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## Institutional Coordination and Sentencing Reform

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# Institutional Coordination and Sentencing Reform

Daniel Richman \*

Deciding how much time a person should spend in prison for a serious crime is an inherently moral and political act. And it is certainly cold-hearted and philosophically problematic to view sentencing as just an agency problem with criminal defendants as objects of a system in which prison terms are simply outputs.<sup>1</sup> So I will not even try to justify resorting to a narrow institutional perspective as a normative matter. But, for better or worse, those political actors with the greatest influence on sentencing regimes have to think in aggregate terms. While there is considerable normative appeal to the idea of courtroom actors, and particularly judges, crafting an individualized sentence for each defendant, we need also to recognize that for elected officials at the top of the prosecutorial hierarchy, sentencing—particularly sentencing after a negotiated guilty plea—presents just another iteration of the classic problem of administrative law: how to limit the ability of agents to take advantage of informational asymmetries to slack off or import their own policy preferences.<sup>2</sup>

One need hardly embrace the policy preferences of elected executive officials or the policy process to see the virtues of considering this internal perspective. The first is simply a matter of advocacy: However convinced one is that sentences are too high or that sentencing policy should be the exclusive province of judges, these are not likely to be effective starting points for conversations with sentencing hierarchs who can promote their sentencing preferences only by restricting the authority of line actors. And these sentencing hierarchs dominate the policymaking and legislative process. Budgetary considerations, at least at the state level, may lead statewide officials to reconsider levels of incarceration, but within these

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1. See Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 38 (2005) (comparing sentencing systems and policies to “machines”).

2. See David Markell, “Slack” in the Administrative State and Its Implications for Governance: *The Issue of Accountability*, 84 OR. L. REV. 1, 4 (2005) (examining agency behavior in the administrative enforcement of environmental law); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 763 (1984) (discussing the ability of bureaucratic superiors to control their subordinates); Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1300 (1997) (stating that “discretion . . . is simply an alternative and rather mystifying way to refer to ordinary bureaucratic processes of supervision and policymaking”); Susan P. Shapiro, *Agency Theory*, 31 ANN. REV. SOC. 263, 264 (2005) (noting that information asymmetries cloud principals’ awareness of agent actions).

constraints, they will still have enforcement priorities. The second is a matter of accountability and transparency. Legislators, elected officials, and political appointees may be all too prone to go overboard in getting “tough on crime,” but our general expectation (at least outside the criminal justice area) that unregulated agents are prone to drift or shirk should not be relaxed. Perhaps there is some optimal amount of drifting or shirking that will compensate for the failure of the political process to appropriately calibrate its response to crime. But even as one recognizes the value of “working group”<sup>3</sup> justice—the justice meted out within the courtroom triad of prosecutor, defense attorney, and judge—one can still find some countervailing value in the efforts of politically accountable officials to maintain a degree of control over the compromises reached by their unelected minions in the low-visibility world of plea bargaining.

Yet how do these officials exercise such control? And what effects will the successful exercise of such control have on the rest of the system? These are the questions considered here (but hardly resolved) in an effort to start exploring how the internal prosecutorial monitoring project conflicts with or reinforces particular sentencing regimes. As a descriptive matter, this is a technical inquiry into the mechanics of institutional coordination and an attempt to add to the literature that, when it does consider the politics of sentencing, tends to treat prosecutorial interests as monolithic.<sup>4</sup> Treatments of prosecutorial discretion in the sentencing context also tend to focus on its challenge to horizontal equity and judicial discretion within sentencing regimes.<sup>5</sup> The goal here is to reverse the arrow and, using an internal executive perspective, to start looking at how sentencing regimes and judicial enforcement of those regimes can be used as tools for the hierarchical control of line prosecutors in the plea bargaining process. To be sure, measures that promote hierarchical control will also promote horizontal equity. Indeed, the two goals have much in common. But the focus here, and perhaps in certain policymaking circles, will be on control.

First, we will consider a problem arising out of ostensibly successful regulation within a local prosecutor’s office. Then we will consider issues relating to regulation from outside the office to see how judicial supervision of plea bargaining through factually intensive sentencing inquiries can reflect

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3. See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE* 20 (1977) (describing the courtroom as a “workgroup”).

4. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991) (analyzing the effects of the sentencing reform movement and determining that rather than restricting discretion, it had “transferred discretion from judges to prosecutors,” referring to prosecutors as a single entity); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 722 (2005) (stating that “[p]rosecutors form the classic enforcement agency” in an analysis of those agencies charged with regulating the sentencing of crime, treating the prosecutors as one cohesive unit in a traditional agency model).

5. See, e.g., Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 138 (2005) (discussing the tension between horizontal equity in sentencing and local prosecutorial discretion).

(and perhaps occur because of) the interest of a statewide or national centralized prosecutorial authority in controlling its own minions. Finally, we consider how the decentralization of authority in a local office can give the chief prosecutor of that office a perspective much like that of a statewide official.

### I. Internal Management and the Pitfalls of Unilateral Reform

We start with a story that, at first blush, seems to be one in which shirking by line actors is successfully and unilaterally attacked by their politically accountable superior. On further analysis, however, it ends up looking much more like a case study in institutional disarray.

In their fascinating 2002 *Stanford Law Review* article, Ron Wright and Marc Miller presented and assessed the efforts of New Orleans District Attorney Harry Connick to take on a system in which, he claimed, “lazy” prosecutors were using the plea-bargaining process to “‘move’ cases and avoid trial.”<sup>6</sup> Connick “instructed his prosecutors not to engage in plea bargaining—particularly charge bargaining—except under very limited circumstances.”<sup>7</sup> What interested Wright and Miller, however, was that Connick coupled this promulgation with a move calculated to reduce the incentives that drive deeply discounted plea offers: a significant commitment of resources to the screening of cases presented by the police for prosecution.<sup>8</sup>

Attorneys in the screening unit—some of the most experienced in the office—would review each investigative file from the police, speak to all the key witnesses and victims, and generally assess the strength of the case.<sup>9</sup> Office policy then required them—if they decided to go forward—to charge the most serious crimes that the facts would support at trial.<sup>10</sup> And office policy made it extraordinarily difficult for the assistants handling the case thereafter to retreat from the charges thus specified.<sup>11</sup> The result, as intended, was that the office declined a relatively high number of cases—a fact it blamed on poor police work—and that bargaining played an extraordinarily limited role in the disposition of cases that it did pursue.<sup>12</sup> Wright and Miller thus found that “[t]he data mostly support . . . Connick’s claims to have implemented a screening/bargaining tradeoff over the last thirty

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6. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 61 (2002).

7. *Id.* at 61–62.

8. *Id.* at 62.

9. *Id.* at 63.

10. *Id.*

11. *Id.*

12. *Id.* at 65.

years.”<sup>13</sup> The lesson, they noted, is “that a committed prosecutor can implement the screening/bargaining tradeoff even without the conscious support of other actors in the system.”<sup>14</sup>

Wright and Miller were careful to note that “[a] prosecutor who shifts to stronger screening risks more strained relations with the local police.”<sup>15</sup> They optimistically suggested, however, that at least in theory, “an intense screening policy should encourage better police work,” particularly if the police insisted on “feedback from the prosecutor’s office both during and after the screening process” and “raise[d] the political cost for recalcitrant prosecutors who continue to decline cases that the police give a high priority.”<sup>16</sup>

In March 2002, after twenty-eight years in the post (five terms), Connick announced that he would not seek reelection.<sup>17</sup> His successor, Eddie Jordan, took office in January 2003<sup>18</sup> and soon commissioned an “Operations and Needs Assessment” that was conducted by national consulting firm Linder & Associates under the auspices of the New Orleans Police Foundation.<sup>19</sup> The consulting team was led by Paul Shechtman, a former Chief of the Criminal Division of the United States Attorney’s Office for the Southern District of New York.<sup>20</sup> The team’s report is a portrait of an utterly dysfunctional system, with the District Attorney’s office at least acquiescing in and perhaps contributing to this dysfunctionality.<sup>21</sup>

The consultants’ report noted the lack of coordination between the D.A.’s office and the police<sup>22</sup> and bluntly set out the consequences of unilateral action. The conviction rate for cases actually pursued hovered between

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13. *Id.* at 117.

14. *Id.*

15. *Id.* at 97.

16. *Id.* at 97–98.

17. Gwen Filosa, *Court Is Adjourned: New Orleans’ Longtime and Controversial DA Harry Connick Says He Has No Regrets and Looks Forward to His Family Time and His Singing Career*, *TIMES-PICAYUNE* (New Orleans, La.), Jan. 10, 2003, at A1.

18. *Id.*

19. EDDIE J. JORDAN, JR., *TOWARD A FULLY INTEGRATED CRIMINAL JUSTICE SYSTEM 4–5* (2005), available at <https://secure.cityofno.com/resources/portal102/DaComstat.pdf>.

20. *Id.* at 5.

21. *See id.* at 109 (stating that assistant district attorneys and New Orleans police officers “do not believe that either group ‘knows what they are doing’”); *id.* at 117 (finding that assistant district attorneys “expressed confusion over the current mission of the DA’s Office”); *id.* at 118 (indicating that communication within the D.A.’s office is “poor”).

22. *Id.* at 7 (noting the lack of collaboration between the D.A.’s office and the New Orleans Police Department in addressing “the issue that many arrests are not prosecutable”). A 2005 report by the Metropolitan Crime Commission in New Orleans noted: “The negative impact of the lack of integration between the NOPD and D.A.’s Office is nowhere more apparent than in the case screening process . . . . The current system was put in place in the 1980’s and little has changed since then.” METRO. CRIME COMM’N OF NEW ORLEANS, *PERFORMANCE OF THE NEW ORLEANS CRIMINAL JUSTICE SYSTEM 2003–2004*, at 20 (2005), available at [http://introcrimeno.org/2Perf\\_of\\_the\\_NO\\_Criminal\\_Justice\\_System\\_2003-20041.pdf](http://introcrimeno.org/2Perf_of_the_NO_Criminal_Justice_System_2003-20041.pdf).

89.9% and 96.6% between 2002 and 2004<sup>23</sup> and, of the defendants who pleaded guilty, between 82.2% and 94.8% pleaded as charged.<sup>24</sup> But only 40.3% of the Part I (FBI index) crime cases presented by the police were accepted for prosecution in 2002 and only 38.2% in 2004.<sup>25</sup> It is difficult to put these acceptance rates in a precise comparative perspective.<sup>26</sup> But in California, in 2004, 60.7% of violent felony arrests and 76.4% of property arrests ended in *convictions* (not simply acceptances), with a 69.8% figure for all felony arrests.<sup>27</sup> While one cannot easily quantify the point, the New Orleans acceptance rates were extraordinarily low.

The New Orleans police evidently were not responding to rigorous prosecutorial screening by bringing stronger cases. They were just continuing to bring weak ones and willing to suffer a refusal to prosecute. The lack of coordination between New Orleans' police and prosecutors was surely not the city's only criminal justice problem before Hurricane Katrina, and the structure and operations of the city's criminal justice institutions will likely be different after it.<sup>28</sup> Yet the episode offers a powerful reminder that transcends both the city's idiosyncratic approach to criminal justice and the rationale behind D.A. Connick's demand for more rigorous screening: for better or worse, the police are critical actors in the sentencing process.

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23. JORDAN, *supra* note 19, at 16.

24. *Id.* at 18.

25. *Id.* at 12; see Amanda Ripley, *What Happened to the Gangs of New Orleans?*, TIME, May 22, 2006, at 54, 60, available at <http://www.time.com/time/archive/preview/0,10987,1194016,00.html> (noting that "in New Orleans, 93% of people arrested from 2003 to 2004 never went to prison").

26. The Department of Justice reports that in forty counties representative of the nation's seventy-five most populous counties, 68% of all felony arrests ended in conviction; this figure consists of a 60% conviction rate for all violent felony arrests and a 72% conviction rate for all felony property arrests. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 24 tbl.23 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf>. Discerning screening rates in the reporting jurisdictions is a challenge, however. In some counties, prosecutors report screened-out cases as "dismissals." *Id.* at 39. In other counties, prosecutors review felony arrests before deciding whether to file felony charges, but if prosecutors choose not to file charges, then the cases are not reported at all. *Id.*

27. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 2004, at 69 (2004), available at <http://ag.ca.gov/cjsc/publications/candd/cd04/Dispositions.pdf>. In New York, the overall conviction rate for arrests in 2001 was 57.5% for New York City and 64.2% for New York State. STATISTICAL SERVS. UNIT, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 2000-2001 CRIME AND JUSTICE ANNUAL REPORT § 3, at 5 (2004), available at [http://criminaljustice.state.ny.us/crimnet/ojsa/cja\\_00\\_01/sec3.pdf](http://criminaljustice.state.ny.us/crimnet/ojsa/cja_00_01/sec3.pdf).

28. See Dan Baum, *Deluged: When Katrina Hit, Where Were the Police?*, NEW YORKER, Jan. 9, 2006, at 50, 52 ("As an institution . . . the New Orleans Police Department disintegrated with the first drop of floodwater."); Adam Nossiter, *New Orleans Crime Swept Away, with Most of the People*, N.Y. TIMES, Nov. 10, 2005, at A18 (noting that New Orleans' inurder rate, which was formerly the highest in the nation, plummeted to zero following Hurricane Katrina); Ripley, *supra* note 25, at 55 (noting that "New Orleans was a disaster site before Katrina").

Once one sees a casefile not as a given but as an artifact of a fact-gathering process that is primarily dominated by the *police* and that incorporates *prosecutorial* decision-making only to the extent that some political or bureaucratic mechanism mediates between the two coordinate entities, one sees the limitations of a sentencing literature that focuses on the results of the plea bargaining or formal adjudicative process. Before we get too caught up in sentencing differentials across the defendants who are actually prosecuted, we ought to give some thought to the defendants who get away because investigative or adjudicative resources are not expended on them. And, of course, it is also helpful to get all murderers off the streets.

Without pointing fingers at D.A. Connick—who after all may have been making the best of a bad situation—one can use the breakdown in relations between his office and the New Orleans Police Department to raise some larger questions. Where prosecutors and police have independent sources of authority and stand in a coordinate, not hierarchical relationship, what mechanisms ensure that each agency internalizes, or at least strongly considers the policies and preferences of the other? One might model the relationship as a bilateral monopoly and assume that some degree of negotiation occurs between the two parties necessary to the prosecution of a criminal case.<sup>29</sup> The validity of this assumption, however, turns on the degree to which the two are trying to maximize their joint output, or to which each is judged by a performance measure that implicates the other.

One could imagine an administrative mechanism that would prevent a prosecutor's office from shifting costs to the police (for however laudable a reason), prevent the police from shifting its costs back to the public (in the form of unprosecuted offenders), or both. In the federal system, the Attorney General—who, along with the Deputy Attorney General, has hierarchical authority over federal prosecutions and those enforcement agencies housed in the Justice Department—at least potentially plays this role.<sup>30</sup> State systems, on the other hand, generally lack even this small degree of structural coordination, because police chiefs report to mayors and because district attorneys are directly elected. The degree to which alternative mechanisms will develop is ultimately a matter of politics.

Bill Stuntz and I have argued that electoral accountability can play an important role in ensuring the health of state systems—at least in comparison to the federal system—since voters can easily grasp and track the prosecutions of murders, rapes, and robberies that are staples of those

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29. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003).

30. See Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1440 (2004) (describing the Department of Justice as a unified agency under control of the Attorney General but noting that in reality "such is not always the case"); Richman, *supra* note 29, at 756 (noting that only the Attorney General and Deputy Attorney General have hierarchical authority over both the prosecutors and investigative agencies within the Justice Department).

systems.<sup>31</sup> In 2003, for example, the D.A. in San Francisco, Terence Hallinan, also found himself at loggerheads with the police. Shortly before the 2003 election, the most recent data (from 2001) showed his office declining to file charges in 36.7% of all felony arrests (compared to a statewide figure of 13.6%)<sup>32</sup>—a rate Hallinan attributed to sloppy police work.<sup>33</sup> Just 29% of all adult felony arrests in 2001 ended in convictions.<sup>34</sup> Hallinan lost the election to an opponent who made much of Hallinan's alleged incompetence and low conviction rate.<sup>35</sup> Indeed, two political scientists, Sanford C. Gordon and Gregory A. Huber, have recently gone so far as to predict that "voters will always reward prosecutors [electorally] for obtaining convictions and punish them for acquittals. This strategy holds irrespective of either how tough on crime voters want prosecutors to be, or how much information voters have about individual cases."<sup>36</sup>

But political accountability will not always do the trick—either because so many elections are largely uncontested or because of deeper democratic failures. The New Orleans report noted that although the city had the highest homicide rate among the nation's seventy-one largest cities in 2002 and 2003,<sup>37</sup> the vast majority of homicides reported and screened in those years did not end in convictions.<sup>38</sup> Indeed, in 2002, only 14.3% of the 258 homicides reported and only 15.0% of the homicide cases screened ended in conviction.<sup>39</sup> Why was this tolerated? Perhaps the rule is that (1) prosecutors are more likely to be held politically accountable than the police where there is a dysfunctional relationship between the two agencies—which would make sense, given that police chiefs are politically accountable only through elected mayors, and mayors have responsibilities (and sources of popularity) that go far beyond the criminal justice system; and (2) prosecutors will not always be held so responsible, either because they are held blameless or because of some larger failure of electoral accountability.

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31. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 604–05 (2005).

32. Bill Wallace, *San Francisco Ranks Last in Convictions; State Figures Show Relatively Low Rate for D.A.'s Office*, S.F. CHRON., Oct. 17, 2003, at A1.

33. *Id.*

34. Conflicts between San Francisco's police and D.A.'s office were somewhat exacerbated by the obstruction of justice investigation that Hallinan pursued against the police department's leadership. *Id.*

35. Demian Bulwa, *Harris Defeats Hallinan After Bitter Campaign*, S.F. CHRON., Dec. 10, 2003, at A1; Maura Dolan, *New D.A. Beat Incumbent While Embracing Positions*, L.A. TIMES, Dec. 11, 2003, at B1.

36. Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 350 (2002).

37. JORDAN, *supra* note 19, at 1.

38. *Id.*

39. *Id.*



At any rate, the New Orleans program ought to be taken as an object lesson in the pitfalls of unilateral regulation of prosecutorial bargaining discretion.

## II. Executive Regulation from Outside the District

For all its perverse systemic effects, the New Orleans D.A.'s screening initiative was a success story as an experiment in the regulation of line prosecutors from within their district.<sup>40</sup> This is not particularly surprising. Using a centralized intake mechanism and essentially freezing the valuation of every case that is allowed to go forward may not serve the interests of sentencing equity, broadly defined, but it will promote the internal management of the sentencing process within a prosecuting office. Managing the process from outside the office, however, can pose very different (even insurmountable) challenges.

Perhaps the best evidence of how difficult it is for a prosecutorial hierarch to manage the process from beyond the district level comes from the story of Alaska's plea-bargaining ban. Because of its late start, Alaska has perhaps the most centralized prosecutorial organization of all fifty states.<sup>41</sup> The Governor appoints the attorney general, who in turn appoints and maintains authority over all district attorneys and assistant district attorneys.<sup>42</sup> In 1975, Attorney General Avrum Gross famously announced a ban on plea-bargaining that, like D.A. Connick's initiative in New Orleans, relied on heightened screening standards at intake and severe limitations on plea dispositions thereafter.<sup>43</sup> From the start, however, "[t]he ban was not implemented uniformly throughout the state," with "'local legal culture' shap[ing] the contours of the policy in each area."<sup>44</sup> And its bite diminished over time as successor attorneys general gave more discretion to local district attorneys.<sup>45</sup> Indeed, by 2003, complaints from line prosecutors in Alaska were less about centralization and more about the *lack* of sufficient policy guidance from above.<sup>46</sup>

There are obviously many unique aspects to the Alaska experiment (beginning with its geographic setting), but it raises a more general issue: To

40. See *supra* notes 9–12 and accompanying text (explaining the screening initiative's success in reducing plea bargains).

41. TERESA WHITE CARNS ET AL., ALASKA JUDICIAL COUNCIL, ALASKA FELONY PROCESS: 1999, at 34 (2004), available at <http://www.ajc.state.ak.us/reports/Final%20Version%20of%20Report9.pdf>.

42. *Id.* at 34 n.43.

43. Teresa White Carns & John Kruse, *A Re-Evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 33–34 (1991); Wright & Miller, *supra* note 6, at 44.

44. Carns & Kruse, *supra* note 43, at 34.

45. *Id.* at 35.

46. CONFERENCE OF W. ATT'YS GEN., REVIEW OF THE OPERATIONS OF THE ALASKA DEPARTMENT OF LAW 22 (2003), available at <http://www.law.state.ak.us/pdf/admin/FINALCWAGReport.pdf>.

what extent can a statewide prosecutorial hierarchy get a handle on, let alone control, the way line prosecutors present cases to sentencing judges? Or put more provocatively: To what extent can such a hierarchy do this without the assistance of sentencing judges? It may sound strange to think of judges as handmaidens of an executive agenda, but the issue is raised by recent developments—nicely highlighted in two pieces by Ron Wright<sup>47</sup>—in New Jersey, one of the few states that comes close to Alaska in the extent it gives the attorney general hierarchical control over the state’s entire corps of prosecutors.

Wright tells how, in response to an increase in mandatory minimum statutes that it (understandably)<sup>48</sup> saw as increasing the risk of prosecutorial manipulation of sentencing outcomes, the New Jersey Supreme Court interpreted these statutes “to require the attorney general to draft statewide charging guidelines.”<sup>49</sup> It also specified that the attorney general, not the prosecuting attorneys for each county, keep effective control of these guidelines.<sup>50</sup> The attorney general responded by promulgating just such guidelines for the covered offenses (mostly in the narcotics area),<sup>51</sup> and the court has worked hard to ensure compliance.<sup>52</sup> Under the new guidelines regime, prosecutors had to explain to trial judges precisely why they were invoking or not invoking enhanced sentencing provisions.<sup>53</sup> The trial judges “reviewed these reasons to assure that the prosecutors were following the guidelines.”<sup>54</sup>

The New Jersey Supreme Court’s readiness to take a laboring oar in institutional reform (“activism” is such a loaded term) might be a sufficient explanation for the implementation of this scheme. But one might still wonder whether it is merely a coincidence that this judicial initiative occurred and has flourished in a state in which county prosecutors are not elected but, like the attorney general, appointed by the Governor with senate confirmation.<sup>55</sup> Did the New Jersey court commandeer the attorney general

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47. Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1088 (2005) [hereinafter Wright, *Prosecutorial Guidelines*]; Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1014 (2005) [hereinafter Wright, *Sentencing Commissions*].

48. For an effort to model prosecutorial manipulation of mandatory sentencing regimes, see David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591 (2005).

49. Wright, *Prosecutorial Guidelines*, *supra* note 47, at 1088.

50. *Id.* at 1095 (discussing *State v. Gerns*, 678 A.2d 634 (N.J. 1996)).

51. For the most recent version of the guidelines, see OFFICE OF THE ATT’Y GEN., STATE OF N.J., BRIMAGE GUIDELINES 2 (2004), available at [http://www.state.nj.us/lps/dcj/agguide/directives/brimage\\_all.pdf](http://www.state.nj.us/lps/dcj/agguide/directives/brimage_all.pdf).

52. Wright, *Sentencing Commissions*, *supra* note 47, at 1031.

53. *Id.*

54. *Id.*

55. N.J. STAT. ANN. § 2A:158-1 (West 1985).

to serve its (ostensibly the statute's) purposes? Did the attorney general readily enlist in an effort that served his own institutional goal of limiting the discretion of line prosecutors? These seem like questions worth pursuing, particularly since Wright points out that after promulgating the judicially mandated guidelines, the New Jersey attorney general created guidelines in other areas on his own initiative.<sup>56</sup>

Noting how the “lack of monitoring or enforcement by other actors” reduces the value of internal prosecutorial guidelines “as a way to achieve consistency and accountability,” Wright suggests that “[t]ogether, the sentencing actors in New Jersey may be creating a partnership that could thrive in many places.”<sup>57</sup> Yet Wright might be under-estimating the role played by New Jersey's unusual hierarchical structure. The “partnership” in New Jersey is not between prosecutors and judges generally but between the judiciary and an attorney general who, but for the guidelines and their judicial enforcement, would be hard-pressed to regulate how his scattered minions use sentencing concessions. Elsewhere, an attorney general would not, and would not be expected to, consider local prosecutors as his minions.<sup>58</sup>

Among states, Alaska and New Jersey are outliers when it comes to the interaction of hierarchical prosecutorial authority and sentencing schemes.<sup>59</sup> They are among the few states whose prosecutorial regime offers at least a clear structural possibility of direct control and perhaps therefore a degree of political accountability in this regard.<sup>60</sup> In other states, the political independence of district offices appears to be a conversation-stopper. Even where statewide elected officials champion mandatory sentencing measures—with California's three-strikes statute being a particularly famous example—they leave ample room for district variance, or at least stand ready to acquiesce in it.<sup>61</sup> A ten-year retrospective study of the California law by the state's District Attorneys Association cited data from the state's most populous counties indicating that prosecutors exercised their discretion to ask

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56. Wright, *Sentencing Commissions*, *supra* note 47, at 1034.

57. *Id.* at 1035–36.

58. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 750 (1996) (noting that in only Alaska, Connecticut, Delaware, New Hampshire, and Rhode Island does the state attorney general have some kind of “supervisory control over local prosecutorial decisions,” including charging).

59. See *id.* at 732 (noting that in New Jersey prosecutors are “appointed by the governor with the advice and counsel of the state senate” and in Alaska, Connecticut, Delaware, and Rhode Island, “local prosecutors are part of the statewide state attorney general's office and are controlled by the state attorney general”).

60. See *id.*

61. See Joshua E. Bowers, “*The Integrity of the Game Is Everything*”: *The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1167–80 (2001) (analyzing the geographic disparity in the California Three Strikes law and suggesting that the California legislature ought to change the law to reflect a principle of proportionality acceptable throughout California).

for dismissal of felony strikes in 21%–40% of all three-strikes cases.<sup>62</sup> (Having already availed himself of this license and having limited the use of the statute within his district to violent third-strikes, the Los Angeles district attorney is now leading a campaign to amend the law and so limit use of the statute throughout the state.<sup>63</sup>) This pattern has been echoed in other states with three-strikes legislation.<sup>64</sup>

Perhaps this acquiescence stems from a substantial harmony in the viewpoints of state officials and local prosecutors—who, if anything, may well be more prone to incarceration than the state officials who have to actually pay for prisons.<sup>65</sup> Perhaps it reflects acceptance of the independent political status of prosecutors. Perhaps it reflects a perceived institutional inability to regulate. Maybe it reflects some combination of these and other factors. But outside those states with a formal statewide regime, statewide elected officials have been largely untroubled with what an outsider might consider district drift but what we take for granted, even celebrate, as local prosecutorial discretion.<sup>66</sup>

The story has been quite different in the federal system. Here, the existence of a unitary Justice Department (at least on paper) offers the structural

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62. CAL. DIST. ATT'YS ASS'N, PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S THREE STRIKES LAW: A 10-YEAR RETROSPECTIVE 11 (2004), available at <http://www.cdaa.org/WhitePapers/ThreeStrikes.pdf> (citing Jennifer Edwards Walsh, *Dismissing Strikes "In Furtherance of Justice": An Analysis of Prosecutorial and Judicial Discretion Under California's Three-Strikes Law 9* (2000) (unpublished Ph.D. dissertation, Claremont Graduate University)).

63. Editorial, *Another Strike at "Three Strikes" Law*, S.F. CHRON., Jan. 9, 2006, at B6; Jill Leovy, *Unlikely Allies Back Three-Strikes Change*, L.A. TIMES, Jan. 11, 2006, at B1.

64. See JAMES AUSTIN ET AL., U.S. DEP'T OF JUSTICE, THREE STRIKES AND YOU'RE OUT: THE IMPLEMENTATION AND IMPACT OF STRIKE LAWS 8 (2000), available at <http://www.ncjrs.org/pdffiles1/nij/grants/181297.pdf> (“[T]he impact [of three-strikes legislation] has been much less than anticipated, as the courts, and in particular, the prosecutors, have taken steps to minimize the potential effects of the new laws.”).

65. See Misner, *supra* note 58, at 719–20 (noting the “split-funding” of the criminal justice system that arises from prosecutors’ use of county funds to operate their offices and the use of state funds to operate prisons, which results in a failure to consider prison resources as a factor when exercising prosecutorial discretion); see also Barkow, *supra* note 4, at 806–07 (discussing the trend of cost-minded state legislatures and politicians to, at times, relax a tough-on-crime stance in favor of a balanced budget); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285–90 (2005) (relating the efforts of many state legislatures to find ways to reduce prison sentences in order to save money). The Los Angeles D.A.’s campaign to limit the three-strikes law is good evidence, however, that ideology can loom larger than this fiscal dynamic. See Bowers, *supra* note 61, at 1177 n.72.

66. Decentralization also means that efforts to cut sentences are best aimed at state legislators or state legislation, as has occurred in California and Arizona, where voter initiatives focused on low-level drug possession sentences. See K. JACK RILEY ET AL., RAND CORP., JUST CAUSE OR JUST BECAUSE?: PROSECUTION AND PLEA BARGAINING RESULTING IN PRISON SENTENCES ON LOW-LEVEL DRUG CHARGES IN CALIFORNIA AND ARIZONA (2005), available at [http://www.rand.org/pubs/monographs/2005/RAND\\_MG288.pdf](http://www.rand.org/pubs/monographs/2005/RAND_MG288.pdf) (providing additional information about the prosecution of imprisoned low-level drug offenders and how such prosecutions might be affected by diversion reform initiatives such as those in California and Arizona).

possibility of extra-district regulation. The nature of federal criminal enforcement also brings a far greater risk of policy drift than one finds in state systems. With no “federal crime rate” to provide an external performance metric, with a level of resources dwarfed by the range of criminal jurisdiction allowed by Congress, and with few clear public expectations of how their caseload should be selected and handled,<sup>67</sup> federal prosecutors pose unique supervisory challenges to distant sentencing hierarchs.

In the federal system, the effort from outside the district to deploy judges as regulators of prosecutorial charging and bargaining has been quite clear, albeit ill-fated. This is the story of “relevant conduct.” And it is a story of an attempt that did not just fail, but really back-fired. As Julie O’Sullivan has explained, the best justification for the modified “real-offense” sentencing approach of the Federal Sentencing Guidelines (which often required sentencing judges to consider criminal conduct alleged in counts that were dropped as part of a plea deal) is that it endeavored to limit prosecutor’s ability to undercharge or to otherwise understate the seriousness of a defendant’s conduct.<sup>68</sup> To be sure, the approach promised to limit prosecutorial leverage in plea negotiations, but the goal was also to have a defendant’s sentence be based on all “relevant conduct,” not just the subset of it that the line prosecutor chose to identify.<sup>69</sup> That judges would actually learn about all of a defendant’s “relevant conduct” was simply a matter of faith—faith that was probably misplaced notwithstanding the efforts of probation officers to serve judges in this regard.<sup>70</sup> As the Sentencing Commission’s Fifteen Year Report makes clear, the extent to which prosecutors—with the cooperation of defense attorneys—understate offense conduct as part of a negotiated settlement may be hard to quantify, but it

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67. Richman & Stuntz, *supra* note 31, at 613–15.

68. Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1359–60 (1997); see also Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 244 (2005) (“Even at the individual case level, the relevant conduct rules were designed to ensure that prosecutors did not manipulate their control of the facts into absolute control over sentencing outcomes.”); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434, 1434–35 (1997) (noting that “the potential justification for requiring judges to consider alleged criminal conduct for which the defendant has not been convicted is that it may negate undercharging by prosecutors” but arguing that alleged-related offense sentencing is a “moral and practical disaster”).

As Michael O’Hear recently noted, the House version of the Sentencing Reform Act would have directed the Justice Department to “‘issue guidelines for U.S. Attorneys to use in deciding what charges to bring and what plea bargains to make,’” and would have authorized judges to reject plea agreements that did not conform to those guidelines. Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 774 n.140 (2006) (quoting H.R. REP. NO. 98-1017, at 36 (1984)).

69. O’Sullivan, *supra* note 68, at 1350–51.

70. Kevin R. Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POL’Y 389, 407–08 (1998).

appears to be quite significant.<sup>71</sup> (It is also entirely possible that judges, uncomfortable with the severity of guideline sentences, consciously overlooked such factual omissions.) Indeed, as Judge Nancy Gertner has written, “real offense” sentencing “in fact proved to be a boon for prosecutors rather than a limit on their power.”<sup>72</sup>

Questioning O’Sullivan’s justification of real-offense sentencing as a way to restrain inappropriate prosecutorial leniency, David Yellen suggested in 1997 that if such leniency really was a problem, the Department of Justice could find other ways to regulate charging decisions.<sup>73</sup> Not long thereafter, in 2003, the Ashcroft Justice Department endeavored to do just that through the famous “Ashcroft Memorandum.” In the wake of congressional efforts to further limit judicial sentencing discretion under then-mandatory sentencing guidelines,<sup>74</sup> Attorney General Ashcroft directed that “in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by [designated supervisory officials]” under certain limited exceptions.<sup>75</sup>

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71. See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 82–92 (2004), available at [http://www.ussc.gov/15\\_year/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/15_year/15_year_study_full.pdf) (suggesting, based on surveys of judges and attorneys along with other compiled data, that understating offenses in plea bargaining is widespread); see also KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 139 (1998) (discussing the extent to which prosecutors misrepresent or manipulate facts in plea agreements); Nancy King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 296–98 (2005) (recognizing the reality of understated offenses as reflecting the compromise and professional judgment expected in plea negotiations).

72. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 577 (2005).

73. Yellen, *supra* note 68, at 1438.

74. See Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 650, 670 (codified as amended at 18 U.S.C. § 3742(e)(3) (Supp. 2004)) (detailing appellate review of sentences given in district court that depart from the guideline range); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1335–36 (2005) (commenting on the Feeney Amendment to the PROTECT Act, which instituted a more stringent review for departures from sentencing guidelines); see also Douglas A. Berman, *Locating the Feeney Amendment in a Broader Sentencing Reform Landscape*, 16 FED. SENT’G REP. 249 (2004) (commenting on the Feeney Amendment’s impact on the traditional purposes of punishment and the institutional framework of sentencing and comparing it with other sentencing guideline systems); O’Hear, *supra* note 68, at 786–90.

75. Memorandum from John Ashcroft, Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors (Sept. 22, 2003), [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm); see also Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 301–02 (2004) (citing Attorney General Ashcroft’s circulation of the Memorandum in compliance with the terms of the Feeney Amendment); O’Neill, *supra* note 30, at 1487 (citing Attorney General Ashcroft’s call for a return to former Attorney General Thornburgh’s position to “charge the most serious crime supported by the known facts”).

It is far from clear whether the Ashcroft Memorandum had any effect on line prosecutors in U.S. Attorneys' offices.<sup>76</sup> When it came to capital cases, which have long been given intensive attention at the highest levels,<sup>77</sup> the Department could indeed preclude lenient dispositions (at least until the case went to the jury).<sup>78</sup> But ordinary cases appear to have been more immune to this policy intervention. The Sentencing Commission's Fifteen Year Report found: "While charging and plea bargaining are officially regulated by nationwide DOJ policies, researchers reported that in practice these policies were less determinative of prosecutorial conduct than internal U.S. Attorney's office policies."<sup>79</sup>

The fact that the Department has had so much trouble regulating line prosecutors does not render its efforts illegitimate. Even one who thinks federal sentencing is generally too high can recognize the interest of politically responsible officials in implementing an administration's policy preferences in the trenches. And an administration's concerns are likely to be grounded as much in institutional perspective as in policy preference.

In their insightful effort to explain why federal drug sentences declined between 1992 and 1999, Bowman and Heise suggested:

Part of the explanation for the continued downward drift of federal drug sentences is surely that some of the front-line actors in the federal criminal system feel passionately that drug sentencing rules are too harsh. But a far more important consideration may be that a critical mass of those front-line actors are simply unconvinced of the imperative to commit the time, institutional resources, and emotional capital necessary to defend strict interpretation of drug sentencing rules.<sup>80</sup>

One factor that might have influenced the way line prosecutors made these judgments during the 1990s was a growing careerism in U.S. Attorneys' offices during this period. By Todd Lochner's calculation, "the

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76. See G. Jack King Jr., *NACDL Survey: USAOs Deny Ashcroft Memo Affecting Plea Bargaining*, CHAMPION, Dec. 2003, at 6, 6 (finding that there has been little effect in charging and plea-bargaining policies in the federal system under Attorney General Ashcroft).

77. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 406-19 (1999) (giving a description of the Department's review of capital cases); see also U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), available at <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm> (reviewing the federal death penalty system).

78. See John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1698 (2003) (comparing the different approaches taken under Attorney General Reno and Attorney General Ashcroft); Richard B. Schmitt, *Ashcroft Is Undeterred in Push for Capital Cases*, L.A. TIMES, Sept. 29, 2004, at A1 (noting that "jurors have rebuffed calls for the federal death penalty in 23 of the 34 capital cases tried since 2001").

79. U.S. SENTENCING COMM'N, *supra* note 71, at 84.

80. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1133 (2001).

average tenure time for assistant U.S. attorneys increased from roughly three-and-a-half years in the 1960s to just over eight years” by 1996–1998.<sup>81</sup> Lochner noted that these figures reflect the tenures only of people who *left* their positions as assistant U.S. attorneys and that it appears that turnover rates declined from 6% to 2%.<sup>82</sup> With this statistical backdrop, Lochner drew on personal interviews with numerous U.S. attorneys and assistant U.S. attorneys to conclude:

[T]he growing length of tenure among assistants tends to discourage compliance with changes in office or department priorities because 1) assistants know that short of egregious behavior they will “outlive” both the attorney general and their respective U.S. attorney; 2) their careerist status has dramatically altered their personal incentive structures, making them less eager to take complex cases involving extensive discovery and overtime hours, and more eager to take cases that can be disposed of quickly and with little effort; and 3) their longevity as federal prosecutors tends to reinforce their view that they, rather than the department or the U.S. attorney, are in the best position to set an office’s prosecutorial agenda.<sup>83</sup>

This growing careerism can only accentuate the inherent tension between line assistants and the political leadership of the Justice Department. The Department, of course, can be well served by plea-bargaining that results in efficient use of its investigative and adjudicative resources, and it can obtain such peak efficiency only by relying on the local knowledge of prosecutors and agents in the field. Yet with such reliance comes the inevitable risk of agency costs and policy drift, which given the extent of federal enforcement discretion, presents far more of an oversight challenge in the federal system than it does in the states.<sup>84</sup>

Hard pressed to implement its controls through administrative directives, where will the Justice Department turn? Prediction is hard here, particularly given the varying extents to which different Administrations have been committed to centralization. There are only a few options: (1) concede defeat; (2) continue at the present level of regulation, in full

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81. Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys’ Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 282–83 (2002). Offices in the largest metropolitan areas, such as New York and Los Angeles, appeared to be exceptions to the trend. *Id.* at 285. This is consistent with the finding by Boylan and Long that assistant U.S. attorney turnover is higher in high-private-salary districts than in low-private-salary districts. Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 627 (2005).

82. Lochner, *supra* note 81, at 282–83.

83. *Id.* at 288.

84. See Richman & Stuntz, *supra* note 31, at 599–618 (arguing that a small sphere of responsibility and a large sphere of jurisdiction allow federal prosecutors time and authority to pursue investigative detours while state prosecutors are constrained by time and politically mandatory prosecutions).



knowledge that the program is more for public and congressional consumption than internal use; (3) increase the extent and rigor of administrative supervision through some combination of direct bureaucratic control and measures that draw on the monitoring potential of the FBI and other enforcement agencies; or (4) do more, presumably through sentencing legislation, to recruit judges as monitors.<sup>85</sup> To be sure, this last option may not be workable. The Sentencing Commission's Fifteen Year Report noted:

Judicial scrutiny of plea agreements, supported by probation officers' independent presentence investigations, were often inadequate to control plea bargaining because both judges and probation officers were heavily dependent on the information provided by the prosecutor in a given case. In addition, resource limitations and a reluctance to reject agreements . . . made judicial rejection of plea agreements that undermined the guidelines relatively rare.<sup>86</sup>

Moreover, as the First Circuit recently noted in a refreshingly candid opinion about fact-bargaining, the "costs of monitoring compliance" with "a system of mandatory disclosure of all possible information at a plea hearing" are high and would come with the loss of "many of the efficiencies created by plea bargaining."<sup>87</sup> The court also worried that such a system would "lead to the blurring of roles" by effectively involving judges in plea-bargaining.<sup>88</sup> Still, one could imagine legislation bolstering the judicial oversight capability with measures of the sort recently suggested by Nancy King<sup>89</sup> and significantly restricting the sentencing options available on any given facts.

One can have one's own policy intuitions or preferences about the extent to which federal judges should have sentencing discretion. The point here, however, is that any realistic policy proposal ought to take into account the Justice Department's likely response to it. A world of untrammelled judicial discretion but intensive administrative monitoring of prosecutors by Washington might ostensibly respect the prestige of the judiciary but at considerable cost to the rest of the system—at least to the extent one values local discretion in the federal system.<sup>90</sup> It is hard (but not impossible) to imagine Washington ever regulating line decision-making with any degree of success. Replicating the intensive supervision of death penalty cases outside the

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85. For a proposal to have judges reject plea bargains that result in substantial sentencing concessions, see Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006).

86. U.S. SENTENCING COMM'N, *supra* note 71, at 84.

87. *United States v. Yeje-Cabrera*, 430 F.3d 1, 28 (1st Cir. 2005).

88. *Id.*

89. King, *supra* note 71, at 304–08.

90. Compare Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 497 (1996) (advocating more centralized control as a means of better internalizing the costs of federal prosecutorial policies), with Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 805–10 (1999) (noting the risks of centralized control).

capital docket—where the death penalty has been authorized against a total of 371 defendants since 1988<sup>91</sup>—would be prohibitively expensive and politically difficult.<sup>92</sup> But it is certainly possible to imagine Washington doing much more in this direction. While Congress has traditionally preferred to commit resources to the districts,<sup>93</sup> rather than Washington, there is enough play in the budget and in existing bureaucratic structures for substantially more monitoring than is the rule today.<sup>94</sup>

To what extent should one value and promote local discretion in the federal system? There are no easy answers here. Stephanos Bibas recently sought to draw some lines: Conceding that “local crime problems, caseloads, and knowledge vary and require varied responses,” he observed,

[o]ur democratically elected representatives have decided to enact uniform national criminal laws to address national problems and enforce them with one voice through one agency—the U.S. Department of Justice. Locales that disagree cannot in effect secede from federal criminal law any more than they can secede from the Union.<sup>95</sup>

He concluded that the “justified variation is grounded in tactical decisions about localized crime problems—particularly, transient crime waves. Unjustified variation, in contrast, stems from value disagreement; from legally irrelevant factors such as race, ethnicity, sex, and class; or perhaps from strategic choices, especially concerning enduring crime problems.”<sup>96</sup>

Even were it easier to distinguish between localized and enduring crime problems, Bibas’s distinction would still be normatively contestable—not right or wrong, just contestable. After all, the notion of ostensibly uniform national criminal laws long predates the Justice Department (not created until 1870).<sup>97</sup> And while Congress did decide to create such a central authority and give it powers over U.S. Attorneys’ offices, it has also endeavored (sometimes) to insulate U.S. Attorneys’ offices from domination or at least to

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91. DICK BURR ET AL., CAPITAL DEF. NETWORK, AN OVERVIEW OF THE FEDERAL DEATH PENALTY PROCESS (2006), [http://www.capdefnet.org/fdprc/contents/shared\\_files/docs/1\\_overview\\_of\\_fed\\_death\\_process.asp](http://www.capdefnet.org/fdprc/contents/shared_files/docs/1_overview_of_fed_death_process.asp).

92. See Richman, *supra* note 90, at 806 (arguing that even if Congress favored complete centralized supervision by Main Justice, it would find “the costs of such supervision prohibitive”).

93. See *id.* at 806–07 (discussing explanations for congressional acquiescence in the decentralization of prosecution).

94. See *id.* at 793–98 (discussing examples of Congress exercising control over budgetary and structural policy for law enforcement agencies).

95. Bibas, *supra* note 5, at 139–40.

96. *Id.* at 141.

97. See Adam H. Kurland, *First Principles of American Federalism and the Nature Of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 54 (1996) (arguing that “the ratification debates, the debate over the Bill of Rights and its subsequent enactment, and the federal criminal legislation enacted by the first few Congresses” demonstrate that “the Constitution allowed for a relatively broad federal criminal jurisdiction if Congress elected to so provide”).

limit Washington's ability to control those offices.<sup>98</sup> Moreover, to the extent that Bibas worries that "[v]ariations also make the law seem arbitrary, undercutting its perceived fairness and legitimacy,"<sup>99</sup> he underestimates Americans' tolerance in this regard. There is, after all, considerable variation in the priorities of district attorneys' offices within a state, notwithstanding the uniformity of the prevailing penal code. Because each district attorney is politically accountable to a different electorate, this variation may be more or less defensible than in the federal system. The point, however, is that the mere existence of a national set of criminal laws does not, by itself, imply some optimal allocation of authority between Main Justice and the U.S. Attorneys' offices.

Against this institutional backdrop, sentencing issues may take on a different complexion. Once one sees the sentencing process as a means whereby Main Justice can monitor and constrain the behavior of line prosecutors, then the hamstringing of judicial discretion so condemned in the sentencing literature may (to some at least) be more attractive than its alternatives. If, for example, one values local discretion (because one prefers the district's approach to the death penalty or drug enforcement to the Administration's or because one thinks a district's commitment to attacking fraud or corruption will be greater than that of a particular Administration or national bureaucracy more generally), one may well prefer that Main Justice recruit local district judges as monitors rather than engage in more direct bureaucratic intervention. It is quite possible that judicial monitoring, in the context of a relatively inflexible sentencing regime, would sufficiently address Washington's interest in limiting the discretion of its prosecutors. One might, under this analysis, embrace a rather inflexible sentencing scheme patrolled by judges charged with looking beyond bargained results not because it is normatively worthy of celebration but as a second- (or third-) best alternative.

Do any of these speculations provide a blueprint for reform in the federal system? I doubt it, but I do think that reformers need to keep them in mind as the rough cease-fire that we now have courtesy of *Booker* begins to break down (a pessimistic but not unrealistic prediction).<sup>100</sup> The last twenty-five years—a time of the largest growth in federal enforcement activity in history—have been a period of spectacular flux in the allocation of power between Washington and U.S. Attorneys' offices and in the extent of

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98. See Richman, *supra* note 90, at 805–10 (explaining the benefits of the existing “dispersed authority” that protects U.S. Attorneys’ offices from Washington’s complete control).

99. Bibas, *supra* note 5, at 139.

100. See Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279 (2006) (empirically evaluating the immediate effects of *Booker* and discussing emerging trends); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 732–34 (2005) (predicting that “there will be no meaningful review of sentencing post-*Booker*”).

sentencing discretion allowed to federal judges. Conversations about the two issues tend to stay on separate tracks. Yet although the two issues need not be linked, they are—at least when it comes to federal prosecutorial discretion—two different ways of talking about some of the same things.

When it comes to sentencing policy outside the federal context, the federal experience, particularly when combined with the more equivocal evidence from Alaska and New Jersey, suggests that more attention should be paid to the way the existence of, or desire for, prosecutorial centralization (or the lack thereof) influences sentencing policymaking.<sup>101</sup> The suggestion here, albeit quite tentative, is that a statewide executive authority interested in promoting or maintaining a degree of control over local prosecutorial offices will be attracted to sentencing regimes that encourage or require judges to scrutinize the congruence of plea bargains with case facts or that mandate other judicial monitoring measures. Of course, there may be countervailing considerations counseling against reliance on judges in this regard, but a state attorney general (or governor, or legislature acting at the behest of the attorney general or governor) will have few other options if the goal is limiting prosecutorial drift. As a general matter, state executive authorities are the dogs that have not barked very loudly when it comes to the overall management of the prosecutorial side of state criminal justice systems. That may well remain the case. But if it changes, the change will likely be seen in sentencing regimes.

### III. Toward New Issues of Intra-District Prosecutorial Control

The dominant pattern in state jurisdictions has statewide officials seeking—to various extents but always with less zeal than their federal counterparts—to restrict judicial sentencing discretion, but with little interest in restricting prosecutorial bargaining positions. They have left these to the regulation of district authorities who, should they want to do so, have had recourse to screening and monitoring regimes of the sort deployed by D.A. Connick in New Orleans, with little need to draft judges to help in the endeavor. Such monitoring regimes, however, require a considerable degree of centralized control. And we are in a period in which “community

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101. Many statewide policymakers have, for budgetary reasons among others, become interested in using sentencing law to reduce overall incarceration levels. See Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEXAS L. REV. 1973, 1986–87 (2006) (empirically demonstrating that sentencing commissions are likely to be “particularly attractive when fiscal concerns of incarceration are salient”). This does not mean, however, that they are not also interested in using sentencing procedures to limit prosecutorial concessions. See *id.* at 1987–88 (discussing reasons legislatures delegate sentencing authority).

prosecution” approaches—which are inherently less centralized—are becoming all the rage.<sup>102</sup>

As Catherine Coles noted: “Working closely with citizens who view their problems locally, by neighborhood, puts pressure on prosecutors to decentralize their operations. Many prosecutors are exploring how this can be achieved, even in the realm of screening and prosecuting cases.”<sup>103</sup> To the degree that prosecutors do move in this direction, we may well see a new interest in judicial monitoring and in sentencing regimes that demand such monitoring on the part of district attorneys. Even flexible sentencing guidelines can promote a D.A. office’s “bureaucratic control over its staff of assistants,” as Jeffery Ulmer and John Kramer found in their study of three offices in Pennsylvania.<sup>104</sup> But with decentralization and the consequent loss of alternative means of bureaucratic control, D.A. offices might become much more interested in less flexible sentencing regimes and even in judicial monitoring. This is very much a story in progress.

#### IV. Conclusion

Even as we try to determine the best allocation of power between judges and prosecutors in the sentencing process, we should not forget that prosecutorial interests are not monolithic and that for prosecutorial hierarchs, sentencing judges are as much potential monitoring partners as they are potential rivals. Whether judges will be enlisted (or, as in New Jersey, will volunteer) in this monitoring project will vary by jurisdiction and by the degree of prosecutorial centralization within the jurisdiction. Those who would engage prosecutorial policy-makers in a sentencing reform project should at least be aware of this, and perhaps can even make use of it.

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102. See JOHN S. GOLDKAMP ET AL., U.S. DEP’T OF JUSTICE, COMMUNITY PROSECUTION STRATEGIES 10 n.3 (2003), available at <http://www.ncjrs.org/pdffiles1/bja/195062.pdf> (noting that the American Prosecutors Research Institute “estimates that 80 sites in the United States are operating some type of community prosecution program”); M. ELAINE NUGENT ET AL., AM. PROSECUTORS RESEARCH INST., THE CHANGING NATURE OF PROSECUTION: COMMUNITY PROSECUTION VS. TRADITIONAL PROSECUTION APPROACHES 18 (2004), available at [http://www.ndaa.org/pdf/changing\\_nature\\_of\\_prosecution.pdf](http://www.ndaa.org/pdf/changing_nature_of_prosecution.pdf) (suggesting that community prosecutors put more emphasis than traditional prosecutors on preventing crime and on making victims feel safe); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1152 (2005) (remarking that district attorneys use decentralized prosecution efforts to strengthen their connection to the community); Catherine M. Coles & George L. Kelling, *Prosecution in the Community: A Study of Emergent Strategies* 35 (Sept. 1998), <http://www.ksg.harvard.edu/criminaljustice/publications/cross-site.pdf> (noting how partnerships with citizen groups push prosecutors to decentralize their operations).

103. Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* 23 (John F. Kennedy Sch. of Gov’t, Harvard Univ., Working Paper No. 00-02-04, 2000), available at [http://www.ksg.harvard.edu/criminaljustice/publications/community\\_prosecution.pdf](http://www.ksg.harvard.edu/criminaljustice/publications/community_prosecution.pdf).

104. Jeffery T. Ulmer & John H. Kramer, *The Use and Transformation of Formal Decision-Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case-Processing Strategies*, 45 SOC. PROBS. 248, 264 (1998).