authority to regulate on this topic from more general legislative mandates to assure reasonable uniformity in the state's sentencing laws. A commission that calls for prosecutors to draft guidelines simply equalizes the burden of uniform sentencing among several different actors.

A sentencing commission also has informational advantages over the judiciary. A full-time sentencing commission can monitor the operation of existing prosecutorial guidelines, sound out the current views of leading prosecutors and legislatures, and estimate when to press ahead with the next incremental effort to strengthen the prosecutorial guidelines. The commission has information about the entire system over time at its disposal and does not depend on the advocates in particular cases as judges must.[120]

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117. The New Jersey Supreme Court's separation of powers rulings in this line of cases depended heavily on the idea that judges have special and traditional responsibility for the remedies that flow from judicial proceedings, including the pronouncement of sentence after criminal proceedings. See Wright, Prosecutorial Guidelines, supra note 80 (manuscript at 7–8). For an innovative discussion of separation of powers in the sentencing field that remains more consistent with federal doctrine, see generally Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33 (2003).

118. See, e.g., United States v. Batchelder, 442 U.S. 114, 125 (1979) (holding that prosecutor has discretion to select charge when more than one statutory provision is applicable); State v. Caskey, 539 N.W.2d 176, 178 (Iowa 1995) (same).

119. See Kan. Stat. Ann. § 74-9101(b)(10) (2002) (directing Kansas Sentencing Commission to "develop prosecuting standards and guidelines to govern the conduct of prosecutors when charging persons with crimes and when engaging in plea bargaining").

120. See Bowman, supra note 41, at 354–57 (exploring advantages of supplementing judicial case level perspective with system-wide perspective of commission); Kevin R. Reitz, Modeling Discretion in American Sentencing Systems, 20 Law & Pol'y 389, 390 (1998)

Although sentencing commissions hold several advantages over judges in choosing the overall direction of prosecutorial regulation, judges might still hold a political advantage over sentencing commissions when the time arrives to initiate any prosecutorial self-regulation. The political insulation of courts might in fact be necessary to launch a process that is bound to antagonize prosecutors in the state. Depending on the political resources of the sentencing commission in a particular jurisdiction and the influence of prosecutors in the state, it might be unrealistic to expect a commission to overcome inertia and start the regulatory process. A judicial ruling might be a more plausible starting point, and judges could aim quickly to transfer the direction of the regulatory process to the commission.

2. *Two-Level Standard of Review.* — Judges may, however, have an ongoing role in the regulation of prosecutors. As the New Jersey experience suggests, a sentencing commission could empower judges to review prosecutors' fidelity to their own guidelines by compelling prosecutors to state on the record their reasons for classifying each case under the relevant guidelines or for departing from the guidelines that are meant to govern ordinary cases.[121] With the written guidelines and the statement of reasons on the record, the sentencing judge could review prosecutors' choices on two different levels, using two different standards of review.

At the individual case level, the judge could review the statement of reasons to prevent any "abuse of discretion," one of the typical forms of judicial review for administrative action.[122] Given the enormous volume of cases involved and the delicate balancing of resources at work in resolving particular cases, the judicial role should be limited to assuring that the stated reason in each case falls within a category already announced in the prosecutorial guidelines and that the prosecutor appears to have applied the standard in good faith.[123]

(proposing theoretical models of diverse sentencing structures and positioning state sentencing actors at case level or system level).

121. A sentencing commission might empower judges to demand prosecutor explanations only for selected charging decisions, such as the prosecutor's decision, in a case already filed, whether or not to select a mandatory minimum sentence crime rather than an alternative charge with a more ordinary range of sentences.

122. See 5 U.S.C. § 706(2)(A) (2000); see also Heckler v. Chaney, 470 U.S. 821, 827–35 (1985) (discussing deferential standard of review generally applicable in administrative context in comparison to unreviewable discretion in prosecutorial context). One indicator of an abuse of discretion would be blatant inconsistencies in the application of the standard from case to case. See Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994) ("[T]he law . . . does prohibit an agency from adopting significantly inconsistent policies that result in the creation of conflicting lines of precedent governing the identical situation." (internal quotation marks and citation omitted)); Yepes-Prado v. INS, 10 F.3d 1363, 1370 n.15 (9th Cir. 1993) ("[I]f the agency has consistently given one factor preeminent weight in its decisionmaking, it cannot choose to give it absolutely no weight in a particular case without explaining its reasons for doing so.").

123. Cf. State v. Comer, 793 N.E.2d 473, 477–78 (Ohio 2003) (holding that sentencing judge must make case-specific findings to justify departure from presumptive minimum in sentence range for first-time offenders).

At a higher level, judges might review the validity of the prosecutorial guidelines themselves (but only once, when prosecutors first attempt to apply a newly drafted guideline), employing the familiar "arbitrary and capricious" standard of review.[124] The reviewing court would ask whether there is a rational basis for believing that the guideline is connected to the chosen policy goal and whether the prosecutor properly considered the major alternatives to the current guideline.[125] While courts sometimes employ this form of review so aggressively that they frustrate legitimate work by administrative agencies,[126] when properly applied this level of scrutiny can promote more deliberative and politically accountable actions by agencies.[127] The same might prove true for this limited form of judicial review of prosecutorial guidelines. Although the case-level review must remain with judges, either judges or the sentencing commission could retain responsibility for reviewing rule content.[128]

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124. See 5 U.S.C. § 706(2)(A) (describing standard of review under Administrative Procedure Act); William Funk, Rationality Review of State Administrative Rulemaking, 43 Admin. L. Rev. 147, 149 (1991) ("[A]ll agency actions, findings, and conclusions can be reviewed to determine if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (citation omitted)); Douglas G. Gifford, Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, 1983 U. Ill. L. Rev. 37, 41 ("[C]ontrols and procedural safeguards similar to those typically applied to other administrators should be imposed upon prosecutors.").

125. Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (citation omitted)). See generally Richard J. Pierce, Jr. et al., Administrative Law and Process 372–75 (4th ed. 2004) (describing evolution and increasing power of arbitrary and capricious standard of review).

126. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1421 (1992) (describing Fifth Circuit of late 1970s and early 1980s as "inhospitable forum for agencies intent upon regulating private conduct"); Richard J. Pierce, Jr., Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking, 37 Duke L.J. 300, 301 (1988) (noting that D.C. Circuit frequently reverses agency policies adopted through rulemaking process).

127. See William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 Nw. U. L. Rev. 393, 442 (2000) (suggesting that D.C. Circuit's "hard look review" has no harmful impact on agency policy and in fact may help improve it); Sidney A. Shapiro, Pragmatic Administrative Law 5 (2005) (unpublished manuscript, on file with the *Columbia Law Review*) (arguing that more rigorous judicial review "has been reasonably successful in narrowing administrative discretion in meaningful ways, adding to the accountability and legitimacy of the administrative state").

128. Judicial review of prosecutorial guidelines under these standards of review is likely to supplant any pressure on courts to use constitutional law to justify regulation of prosecutors. The type of review I advocate here is more measured (some might say anemic) than the sort of constitutional involvement in crime definitions and punishments that others have proposed. See Stuntz, supra note 2, at 587–94 (calling for judges to constitutionalize the definition of crimes); see also Markus Dirk Dubber, Toward a Constitutional Law of Crime and Punishment, 55 Hastings L.J. 509, 510 (2004) (same); Richard S. Frase, Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?, 89 Minn. L. Rev. 571, 629–34 (2005)

The two levels of judicial review discussed here would also entail two different sorts of remedies. A sentencing judge who finds a violation of prosecutorial guidelines in a particular case could dismiss the case without prejudice to a later refiling.[129] Particularly in the early phases of prosecutorial guidelines, this modest remedy accomplishes enough—promoting more visible and consistent choices by prosecutors—without unduly antagonizing the prosecutor.

The remedy for a finding of "arbitrary and capricious" rule content is another matter. Again, traditional administrative law offers a model: Reviewing courts that find an administrative regulation to be arbitrary and capricious typically remand the rule to the agency (in this case, the state prosecutors) to reconsider, redraft, and re-explain.[130]

3. *Commissions as the Fulcrum Between Judicial and Prosecutorial Regulation.* — Prosecutorial guidelines alone do not necessarily provide a more desirable set of sentencing outcomes. Every sentencing system must resolve the tension between individualized justice and reasonably consistent sentences for similar defendants. As the New Jersey story indicates, guidelines can make it more difficult for prosecutors to offer individualized treatment in particular cases because more visible declaration of reasons in particular cases may leave prosecutors less able to make quiet concessions to some defendants.

Prosecutorial guidelines, however, could shift some of the work of individualizing justice back to judges. When prosecutors start to carry some of the regulatory load and take more responsibility for uniform application of the law, it takes some of the burden off judges and leaves them with a new responsibility to individualize sentences. A state that produces a working set of prosecutorial guidelines can create a better regulatory balance by giving judges wider sentencing ranges under their guidelines and more expansive powers to depart from the guidelines. Judges have the experience and the professional disposition to make individualized sentencing decisions, which can be both visible and principled.

If judges themselves were to implement this tradeoff, it might appear to be an unseemly power grab. In contrast, if sentencing commissions lead the process, they can more credibly ease the strictures of judicial sentencing guidelines even as they raise expectations for prosecutorial uniformity under their new guidelines. Commissions can maintain the balance between the competing institutions and the competing values.

(evaluating methods of incorporating proportionality principles in Eighth Amendment jurisprudence). In spite of the scholarly support of constitutionalization, I believe this commission-led model of prosecutorial guidelines is both more realistic and takes better advantage of different institutional strengths.

129. The New Jersey appellate courts remanded cases when prosecutors placed no explanation on the record. See cases cited supra note 91.

130. See Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 295 (2003) (noting that court has discretion to determine whether rules will be vacated during remand or left in place).

4. *Commission Advantages over Legislatures.* — A sentencing commission can also improve on the work of legislatures in the formation of prosecutorial guidelines. The sentencing commission carries the classic advantages of an administrative agency: the expertise, the time to devote to careful policy development, and the opportunity to revisit issues as conditions change.[131] Because criminal sentencing involves complex interactions among many different actors,[132] and because the American criminal justice system has limited experience with prosecutorial regulation, it is important to move carefully and to learn from experience. This sort of situation plays more to the strength of the administrator than the legislator.[133]

A sentencing commission that develops prosecutorial guidelines need not develop an independent expertise in all the questions involved. Unlike the classic "command and control" regulatory agency that drives the selection and support of a policy, the task of a sentencing commission is to coordinate the policy choices of prosecutors, judges, and others with a stake in the system. Moreover, the negotiations are ongoing: The incremental changes to the prosecutorial guidelines allow for even more fine tuning than is typical for administrative rulemaking.

In this emphasis on negotiation and iteration, the creation of prosecutorial guidelines resembles the "collaborative governance" ventures that are increasingly common on the American regulatory landscape.[134] Although deference to the priorities and expertise of interested parties may not be appropriate in all settings, it is ideal in the sentencing context. The "regulated" parties here are public entities, accountable in

131. Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 82 (1985). For discussions of the advantages of time and expertise of sentencing commissions, see, e.g., Barkow, Administering Crime, supra note 18, at 800–12; Kevin R. Reitz & Curtis R. Reitz, Building a Sentencing Reform Agenda: The ABA's New Sentencing Standards, 78 Judicature 189, 191 (1995); Michael H. Tonry, The Sentencing Commission in Sentencing Reform, 7 Hofstra L. Rev. 315, 323–24 (1979); von Hirsch, supra note 15, at 7–8.

132. See Dale G. Parent, Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines 135–53 (1988) (describing roles of different groups in crafting sentencing policy).

133. See Warner W. Gardner, Federal Courts and Agencies: An Audit of the Partnership Books, 75 Colum. L. Rev. 800, 800–01 (1975) (recognizing that agencies and courts constitute a partnership); Harold Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 512 (1974) (same).

134. See Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 8–33 (1997) (explaining that agencies set minimum standards, convene multiparty negotiations to elaborate on standards, and follow an iterative process by monitoring and adjusting regulations in light of technological developments); Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn. L. Rev. 342, 371–442 (2004) (discussing "organizing principles" of contemporary governance model and their application to employment, environmental, and internet law).

their own right to the law and to the voters.[135] The commission can best contribute to sound outcomes by facilitating a balanced set of rules that recognizes the distinct knowledge and priorities of the different sentencing actors.[136]

Will legislators authorize such coordinating work by sentencing commissions? In states where all sentencing commission proposals must be ratified by the legislature, will the ratification happen? The accounts from Washington and Kansas confirm that it can happen.[137] In states with an established sentencing commission and stable sentencing guidelines for judges already in place, the commission may have the political capital and credibility to ask the legislature to assign this project to them.[138] Given that the initial power over the content of guidelines remains with the prosecutors themselves, a coalition of the state's judges and the sentencing commission might convince the legislature to act despite the initial reluctance of the prosecutors.

V. TRANSPARENCY AS A DRAFTING PRINCIPLE

So far, this Essay has considered the process for developing prosecutorial guidelines and the roles that different actors could play in the formation of such guidelines, but it has devoted only passing attention to the content of these guidelines. What would such guidelines say?

In some respects, prosecutorial guidelines could resemble the sentencing guidelines for judges. They could designate policies for selecting charges in "heartland" cases, while allowing for departures in unusual cases based on reasons that a reviewing supervisor (and ultimately a reviewing court) would find adequate. The New Jersey guidelines use such a departure structure for specifying the plea bargain discounts that prosecutors should normally offer to defendants.[139] Where the structure of prosecutorial guidelines parallels the structure of the sentencing guidelines for judges, they reinforce the message that the different sentencing actors share the burdens of uniform sentencing. Such a familiar struc-

135. See Sidney A. Shapiro, Outsourcing Government Regulation, 53 Duke L.J. 389, 391 (2003) (detailing limits on effective use of collaborative programs to assure control by public entities).

136. The situation here might be characterized as a prisoner's dilemma for legislatures and prosecutors—each party pursues self-interested ends, and thus creates a suboptimal result. The sentencing commission might become a facilitator, making it possible to avoid the dilemma.

137. See supra Parts II and III.

138. See Ronald F. Wright, Nat'l Inst. of Justice, Managing Prison Growth in North Carolina Through Structured Sentencing 12 (1998), available at http://www.msccsp.org/resources/structured.pdf (on file with the *Columbia Law Review*) (reporting that North Carolina legislature "deferred, in the end, to criminal justice professionals with strong hands-on experience in sentencing practices—judges, prosecutors, and corrections officials"); Barkow, Administering Crime, supra note 18, at 771–87 (discussing political insulation of sentencing commissions in Minnesota, Washington, and North Carolina).

139. *Brimage* Guidelines 2, supra note 99, at § 12.1.

ture also takes advantage of existing case law and other experience with the guidelines.

The prosecutorial guidelines may also take advantage of the distinction between procedural and substantive guidelines. Some existing prosecutorial guidelines do not directly address the charging or disposition outcomes that are available to an individual prosecutor.[140] Instead, they establish review protocols within the prosecutor's office to ensure that less experienced trial attorneys receive supervisory approval for their choices in certain categories of cases. Depending on the size and structure of the office, such procedural guidelines can go far in assuring reasonable consistency. Substantive guidelines, on the other hand, instruct the prosecutor more directly about the charging and disposition outcomes that are acceptable for various categories of cases. Procedural guidelines might be more appropriate early in the life cycle of developing prosecutorial guidelines, and commissions might defer more carefully to the views of prosecutors as the proposed guidelines shift along the spectrum from procedural to substantive.[141]

Whatever structure the guidelines take, the touchstone value of their content should be transparency. In other words, the guidelines should make it easier for litigants and voters—for insiders and outsiders—to anticipate or reconstruct the charges filed, the sentence imposed, and the basic reasons for both.

The transparency of the guidelines should pay dividends both at the case level and the system level. First, in service of an incremental system of prosecutorial guidelines, the earliest versions should make it possible for defendants, judges, and supervisors in the prosecutor's office to see and understand the prosecutor's charging and disposition decisions in particular cases. This transparency at the case level has both prospective and retrospective elements. During the pretrial period, when discovery and plea negotiations occur, guidelines that promote transparency require some disclosure from the prosecutor about the alleged grounds for an enhanced sentence.[142]

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140. My informal discussions with chief prosecutors in North Carolina and elsewhere suggest that this may be the most common type of policy applied in prosecutors' offices.

141. See James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1560–72 (1981) (calling for prosecutorial guidelines to address substantive limits rather than procedural limits); Wright, Prosecutorial Guidelines, supra note 80 (manuscript at 16–17) (addressing distinction between procedure and substance among existing prosecutorial guidelines).

142. The lack of transparency (compared to state guidelines) is one of the federal guidelines' shortcomings. The federal guidelines do not employ explicit prosecutorial guidelines, but rely instead on a combination of (1) internal prosecutorial regulation from the Department of Justice that is not publicly monitored, and (2) indirect limits by judges on prosecutors' choices. Judges monitor prosecutors' charging decisions through three mechanisms. First, the "relevant conduct" provision allows the judge to consider facts at sentencing even if the prosecutor did not choose criminal charges that reflected those facts. U.S. Sentencing Guidelines Manual § 1B1.3 (2004). Second, the "grouping rules" instruct the judge to discount the sentencing impact of multiple counts, depending on the

After the defendant goes to trial or pleads guilty, guidelines should compel the prosecutor to state the reasons to support charging decisions with major sentencing consequences, including any changes in the charges as originally filed. Guidelines may also include some power for the judge to insist on supplemental reasons when the original statement does not match the known facts in the case.

The guidelines should also promote transparency at the system level.[143] After some time under the guidelines, it should be possible to place cases into categories and monitor long-term trends. The ability to reconstruct the patterns of prosecutors' choices across many cases is crucial to any incremental development of prosecutorial guidelines. A commission must be able to see what prosecutors are doing under current

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seriousness and relatedness of the extra counts. Id. §§ 3D1.1–.5. Third, the guidelines delineate the standards upon which judges may accept or reject plea agreements. Id. §§ 6B1.1–.4. The federal guidelines rely on an ex post strategy, as judges react to charges after the fact, rather than an ex ante strategy as embodied in prosecutorial guidelines explored in this Essay.

The federal guidelines do not effectively promote transparency or accountability because the relevant conduct provisions give prosecutors the practical authority of deciding whether the probation officer and sentencing judge will learn about noncharged facts that will bind the judge to increase the sentence by specified amounts. The decision in United States v. Booker, 125 S. Ct. 738 (2005), may have improved the transparency of the system at the case level because defendants now must have better notice and better factfinding procedures for the potential grounds for an enhanced sentence. But the fundamental transparency problem with the federal system is that the relevant conduct rules are binding in only one direction. Even if the prosecutor must now signal earlier to the defendant what facts will be relevant at sentencing, the prosecutor's decision not to develop or present facts remains inscrutable. See Boerner, supra note 4, at 197 (arguing that relevant conduct rules reduce prosecutor accountability).

143. For other efforts to explicate and promote transparency in sentencing guidelines, see generally Marc L. Miller, A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform, 105 Colum. L. Rev. 1351 (2005) (arguing that accessibility and transparency of state sentencing data are necessary to advance next stage of reforms); Marc L. Miller, Sentencing Reform "Reform" Through Sentencing Information Systems, *in* Future of Imprisonment, supra note 23, at 121, 146–48 (proposing that "wide availability of sentencing data including judge identifiers and detailed offense and offender information" will improve transparency in sentencing); O'Hear, supra note 65, at 359–60 (arguing that federal sentencing guidelines promote aspects of transparency such as certainty, predictability, and objectivity); Schulhofer, supra note 11, at 822 (concluding that determinate sentencing increases transparency and thus "produce[s] wiser policy and more satisfactory possibilities for participation by affected parties"). Transparency is also an implicit theme in several efforts to evaluate and regularize the work of prosecutors. See Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 Fordham L. Rev. 13, 54–67 (1998) (calling for collection and publication of data on race of defendant and victim, each category of offense, and type of action taken at each stage of process); Daniel C. Richman & William J. Stuntz, Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 Colum. L. Rev. 583, 628–31 (2005) (claiming that sentencing defendants for actual conduct that law enforcement seeks to punish promotes prosecutorial accountability and deterrence).

guidelines before raising expectations in a later round of revised guidelines.[144]

One version of transparent guidelines would make it difficult for prosecutors to change the charges filed after an initial assessment of the case. The guidelines would instruct prosecutors about the strength of evidence necessary to file a charge, specify the grounds for declining to file charges even when supported by sufficient evidence, and then make it difficult to change the initial charges to dispose of the case before trial. In short, the guidelines would discourage charge bargaining.[145] The policy might call for prosecutors to document any reduction or increase in charges after the initial filing. Such internal prosecutor office guidelines have operated in New Orleans,[146] Seattle,[147] Alaska,[148] and elsewhere.[149] The criminal courts in these jurisdictions absorbed the modest increases in trial rates, and the greater restrictions on changing the charges made it easier to measure the strength of cases and to hold prosecutors accountable.[150]

Limits on charge bargaining in particular promote transparency because it is so difficult to judge which criminal charge best expresses the value of a criminal case, in light of the available evidence. A system that allows the prosecutor to easily amend the original charges leaves room for the prosecutor to seek (and sometimes obtain) convictions on charges that poorly fit the underlying conduct. When prosecutors must make a

144. See Frase, Role of the Legislature, supra note 23, at 374–75 (urging caution about prosecutorial guidelines because of lack of necessary databases to track prosecutors' choices).

145. Note that the New Jersey *Brimage* Guidelines explicitly limit charge bargaining. See *Brimage* Guidelines 2, supra note 99, at § 1.1 ("When a prosecutor has a factual and legal basis to charge a defendant with a *Brimage*-eligible offense, the prosecutor shall be required to charge the most serious provable *Brimage*-eligible offense, and the prosecutor shall not dismiss, downgrade, or dispose of such charge except in accordance with . . . these Guidelines."); cf. Raymond I. Parnas & Riley J. Atkins, Abolishing Plea Bargaining: A Proposal, 14 Crim. L. Bull. 101, 114–20 (1978) (advocating law that prevents prosecutor from changing charges after filing unless prosecutor shows special circumstances); Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1965–66 (1992) (proposing that sentencing guidelines make it more difficult for prosecutors to threaten to change charges and inflate sentence).

146. Wright & Miller, Screening/Bargaining Tradeoff, supra note 69, at 61–66.

147. Maleng, supra note 57, at 6.

148. Teresa White Carns & John A. Kruse, Alaska's Ban on Plea Bargaining Reevaluated, 75 Judicature 310, 310 (1992).

149. E.g., Kuh, supra note 14, at 55 (describing Manhattan District Attorney's Office internal guidelines establishing specific charge discounts in exchange for guilty pleas); Richard H. Kuh, Sentencing: Guidelines for the Manhattan District Attorney's Office, 11 Crim. L. Bull. 48, 48 (1975) (describing another set of internal guidelines prohibiting sentencing recommendations in ordinary circumstances).

150. See Ronald Wright & Marc Miller, Honesty and Opacity in Charge Bargains, 55 Stan. L. Rev. 1409, 1416 (2003) (explaining that restrictions on charge bargaining lead "citizens and their agents (including journalists and scholars) [to] make systematic judgments about prosecutorial charging," enabling voters to check overly broad prosecutorial discretion).

single, early evaluation of a case's merits, they must carefully and accurately charge from the beginning. Such a regime makes it easier for supervisors to prevent the gamesmanship of "overcharging." The charges filed on the public record—and thus the charges for which the public will ultimately hold the prosecutor accountable—will reflect the prosecutor's best judgment.[151]

The public should expect nothing less from its prosecutors than the exercise of sound judgment. Moreover, these judgments should be accurately reflected in public records and proceedings in a visible way that allows voters to evaluate those choices. A more transparent and deliberative prosecutor's office is more likely to avoid arbitrary differences in its treatment of defendants, and the hope of reasonable consistency in the work of prosecutors speaks to some of our deepest aspirations for equality of persons under the law.

Placing the discretion of prosecutors within additional legal limits will bring some losses along with the gains. Prosecutorial guidelines, for instance, might lead to more consistent use of mandatory minimum penalty statutes and other substantively unjust laws, instead of the more infrequent uses of those laws at present.[152] Nevertheless, for other criminal justice actors, policymakers have considered the tradeoff a positive one. The use of law to shape police discretion has yielded benefits for several generations now.[153] More recently, well-constructed sentencing guidelines have improved the work of sentencing judges, allowing the coexistence of judicial discretion and legal norms that assure consistent and visible decisions.[154] Prosecutors are the next sentencing actors in line to share the burdens of regulation.

CONCLUSION

Sentencing commissions have added value to criminal sentencing by acting as intermediaries. They sit midway between the legislature and the sentencing judge, midway between the drafters of general rules and the

151. For further elaboration of this argument, see id.

152. Cf. Alschuler, Failure, supra note 41, at 933–38 (arguing that judicial sentencing guidelines can be associated with greater severity in punishment); Joachim J. Savelsberg, Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law, 97 Am. J. Soc. 1346, 1377 (1992) (arguing that sentencing guidelines make disparities less visible by shifting discretion from sentencing to other areas, such as prosecution decisions).

153. See Samuel Walker, Taming the System: The Control of Discretion in Criminal Justice 1950–1990, at 52–53 (1993).

154. See Tonry, Sentencing Matters, supra note 41, at 10 (stating that judges in several states "came to favor guidelines because they provided a starting point for considering what sentences to impose and were seen to reduce disparities"); Chanenson, supra note 12 (manuscript at 66–76) (discussing balance between judicial discretion and accountability of structured sentencing systems); Norval Morris, Towards Principled Sentencing, 37 Md. L. Rev. 267, 285 (1977) (advocating presumptive sentencing guidelines because they allow for systematic reform while preserving judicial flexibility).

actors who apply the rules in particular cases. They share some of the systemic perspective of the legislature, but remain familiar enough with the changing daily reality of criminal courtrooms.

This intermediary role could also make the sentencing commission the key player in the creation of prosecutorial guidelines. A sentencing commission can stand between prosecutors and other sentencing actors. Commissions understand well the institutional priorities of prosecutors, but they also have credibility with other actors on questions of sentence consistency. They have staying power and thus can orchestrate long-term development of prosecutorial guidelines even if they start quite modestly. State sentencing commissions have now matured enough to do what once seemed impossible: to promote and monitor meaningful self-regulation from prosecutors.