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RECASTING PROSECUTORIAL DISCRETION

ROBERT L. MISNER*

I. INTRODUCTION

Decision-making in the criminal justice system at the state level is entrusted to a myriad of elected and appointed officials who often act independently of one another. The great majority of the decisions made by the various officials are effectively unreviewable either through judicial or administrative processes.¹ In theory, the electorate holds decision-makers responsible for their actions. However, because of the current diffusion of responsibility, the electorate cannot easily scrutinize the actions of any one official or hold that official independently accountable for the successes or failures of the entire system. In fact, no one is currently held accountable for the successes or failures of the criminal justice system. One result of the diffusion of responsibility is that citizens do not believe that the criminal justice system is responsive to their needs.² Citizens do not feel safe despite

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¹ See *infra* part III.B.

² A December 1993 study by the Gallup Poll projects that 38% of Americans frequently fear that they, or someone in their family, will be sexually assaulted, 35% frequently fear home burglaries, and 19% frequently fear being murdered. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 182 (Kathleen Maguire & Ann L. Pastore eds., 1994). The public consensus is that crime is escalating. For over two decades, a majority of respondents in national surveys conducted by the Gallup Poll have indicated that they feel that there is more crime in their neighborhoods today than one year ago, *id.* at 185, and 42% of survey respondents feel less safe today when outside of their homes as compared to one year ago. *Id.* at 184. Fear of violent crime is especially prevalent among children. A 1993 survey by Louis Harris and Associates of children in grades four through twelve reported that 54% of children frequently worry about crime, *id.* at 217, and 22% of students fear for their personal safety at school. *Id.* at 218.

Fear of victimization generally leads to significant behavior modifications. In 1993, the Gallup Poll reported that 43% of survey respondents installed special locks, 40% avoided walking alone at night in their own neighborhoods, 38% kept a dog for protection, 30% purchased a gun, 27% carried a weapon, and 18% installed a burglar alarm in response to perceived needs for greater self-protection from crime. *Id.* at 193.

the fact that the rate of imprisonment has skyrocketed nationally in the past ten years.³

In the past thirty years, the diffusion of responsibility has begun to abate and power has increasingly come to rest in the office of the prosecutor. Developments in the areas of charging, plea bargaining, and sentencing have made the prosecutor the preeminent actor in the system.⁴ The centralization of authority in the prosecution is a development necessary for a coordinated and responsive criminal justice system in which the prosecutor will ultimately be held accountable to the voters for the successes and failures of the system.

Previous practices which gave to each sentencing judge the authority to determine sentencing policy on an *ad hoc* basis through indeterminate sentences, open-ended sentencing statutes, and uncontrolled parole eligibility resulted in unacceptable sentencing disparities, overcrowded prisons, and indiscernible sentencing policies, with no apparent impact upon the crime rate.⁵ The individual-

Surveys in recent years show a growing public concern about violent crime. The Gallup Poll reported that 37% of survey participants in a January 1994 survey responded that crime was the most important problem facing the country. *Id.* at 154. In the prior 13 years, no more than 9% of survey respondents identified crime as the most important problem facing the country. *Id.* at 154. For over 14 years, however, the national consensus has been that too little is spent on crime prevention. *Id.* at 178.

The public perceives drug abuse, the unwillingness of parents to discipline their children, poverty, the availability of guns, and a general decline in morality as some of the main causes of violent crime. *Id.* at 175.

³ The overall incarceration rate per 100,000 population in the United States rose 186% from 1973 to 1990, while the total number of prison inmates rose 238%. UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF GENERAL GOVERNMENT ELECTED OFFICIALS 9-10 (1993) [hereinafter U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS].

⁴ See *infra* part III.B.2. The role of discretion in the administration of criminal justice has been the subject of an enormous body of legal literature. See, e.g., KENNETH CULP DAVIS, POLICE DISCRETION (1975); James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521 (1981). Much of the writing discusses the role of the prosecutor in plea bargaining. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) [hereinafter Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*]; Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459 (1988); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) [hereinafter Alschuler, *Plea Bargaining and Its History*]; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) [hereinafter Alschuler, *The Prosecutor's Role in Plea Bargaining*]; Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37; Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); Stephen J. Schulhofer, *Criminal Justice Discretion in a Regulatory System*, 17 J. LEGAL STUD. 43 (1988) [hereinafter Schulhofer, *Criminal Justice Discretion in a Regulatory System*]; Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) [hereinafter Schulhofer, *Is Plea Bargaining Inevitable?*]; Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993).

⁵ See *infra* part III.B.2.b. In response to these and similar criticisms, Congress adopted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as

ized sentencing policies of various judges cannot be woven into a single policy of law enforcement.⁶ Because courts cannot mold an effective system of law enforcement, and because legislatures are unsuited to the daily implementation of broad policy, the time has come to encourage prosecutors to fashion local policies of law enforcement to suit the current needs of their communities. But before there can be responsible policy-making by the prosecutor, the prosecutor must be made responsible for the efficient use of finite prison resources.

The current flaw in the evolving power of the prosecutor is the failure to force her to face the full cost of prosecutorial decisions. In most jurisdictions, county prosecutors use local funds to operate their offices and therefore, prosecutors must be concerned about the cost of prosecution.⁷ But because prisons are operated with state funds,⁸

amended at 18 U.S.C. § 3551 (1994)). The Act has been roundly criticized and has itself generated much discussion, some of which has occurred during symposia: Symposium, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 181 (1993); *F. Hodge O'Neal Corporate and Securities Law Symposium: Corporate Sentencing*, 71 WASH. U. L.Q. 189 (1993); *Federal Sentencing Guidelines Symposium*, 29 AM. CRIM. L. REV. 771 (1992); Symposium, *Making Sense of the Federal Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 563 (1992); Symposium, *Punishment*, 101 YALE L.J. 1681 (1992); *Sentencing Symposium*, 27 AM. CRIM. L. REV. 231 (1989); *Symposium on Federal Sentencing*, 66 S. CAL. L. REV. 99 (1992); *A Symposium on Sentencing Reform in the States*, 64 U. COLO. L. REV. 645 (1993) (a comparison of state and federal sentencing reforms). Federal judges have often been outspoken in their criticism of the federal guidelines. See FEDERAL COURTS STUDY COMM'N., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMISSION, 133-43 (1990). States have also adopted sentencing reforms to meet these criticisms. See, e.g., Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679 (1992) (arguing that state sentencing reforms are more creative and more likely to be successful than their federal counterpart); Frederick A. Hussey & Stephen P. Lagoy, *The Impact of Determinate Sentencing Structures*, 17 CRIM. L. BULL. 197 (1981) (analyzing state sentencing reforms).

⁶ With little statutory guidance and virtually no appellate review, sentencing judges in most jurisdictions have been left to themselves to decide what facts about a crime or a criminal are at all relevant to a sentence, and how those facts ought to affect sentence length. As a consequence, judges have been able—indeed they have virtually been forced—to sentence on the basis of their own philosophy of criminal law.

Peter B. Pope, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258, 1258-59 (1986) (footnotes omitted). See also Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992).

⁷ One of the early in-depth studies of the duties of the prosecutor came as part of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. In FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH CRIME (1969), Professor Miller discussed plea bargaining:

Careful allocation of limited enforcement resources is most dramatically reflected in current administration practice of making concessions to induce pleas of guilty. Commonly referred to as "bargaining for guilty pleas," the encouragement of such pleas in the interest of efficiency in administering the system is common in the United States.

Id. at 191-92 (footnotes omitted). Local funding (from county or city sources) accounts for more than 90% of prosecution costs nationally. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS 3 (1993). See *infra* note 128 and accompanying text.

effecting a "split-funding" of the criminal justice system, most prosecutors need not directly consider the availability of prison space or prison resources when making charging, bargaining, or sentencing decisions.

The result extends beyond the status quo of overcrowded prisons and ever-bloating prison budgets. The result is a system in which the local prosecutors effectively dictate the level of spending that the state legislature must maintain. It is the prosecutor who is most instrumental in determining the number of new prisoners who must be housed in state prisons. If the legislature refuses to write a blank check for the prison system, often the prisons must release persons who have not completed their sentences⁹ to make way for new prisoners or face the threat of federal court intervention.¹⁰ The release of prisoners through the backdoor has resulted in an increase in the number of persons who are returned to prison after release.¹¹ The backdoor release policy is also apparently a source of great consternation for the public.¹²

As a result, the electorate does not have one official to whom it can look for leadership. Furthermore, the prosecutor has little incentive to create prosecutorial guidelines, to become an active participant in crime prevention programs, or to find less costly means of punishment.

The thrust of this Article is to attempt to find a mechanism for tying the exercise of prosecutorial discretion to the availability of prison resources. Because of the great variations in the size, complexity, and state constitutional and statutory bases of prosecutors' authority from state to state,¹³ implementing details of any proposal are unlikely to be wholly uniform. However, for many jurisdictions, particularly large urban jurisdictions, it is possible to outline a general proposal: a state agency must make a determination of the amount of prison space available for the upcoming fiscal year. Based upon past practices, demographic projections, and other relevant factors, available prison resources will be allocated to each prosecutor for use dur-

⁸ See *infra* note 54.

⁹ UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 10-15.

¹⁰ Federal court decrees have ordered changes to be made in the prison systems of 45 states. See *id.* at 2.

¹¹ "As a percentage of all admissions, those returning to prison after a conditional release has increased from 17% to 29.5%." UNITED STATES DEP'T OF JUSTICE, *supra* note 7, at 7.

¹² See Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 688 (1993).

¹³ See *infra* part III.A.2.

ing the next year. Through charging decisions, plea bargains, and sentence recommendations, the prosecutor will set criminal law enforcement policy within the local jurisdiction in order to make the most effective use of the resources allocated to the prosecutor's office. If the prosecutor uses fewer resources than allocated, the savings would be disbursed to the county. If the prosecutor requires more resources than allocated, the county must use local funds to purchase additional prison space either from the state or another jurisdiction. It will be incumbent upon the prosecutor, with the assistance of the state allocation agency, to collect data and justify the use of resources to the electorate. The electorate must then decide whether the prosecutor's enforcement policy and use of resources have met the demands of the people. It is hoped that the responsibility centered in the prosecutor will make for a more enlightened review by the voters.

This proposal, which retains the clear historical preference for local control of crime enforcement,¹⁴ will not necessarily lead to fewer prosecutions or smaller prison populations. The proposal returns budget choices to the state legislature while making the local prosecutor more responsible to the electorate. However, the proposal does not require the abandonment of current attempts at sentencing reform, such as sentencing guidelines. In fact, the proposal requires a high degree of certainty in sentencing—the prosecutor must be able to predict what a conviction will cost in terms of available prison resources. Sentencing reform, to date, has served to channel the discretion of judges and releasing agencies such as parole boards, but sentencing reform has not attempted to guide prosecutorial discretion. The proposal accomplishes prosecutorial control through a mix of financial accountability and voter review.

Once the mechanism for tying the exercise of prosecutorial discretion to the availability of state prison resources has been created, other changes might be forthcoming. For example, once the prosecutor has the incentive to develop precise guidelines for the operation of the office, the state legislature may deem it appropriate for local prosecutors to create the guidelines for state administrative rule-making procedures that afford an opportunity for public comment and discussion. Prosecutors may become more creative in developing programs to strike at the core roots of crime and center on issues of crime prevention if it becomes economically and politically expedient to do so. The results of these experiences might be shared from jurisdiction to jurisdiction.

This Article first presents a snapshot of crime and sentencing in

¹⁴ *Id.*

the United States in order to emphasize that the economic stakes require a more responsible process for making public policy choices in these areas. The discussion then turns to a description of the offices of the local prosecutor with an emphasis on the preeminent role that the prosecutor has assumed in the criminal justice system. Criticism levelled at the office of the prosecutor has accomplished very little. The time has come to accept the fact that the due process approach of ordering prosecutorial discretion has little support, as witnessed by the breadth of discretion permitted to the prosecution by both the judicial and legislative branches of state governments. Consistency and fairness are more likely to result from economic restraints and voter review than any attempt to place judicial controls upon the exercise of prosecutorial discretion. Therefore, in the final section, this Article proposes an outline for tying the exercise of prosecutorial discretion directly to the availability of prison resources.

II. REALITY AND PUBLIC PERCEPTION OF CRIME

The detection, prosecution, and punishment of crime is an expensive business. In 1992, more than 16,000 city, county, and state law enforcement personnel¹⁵ reported that 14,438,191 "crime index offenses" had been committed in their jurisdictions.¹⁶ These agencies reported a 21% overall clearance rate—a rate that has remained constant for the last ten years.¹⁷ Approximately 2.9 million arrests were made by these law enforcement agencies in 1992.¹⁸

In March 1993, the United States Department of Justice published its analysis of sentencing in state courts for 1990, noting that state courts reported 829,344 felony convictions for that year, up from 583,000 in 1986.¹⁹ The convictions resulted in 46% of persons con-

¹⁵ U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: 1992 UNIFORM CRIME REPORTS 1 (1993). The Uniform Crime Reporting Program (UCR) of the United States Department of Justice:

is a nationwide, cooperative statistical effort of over 16,000 city, county, and state law enforcement agencies voluntarily reporting data on crimes brought to their attention. During 1992, law enforcement agencies active in the UCR Program represented over 242 million United States inhabitants or 95 percent of the total population as established by the Bureau of the Census.

Id.

¹⁶ *Id.* at 5. Seven crimes make up the "Crime Index Offenses": murder, non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft. *Id.*

¹⁷ *Id.* at 6.

¹⁸ *Id.*

¹⁹ BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T. OF JUSTICE, BULLETIN: FELONY SENTENCES IN STATE COURT, 1990, at 1, 2 (1993). The publication reports sentencing data from the 1990 National Judicial Reporting Program which is a biennial collection of data from a sample of felony trial courts in 300 counties. Its purpose is to provide national

victed sentenced to prison, 25% sentenced to jail usually for a year or less, and 29% sentenced to probation.²⁰ In 1986, drug traffickers accounted for 13% of all felony convictions in state courts. By 1990 that number had grown to 20% of all state felony convictions.²¹ The percentage of drug trafficking convictions receiving a state prison sentence increased from 37% in 1986 to 49% in 1990.²² But increases in prison population were not solely due to increased numbers of convicted drug traffickers. The number of arrests for crimes of sexual assault, robbery, aggravated assault, and burglary rose 34% from 1980 to 1992, and the rate of incarcerations for those convicted increased from 128 per 1,000 arrests in 1980 to 148 per 1,000 arrests in 1992.²³ The average prison sentence for all felons in 1990 was six and a quarter years with the likelihood that the person would actually serve about two years in prison.²⁴

Of those convicted of a felony in 1990, 91% pled guilty and 9% were found guilty at trial,²⁵ Males accounted for 86% of all convicted felons,²⁶ whose average age was twenty-nine.²⁷ Using racial categories defined by the United States Department of Justice, 52% of convicted felons were white, 47% were black and 1% were other races.²⁸

Large, urban communities in 1980 contained 37% of the nation's population but accounted for half of all crime reported to police, half of all felony arrests, and half of all state court felony convictions.²⁹ From 1986 to 1990, the annual growth rate of felony convictions in large, urban communities grew a surprising 61%.³⁰ In these communities courts processed cases more quickly in 1990 than in 1986, de-

estimates of the types of sentences imposed after conviction.

The 1990 survey was based on a sample of 300 counties selected to be nationally representative. The sample consisted of the same jurisdictions as in the 1988 survey and included the District of Columbia and at least one county from every State except, by chance, Vermont. Among sampled counties, two sentenced no felons during 1990. The 1990 survey excluded Federal courts and those state or local courts that did not adjudicate felony cases. The 1990 survey included only offenses that state penal codes defined as felonies.

Id. at 2.

²⁰ *Id.* at 2.

²¹ *Id.* at 1.

²² *Id.*

²³ See, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 1993 8 (1994) [hereinafter PRISONERS].

²⁴ *Id.* at 4.

²⁵ *Id.* at 1.

²⁶ *Id.* at 5.

²⁷ *Id.* at 6.

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 7.

³⁰ *Id.*

spite the increased volume.³¹ In 1990 the average time from arrest to sentencing was 199 days, down from an average processing time of 220 days in 1986.³²

Not surprisingly, increases in the number of crimes, the number of reported crimes, and the rate of incarceration of offenders has increased the demands made upon state prisons. In 1993 the number of prisoners under the jurisdiction of state correctional authorities was 948,881, which represented an increase of 7% over 1992.³³ The incarceration rate of state prisoners in 1993 was 351 prisoners per 100,000 inhabitants, compared to a rate of 139 prisoners per 100,000 inhabitants in 1980.³⁴ Regionally, the south has the highest incarceration rate³⁵—the four states with the highest incarceration rates are Texas, followed by Oklahoma, Louisiana and South Carolina.³⁶ Remarkably, one out of every 181 Texans is in a Texas prison, and this does not account for additional numbers of Texans serving jail time or under sentences of parole or probation.³⁷ California has the largest number of inmates—almost 120,000 in 1993.³⁸ The states of Washington, Texas, New Hampshire and Connecticut had increases in prison population from 1988 to 1993 that exceeded 70%.³⁹ The United States Advisory Commission on Intergovernmental Relations attempted, as one of its tasks, to determine the factors which have influenced the dramatic rise in the rate of incarcerated persons: why does the United States have the highest incarceration rate in the world?⁴⁰ From 1925 to 1974, the “annual increase in the proportion of the U.S. population in prison was 0.5%.”⁴¹ From 1974 to 1985, the increase grew to 6.2% per year. From 1986 to 1990 the growth rate increased even higher to 7.9% per year.⁴² While the overall incarceration rate increased 186.3% from 1973 to 1990,⁴³ the total number of prison inmates rose 238.2%.⁴⁴

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1.

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *Id.* at 4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 1-2. By contrast, in 1990 the United States incarceration rate for all prisons and jails was 426 per 100,000 population. In the United Kingdom the rate was 97, in France the rate was 81, and in Denmark the rate was 68. *Id.*

⁴¹ *Id.* at 10.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

In its conclusion, the Advisory Committee found that population growth and increases in reported crime accounted for approximately 25% of the increase in the number of inmates. Changes in arrest policies, such as drug and drunk driving arrests, accounted for a 5% increase. More than 60% of the growth in prison population was attributable to changes in prosecutorial decisions and judicial decisions to incarcerate persons who previously would not have been incarcerated. Although arrests increased by 76% from 1973 to 1989, the number of convicted persons sentenced to prison increased by 221%.⁴⁵ Clearly, changes in sentencing laws, such as mandatory sentencing and sentencing guidelines, played a major role in their dramatic increase.

In addition to population growth and increased reported crime, the Advisory Committee found that the increase in the length of prison sentences and the increase in the rate at which conditional release violators were returned to prison also affected the growth in prison populations. The Advisory Committee determined that 7.1% of the growth of prison populations from 1974 to 1990 was attributable to inmates serving longer sentences of incarceration. During this same period, prisons were often faced with federal court orders limiting the number of prisoners who could be held in a particular institution. Many states were forced to release prisoners by such methods as increasing "good time" credits or by providing for emergency release policies in order to meet the court ordered prison population restrictions.⁴⁶ The "back-end" measures of release have been controversial, apparently for good reason. As the Bureau of Justice Statistics of the United States Department of Justice reported in a study conducted in 1994:

Since 1977 the relative sizes of the two principal sources of admissions to prison—court commitments and returned conditional release violators—have changed. Court commitments account for a decreasing share of all prison admissions: 69.5%, down from 82.4% in 1980. As a percentage of all admissions, those returning to prison after a conditional release increased from 17.0% to 29.5%.⁴⁷

The reason for the five-fold growth from 1980 to 1992 in the absolute number of release violators returned to prison is not clear. The number may suggest that prison populations are justifiably high—there are not large numbers of prisoners who need not be incarcerated yet who have been released because of prison population caps. On the other hand, it may suggest that the release criteria used to

⁴⁵ *Id.* at 10-15.

⁴⁶ *Id.*

⁴⁷ PRISONERS, *supra* note 23, at 7.

determine early release are faulty—the “wrong” prisoners are released. It may also suggest that prison has a criminogenic effect upon persons who should not have been incarcerated in the first instance or that parole officers are more diligent as they supervise the lives of early release prisoners.

By 1993, increases in the rate of incarceration translated into an average of 1,056 new inmates arriving each week at state prisons.⁴⁸ Already overburdened prisons have gasped at the additional strain. Based upon the Department of Justice “operational capacity” standard, in 1993, forty-two states and the federal prison system reported inmate population at 100% or more of capacity.⁴⁹ State prisons as a whole “were estimated to be operating at 118% of their highest capacities.”⁵⁰ Since overcrowding of state prisons is usually the primary cause behind federal court intervention into state prison operations, it is not surprising that forty-five out of the fifty state prison systems have operated under some form of federal court decree.⁵¹ It has also been estimated that 25% of all local jails housing more than 100 prisoners are under federal court decrees.⁵² One researcher has found that thirteen states have emergency overcrowding legislation which permits the release of prisoners when prison populations exceed specified levels.⁵³

The increased rate of incarceration has wreaked havoc with state and local budgets. Between 1970 and 1990 “spending on corrections increased faster than any other area of public spending.”⁵⁴ Spending increases for corrections has greatly outpaced spending increases for police, courts, and community programs. For example, over the period of 1971-1990, corrections spending increased in constant dollars per capita by 154%, whereas increases for legal services and prosecution increased 152%, courts by 58%, and police by only 16%.⁵⁵ The United States Advisory Commission on Intergovernmental Relations reported that the brunt of additional costs has been borne mainly by the counties and the states. The Advisory Committee reported that

⁴⁸ *Id.* at 4.

⁴⁹ *Id.* at 6-7.

⁵⁰ *Id.* at 7.

⁵¹ U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 2. See Penelope Lemov, *Taking Your Prison Back From the Feds*, 6 GOVERNING 22 (1993).

⁵² U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 2. It is estimated that one-third of the 500 largest local jails are under court supervision. See also Lemov, *supra* note 51, at 22.

⁵³ Bradford J. Tribble, Note, *Prison Overcrowding in Alaska: A Legislative Response to the Clear Settlement*, 8 ALASKA L. REV. 155, 167-68 (1991).

⁵⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, BULLETIN: JUSTICE EXPENDITURE AND EMPLOYMENT 1990, at 1 (1993).

⁵⁵ *Id.* at 4-5.

although, on average, state per capita spending on corrections remains low (\$83 per capita in 1990) when compared with such governmental functions as education (\$934 per capita in 1990),⁵⁶ many local government officials report that discretionary dollars increasingly are needed in corrections budgets.⁵⁷ Overall spending for corrections was approximately 3.9% of all state and local governmental spending in 1990.⁵⁸ Total state and local spending for corrections during fiscal year 1990 was just over \$23.5 billion.⁵⁹ State and local corrections departments employed the full time equivalent of 525,000 employees.⁶⁰

Accounting practices make it difficult to gather and compare costs on prison construction and operation. Estimates on the cost to build one prison cell range from \$30,000 to \$50,000 for new construction and approximately \$15,000 per bed for additions to existing facilities.⁶¹ The cost for confining an inmate in a state prison ranges from \$9,000 to \$20,000 per year.⁶²

The attempt to predict the rate of crime or the rate of incarceration over the next decade is a risky business. The conventional wisdom in the 1970s was that as the baby boomers moved through the prime crime age of fifteen years old to thirty-five years old, crime rates would moderate. If the conventional wisdom had been accurate, crime would have peaked in 1980. As noted above, this has not occurred. With the likelihood of increased concentration on drug prosecutions coupled with recent increases in juvenile crime and violent crime, most projections point to a continuing need for more prison space.⁶³ The public is equally as pessimistic as the experts in concluding that crime will continue to be a major public policy issue for the foreseeable future.⁶⁴ One issue is clear: whatever attempts are made to stem the rate of crime or to react to the rate of crime, the local prosecutor will be at the center of the action.

⁵⁶ UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 16.

⁵⁷ *Id.*

⁵⁸ BUREAU OF JUSTICE STATISTICS, *supra* note 54, at 2.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.* at 6.

⁶¹ UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 127.

⁶² John N. Hauser & William D. Kissinger, *An Answer to Overcrowding: Adopt the CJS Model Adult Community Corrections Act*, 6 CRIM. JUST. 13 (1992).

⁶³ *Id.* at 20.

⁶⁴ See *supra* note 2 and accompanying text.

III. THE PREEMINENT ROLE OF THE PROSECUTOR

A. THE OFFICE OF THE PROSECUTOR

Care must be taken to understand the current state of the office of the local prosecutor in light of the emphasis that history has placed upon the crime control function of this independent office. The understanding begins with the historical origins of the office.

1. History

The local prosecutor is an American innovation of European ancestry. Like the English Attorney General, the American prosecutor has the power to terminate all criminal prosecutions.⁶⁵ Like the French *procureur publique*, the prosecutor has the power to initiate all public prosecutions.⁶⁶ Similar to the Dutch *schout*, the prosecutor is a local official of a regional government.⁶⁷ Whereas the American prosecutor's European precursors were agents of a national authority, pioneer life in America demanded that the primary law enforcement official be an agent of the local government.⁶⁸

Early attempts to implement the English system of private prosecution in America fell victim to the twin factors of cost and demand.

⁶⁵ JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 3 (1980). A system of private prosecution prevailed in England during the seventeenth and eighteenth centuries. By filing a writ of *nolle prosequi*, the English Attorney General could dismiss any private prosecution. This purely discretionary power was occasionally used to control the excesses of private prosecution. See Abraham Goldstein, *History of the Public Prosecutor*, in 3 *ENCYCLOPEDIA OF CRIME & JUST.* 1286 (Sanford Kadish ed. 1983); but cf. John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 *AM. J. LEGAL HIST.* 313 (1973) (tracing the origins of public prosecution in England to the Marian Statutes of 1554 and 1555 despite the prevailing system of private prosecution at the time). For a modern treatment of the doctrine of *nolle prosequi*, see YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 914-15 (8th ed. 1994).

Jacoby notes that scholars disagree on the historical origins of the American prosecutor, see NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON PROSECUTION* 7 (1931) (favoring a strong French influence but overlooking the pre-American Revolution origins of the prosecutor); see also W. Scott Van Alstyne, Jr., Comment, *The District Attorney—A Historical Puzzle*, 1952 *WIS. L. REV.* 125 (1952) (arguing for a strong Dutch influence); Jack M. Kress, *Progress and Prosecution*, 423 *ANNALS AM. ACAD. POL. & SOC. SCI.* 99 (1976) (arguing that the true origin of the American prosecutor is a synthesis of the three major European influences).

⁶⁶ JACOBY, *supra* note 65, at 3; cf. Roscoe Pound, *The Influence of French Law in America*, 3 *ILL. L. REV.* 354 (1908) (discussing the influence of civil law in its French form on American law during the late eighteenth and early nineteenth centuries).

⁶⁷ JACOBY, *supra* note 65, at 3. Professor Friedman notes that Dutch influence did not end with the political domination of New York by the English in the middle of the seventeenth century. In New York's colonial judicial system, Dutch terminology and English procedure coexisted until the early 1680s. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 44-45 (1985).

⁶⁸ JACOBY, *supra* note 65, at 5.

Private prosecution for the pioneer society "entailed both effort and expense to the private prosecutor, who was obliged to employ a lawyer to conduct the preliminary stages of the prosecution and even the trial itself."⁶⁹ In addition, it was not until just prior to the American Revolution that the rule denying counsel to felons was abolished. Until then, there was little occasion for the appearance of the "criminal lawyer." During the late seventeenth and early eighteenth centuries, each colony established the office of the Attorney General, whose duties generally included the presentment of criminal indictments. By the outbreak of the Revolution, private prosecution was replaced by public prosecution through county officials, some of whom were deputies of the state Attorney General but were nominated by the county court with little supervision of the Attorney General. Others were deputies of the Attorney General, operating with direct supervision, and others were county officials nominated by the local courts.⁷⁰

By the early nineteenth century, the local prosecutor was merely an adjunct of the local court.⁷¹ In the area of criminal prosecution, the power and importance of the local sheriff and coroner clearly outstripped that of the local prosecutor.⁷² The wave of democratic zeal that expanded suffrage in the American republic beginning about 1820 and culminating before the Civil War precipitated the movement to the election of local officials, including local judges.⁷³ After it was commonplace to elect local judges, it became customary to elect the prosecuting attorney.⁷⁴

In 1832, Mississippi became the first state to include within its constitution a provision for the popular election of local prosecuting attorneys.⁷⁵ The states entering the Union after 1850 generally provided for the election of the prosecuting attorney either through the state constitution or through state statutes.⁷⁶ This change from appointed to elected status allowed the local prosecutor to expand his power. No longer beholden to the opinions and politics of those who appointed him, the local prosecutor emerged as an executive official

⁶⁹ HOMER S. CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE* 13 (1937).

⁷⁰ *Id.*

⁷¹ JACOBY, *supra* note 65, at 19.

⁷² *Id.*

⁷³ *Id.* at 25; see Goldstein, *supra* note 65, at 1287; see also LEWIS MAYERS, *THE AMERICAN LEGAL SYSTEM: THE ADMINISTRATION OF JUSTICE IN THE UNITED STATES BY JUDICIAL, ADMINISTRATIVE, MILITARY, AND ARBITRAL TRIBUNALS* 413 (2d ed. 1964); cf. JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 251-357 (1950) (discussing the impact of Jacksonian Democracy on the profession of lawyering and the Bar).

⁷⁴ JACOBY, *supra* note 65, at 24. Regarding the popular election of judges, see FRIEDMAN, *supra* note 67, at 126-27.

⁷⁵ JACOBY, *supra* note 65, at 25.

⁷⁶ *Id.* at 26.

charged with using his individual discretion to apply local standards in enforcing essentially local laws.⁷⁷ By 1912, when Arizona and New Mexico were admitted to the Union as the last of the forty-eight contiguous states, all forty-eight states provided for local prosecutors through either constitutional provision or statute; in all but five states prosecutors were elected officials.⁷⁸

The post World War I increase in crime in America's urban centers led to serious examinations of the local prosecutor's role.⁷⁹ The prosecutor's absolute discretion in the exercise of the local government's accusative powers and the lack of professionalism in the offices of the prosecutor alarmed government commissions and legal scholars writing during the twenties and thirties.⁸⁰ Crime commissions were created in Baltimore and Chicago in 1921, Cleveland in 1922,

⁷⁷ *Id.* at 25, 38. Professor Goldstein notes that the change in public and judicial perceptions of the local prosecutor, *i.e.* from a minor judicial official to a member of the executive branch, was reflected in the new state constitutions of this time, which now listed the prosecuting attorney as a member of the executive branch, along with other officials of local government, Goldstein, *supra* note 65, at 1288.

⁷⁸ JACOBY, *supra* note 65, at 26. As of 1912, Connecticut, Delaware, Kansas, Maine, Minnesota, Missouri, Nebraska, Ohio, Rhode Island, and Wyoming did not provide for the office of prosecuting attorney by constitutional provision. The constitutions of the other 38 states provided for a prosecuting attorney. Earl H. De Long & Newman F. Baker, *The Prosecuting Attorney: Provisions of Law Organizing the Office*, 23 J. CRIM. L. & CRIMINOLOGY 926, 928-29 (1933).

The five states as of 1912 that did not provide for the election of local prosecutors were Connecticut, New Jersey, Delaware, Rhode Island, and Florida. See Jacoby, *supra* note 65, at 26. Only Florida has since altered its procedure to provide for the election of prosecuting attorneys.

All four states in which the prosecuting attorneys are not elected were original states of the Union. Jacoby suggests that this result is due to the preservation of their colonial systems of prosecution. JACOBY, *supra* note 65, at 26.

⁷⁹ JACOBY, *supra* note 65, at 30.

⁸⁰ *Id.* at 30-34; see, e.g., NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *supra* note 65; De Long & Baker, *supra* note 78; Newman F. Baker, *The Prosecutor: Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770 (1933); Newman F. Baker & Earl H. De Long, *The Prosecuting Attorney: Powers and Duties in Criminal Prosecution*, 24 J. CRIM. L. & CRIMINOLOGY 1025 (1934); Earl H. De Long & Newman F. Baker, *Powers and Duties of the Prosecuting Attorney: Quasi-Criminal and Civil*, 25 J. CRIM. L. & CRIMINOLOGY 21 (1934); Earl H. De Long, *Powers and Duties of the State Attorney-General in Criminal Prosecution*, 25 J. CRIM. L. & CRIMINOLOGY 358 (1934); Earl H. De Long & Newman F. Baker, *The Prosecuting Attorney and His Office* (pts. 1 & 2), 26 J. CRIM. L. & CRIMINOLOGY 695, 884 (1935); Newman F. Baker & Earl H. De Long, *The Prosecuting Attorney: The Process of Prosecution* (pts. 1 & 2), 185 J. CRIM. L. & CRIMINOLOGY 3, 26 (1935); Newman F. Baker, *The Prosecuting Attorney: Legal Aspects of the Office*, 26 J. CRIM. L. & CRIMINOLOGY 647 (1936); Newman F. Baker & Earl H. De Long, *The Prosecuting Attorney and Reform in Criminal Justice*, 26 J. CRIM. L. & CRIMINOLOGY 821 (1936); Newman F. Baker, *Some Problems of Criminal Prosecution*, 14 OR. L. REV. 153 (1934); Franklin G. Davidson, *The Prosecuting Attorney's Office—Do Modern Conditions Create New Duties for This Office?*, 4 IND. L. J. 327 (1929); William B. Quinlan, *The District Attorney*, 5 MARQ. L. REV. 190 (1921); R. Justin Miller, *Information or Indictments in Felony Cases*, 8 MINN. L. REV. 379 (1924); Raymond Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403 (1931).

and the states of Missouri, Georgia, New York, Illinois, Minnesota, Pennsylvania, and California before 1930.⁸¹ In 1931, the federal government created the Wickersham Commission to study the status of criminal justice in the United States.⁸²

Generally the commissions found that the elective nature of the office often led to undue political influence on prosecutorial decisions.⁸³ The commissions also noted that the elective office did not attract qualified candidates and that insufficient checks upon prosecutorial discretion existed in the system.⁸⁴ The criticisms led to few systemic changes. But by the early 1970s a significant majority of the states required that the prosecutor be a licensed attorney.⁸⁵ States also tended to make the office of the prosecutor a full-time position.⁸⁶

The history of the development of the office of prosecutor has the clear theme, in the words of Joan Jacoby, of "local representation applying local standards to the enforcement of essentially local laws."⁸⁷

⁸¹ JACOBY, *supra* note 65, at 30. For a comprehensive bibliography of crime commission reports and surveys through 1931, see NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *supra* note 65, at 257-64.

⁸² NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *supra* note 65, at 3.

⁸³ *E.g., id.* at 14-15 (describing the notoriously intimate connection between criminal justice and local politics during the early twentieth century).

⁸⁴ JACOBY, *supra* note 65, at 31. See also NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *supra* note 65, at 15-16 (noting that the office of prosecuting attorney was generally filled by "ambitious beginners as a stepping-stone to practice," and that the insufficient checks on the prosecutorial discretion was "ideally adapted to misgovernment").

⁸⁵ JACOBY, *supra* note 65, at 34. See, e.g., *People ex rel. Elliott v. Benefiel*, 91 N.E.2d 427, 429 (Ill. 1950) (holding that while there is no express statutory or constitutional specification that a State's Attorney be a lawyer, both the term State's Attorney and the duties as prescribed by statute imply that the State's Attorney be licensed to practice law); see also *State ex rel. Indiana State Bar Association v. Moritz*, 191 N.E.2d 21, 24-25 (Ind. 1963) (holding that although respondent was elected prosecuting attorney, inasmuch as he had not met the requirements for admission to the state bar, he was not entitled to practice law as a prosecuting attorney); *but cf. State ex rel. Dostert v. Riggelman*, 187 S.E.2d 591, 596 (W. Va. 1972) (holding that a candidate for the office of prosecuting attorney who, at the time of the primary election, was not a duly licensed attorney, but could remove his ineligibility before the next general election or the commencement of the next term of office, could be nominated for such office).

New York is a prominent example of a state without a license requirement for its district attorneys. See *People v. Carter*, 566 N.E.2d 119, 123-24 (N.Y. 1990), *cert. denied*, 499 U.S. 976 (1991) (holding that neither the constitution nor any statute requires that a district attorney or an assistant district attorney be an attorney admitted to practice law).

⁸⁶ JACOBY, *supra* note 65, at 35.

⁸⁷ *Id.* at 38. Compare Jacoby's conclusion with Langbein, *supra* note 65, at 335 (summarizing the theme of the Marian Statutes, which authorized public prosecution by Justices of the Peace, as "[p]rosecution should be local, to draw upon the knowledge of the community."). See, e.g., MICH. STAT. ANN., § 5.751 (Callaghan 1973).

2. Description of the Office

The authority of local prosecutors is detailed in the state constitutions of thirty-three states.⁸⁸ Often the state constitutional provisions are fleshed out by statutes.⁸⁹ In twelve states authority for local prosecutors is only statutorily based.⁹⁰ In four states, local prosecutors are part of the statewide state attorney general's office and are controlled by the state attorney general.⁹¹ In some states prosecutorial decision-making takes on a distinctive flavor. In Arizona, for example, the attorney general has limited jurisdiction over specific crimes if the charges were brought through the state grand jury.⁹² If there is a conflict of interest or if the local prosecutor seeks assistance, the Arizona attorney general may prosecute local crimes.⁹³ In Maine, the salaries of assistant district attorneys are subject to the approval of the governor and the attorney general.⁹⁴ In New Hampshire, the county attorneys act under the direction of the attorney general.⁹⁵

The majority of local prosecutors prosecute cases within the jurisdiction of the county,⁹⁶ and a few local prosecutors prosecute crimes only within the jurisdiction of a city.⁹⁷ A sizeable minority of local

⁸⁸ See ALA. CONST. of 1901, amend. 328, § 6.21(f); ARIZ. CONST. art. XII, § 3; ARK. CONST. of 1874, art. 7, § 24; ARK. CONST. of 1874, amend. 21; COLO. CONST. art. 6, § 13; FLA. CONST. art. V, § 17; GA. CONST. art. VI, § VIII, ¶ 1; IDAHO CONST. art. V, § 18; ILL. CONST. art. 6, § 19; IND. CONST. art. 7, § 16; KY. CONST. §§ 97, 99; LA. CONST. art. V, § 26; MD. CONST. art. V, § 7; MICH. CONST. of 1963 art. VII, § 4; MISS. CONST. art. VI, § 174; MONT. CONST. of 1972 art. XI, § III; NEV. CONST. art. 4, § 32; N.H. CONST. part 2, art. 71; N.J. CONST. art. 7, § 2, ¶ 1; N.M. CONST. art. VI, § 24; N.Y. CONST. art. XIII, § 13; N.C. art. IV, § 18; N.D. CONST. art. VII, § 8; OR. CONST. art. VII, § 17; PA. CONST. art. 9, § 4, R.I. CONST. art. IX, § 12; TENN. CONST. art. VI, § 5; TEX. CONST. art. 16, § 65; UTAH CONST. art. VIII, § 16; VT. CONST. ch. II, § 50; VA. CONST. art. VII, § 4; WASH. CONST. art. XI, § 5; W. VA. CONST. art. IX, § 1; WIS. CONST. art. VI, § 4.

⁸⁹ See, e.g., MICH. STAT. ANN., § 5.751 (Callaghan 1973).

⁹⁰ See ALA. CONST. of 1901, amend. 328, § 6.21(f); ARIZ. CONST. art. XII, § 3; ARK. CONST. of 1874, art. 7, § 24; ARK. CONST. of 1874, amend. 21; CAL. GOV'T CODE § 24000 (Deering 1973); GA. CONST. art. VI, § VIII, ¶ 1; HAW. REV. STAT. §§ 62-1, 62-71 (1968); IDAHO CONST. art. V, § 18; ILL. CONST. art. 6, § 19; IND. CONST. art. 7, § 16; IOWA CODE § 331.751 (1994); KAN. STAT. ANN. § 22a-101 (1974); ME. REV. STAT. ANN. tit. 30-a, § 251 (West 1973); MASS. GEN. L. ch. 12, § 12 (1985); MINN. STAT. § 388.01 (1976); MO. REV. STAT. § 56.010 (1986 Supp.); NEB. REV. STAT. § 23-1201 (1943); OHIO REV. CODE ANN. § 309.01 (Baldwin 1976); OKLA. STAT. tit. 19, § 215.1 (1971); S.D. CODIFIED LAWS ANN. § 7-16-1 (1967); WYO. STAT. § 18-109 (1957).

⁹¹ See ALASKA STAT. § 44.23.020(a)(3)(1993); CONN. CONST. of 1985 art. 23; CONN. GEN. STAT. §§ 51-275-288 (1985); DEL. CODE ANN. tit. 29, § 2502 (1972); R.I. CONST. art. IX, § 12; R.I. GEN. LAWS ch. 9, tit. 42 (1987).

⁹² ARIZ. REV. STAT. ANN. § 21-424 (1992).

⁹³ ARIZ. REV. STAT. ANN. § 41-193 (1992).

⁹⁴ ME. REV. STAT. ANN. § 272(3) (West 1994).

⁹⁵ N.H. REV. STAT. ANN. § 7:34 (1988).

⁹⁶ See, e.g., IOWA CODE ANN. § 331.751 (West 1994); MINN. STAT. ANN. § 388.01 (West Supp. 1995).

⁹⁷ See, e.g., MD. ANN. CODE art. 10, § 34 (1957).

prosecutors have jurisdiction over matters arising in more than one county.⁹⁸ In Texas, more than one district attorney may have jurisdiction over a criminal matter.⁹⁹

All local prosecutors have jurisdiction over criminal matters. In some jurisdictions criminal appeals are argued by the local prosecutor¹⁰⁰ whereas in other states the state attorney general handles criminal appeals.¹⁰¹ In Oregon, appeals can be handled by either office.¹⁰² In most jurisdictions, local prosecutors prosecute juvenile matters.¹⁰³ In many jurisdictions, the local prosecutor also serves as counsel for the local jurisdiction in civil matters.¹⁰⁴

The great majority of local prosecutors, whether the office is a constitutionally based office or simply a statutorily created office, are elected officials.¹⁰⁵ In New Jersey, however, the local prosecutor is appointed by the governor with the advice and counsel of the state senate.¹⁰⁶ In larger jurisdictions the local prosecutor is a full-time position and the prosecutor and assistants are prohibited from conducting a private practice.¹⁰⁷ In smaller jurisdictions, it is not uncommon for either the prosecutor, the assistants, or both, to be part-time officials.¹⁰⁸ For example, in Virginia, seventy-six local prosecutors are full time officials while forty-five local prosecutors hold part-time positions.¹⁰⁹

There is relatively little written about the day-to-day workings of the prosecutor's office. Perhaps the most reliable information comes from the biennial report of the Bureau of Justice Statistics of the United States Department of Justice.¹¹⁰ Even this report, which is based upon the results of a survey of 290 prosecutors nationwide, is only the second report produced by the Bureau.¹¹¹ Some of the information provided by the Bureau is titillating for what it does not re-

⁹⁸ See, e.g., ARK. CODE ANN. § 16-21-101 (Michie 1994) (a judicial district consists of more than one county, see ARK. CODE ANN. § 16-13-901 (1994)); OKLA. STAT. ANN. tit. 19, § 215.1 (West 1988).

⁹⁹ See TEX. GOV'T CODE ANN. § 43.101 et. seq. (West 1988).

¹⁰⁰ See, e.g., PA. STAT. ANN. tit. 16, § 1402 (Supp. 1995).

¹⁰¹ See, e.g., MD. ANN. CODE art. 10, § 34 (1994); NEB. REV. STAT. § 23-1201 (1991).

¹⁰² OR. REV. STAT. § 180.060(d)(4) (1995).

¹⁰³ See, e.g., S.C. CODE ANN. 20-7-630 (Supp. 1995).

¹⁰⁴ See, e.g., ALA. CODE § 12-17-184(3) (1995); MINN. STAT. ANN. § 388.051 (West Supp. 1995).

¹⁰⁵ UNITED STATES DEPT. OF JUSTICE, *supra* note 8, at 2.

¹⁰⁶ N.J. STAT. ANN. § 2A:158-1 (West 1985).

¹⁰⁷ UNITED STATES DEPT. OF JUSTICE, *supra* note 8, at 1.

¹⁰⁸ *Id.*

¹⁰⁹ NATIONAL DISTRICT ATTORNEYS ASSOCIATION, 1994 NATIONAL DIRECTORY OF PROSECUTING ATTORNEYS 163.

¹¹⁰ BUREAU OF JUSTICE STATISTICS, *supra* note 7.

¹¹¹ *Id.* at 2.

port: for example, in the seventy-five largest counties in the United States, 48% of the offices had at least one prosecutor who was armed.¹¹² Other information is very important as background information for this proposal for change.

As defined in the Bureau of Justice Statistics survey, a "chief prosecutor" is the most popular title for the attorney who advocates for the public in felony cases.¹¹³ More than 95% of the chief prosecutors are elected locally.¹¹⁴ About three-fourths of the prosecutors' offices represented jurisdictions with less than 65,000 people. Only one percent of the offices represent jurisdictions in which the population exceeds one million.¹¹⁵ A workforce of approximately 57,000 full-time and part-time professional and support staff were employed by local prosecutors.¹¹⁶ The largest office is the Office of the District Attorney of Los Angeles County which employs more than 2,700 people.¹¹⁷ Across the nation, about one-third of the offices had a total staff of four or fewer, including the chief prosecutor. The median total staff size was seven, with a median of three assistant prosecutors.¹¹⁸

Prosecutors are usually white males—70% of prosecutors are male and 88% of prosecutors are white, non-Hispanic.¹¹⁹ About one-third of all prosecutors have had nine or more years of trial experience; one-third has had less than four years trial experience.¹²⁰ In 70% of the offices, the chief prosecutor served full time.¹²¹

More than half of the nation's prosecuting offices closed more than 800 cases per year.¹²² The median number of felony cases closed by each office was 203.¹²³ The average closed case cost the office approximately \$400 to process to completion.¹²⁴ A majority of offices handled newly created crimes within the last three years.¹²⁵ Almost universally prosecutors notified victims of the outcome of the case.¹²⁶

Local funding (money from county or city sources) accounts for

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 3.

¹²⁰ *Id.*

¹²¹ *Id.* at 2.

¹²² *Id.* at 3.

¹²³ *Id.*

¹²⁴ *Id.* at 1.

¹²⁵ *Id.*

¹²⁶ *Id.* at 7.

more than 90% of prosecution costs nationally.¹²⁷ Only 11% of prosecuting offices were funded solely by state funds, while 39% of prosecutors were funded solely by county or city funds.¹²⁸ Those offices which had funds from both state and local sources received the great majority of their funds from local sources.¹²⁹ For example, the Los Angeles County District Attorney receives 90% of its \$218 million budget from local sources.¹³⁰ The entire \$15 million budget of the Dallas prosecutor's office comes from local funding.¹³¹ Budgets for prosecutors ranged from \$21,000 to over \$200 million. On average prosecutors operated on a budget of \$190,000 per year.¹³²

The internal management of local prosecutor offices varies greatly among jurisdictions, dependent mainly on the size of the office. Only one prosecutor of the 290 prosecutors who were surveyed by the Bureau reported no plea negotiations in felony cases for 1992. More than 90% of the offices reported that plea negotiations included charging and sentencing recommendations.¹³³ Factors considered in plea bargaining included a defendant's criminal history, defendant's cooperation with the prosecution, strength of the case, evidentiary

¹²⁷ *Id.* at 3.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ The United States Department of Justice Bureau of Statistics has been most generous in providing budget details for 47 of the largest 75 counties in the United States. Excerpts for 19 counties are reported below:

County	Total Budget	% State Funds	% County/City Funds
Maricopa, AZ	\$ 29,162,692	17%	82%
Los Angeles, CA	217,494,000	10	90
Orange, CA	31,577,163	5	90
Sacramento, CA	31,814,448	8	92
San Diego, CA	48,523,170	32	68
San Francisco, CA	15,085,522	0	100
Santa Clara, CA	22,779,088	6	94
Broward, FL	15,254,749	92	8
Dade, FL	27,005,427	88	11
Cook, IL	57,600,000	0	100
Wayne, MI	17,853,470	4	95
Essex, NJ	19,224,282	0	95
Kings, NY	45,976,073	12	83
Nassau, NY	17,500,000	6	93
New York, NY	55,486,410	6	87
Suffolk, NY	16,407,192	13	87
Philadelphia, PA	33,500,000	9	84
Harris, TX	20,810,201	0	100
King, WA	17,700,000	15	85

Letter from Carol DeFrances, Statistician, Bureau of Justice Statistics, United States Dept. of Justice, to Robert Misner (Jan. 27, 1995) (on file with the author).

¹³² BUREAU OF JUSTICE STATISTICS, *supra* note 7, at 3.

¹³³ *Id.* at 5.

problems, and victims' concerns. Only about 12% of prosecutors' offices in 1992 had written criteria governing negotiations.¹³⁴ Case-by-case supervisory review, office wide unwritten policy, mandatory sentencing laws, and sentencing practices were listed in order of frequency as the means that local prosecutors used to control plea bargaining within their offices. In more than 25% of all offices, case-by-case supervisory review was the only means of controlling plea bargaining.¹³⁵ More than 60% of prosecutors reported having a policy which required plea bargaining to be completed before either the setting of a trial date or before the start of the trial.¹³⁶

More than 93% of all offices reported felony cases that resulted in the imposition of sanctions other than incarceration or probation. These sanctions included counseling and drug therapy, victim compensation, forfeiture of property, and residence in halfway houses. An increasing number of offices reported the use of "loss of liberty" sanctions which include electronic surveillance, house arrest, or boot camp.¹³⁷

B. CENTERING POWER IN THE PROSECUTOR

Before tracking the dominance of prosecutorial discretion in the criminal justice system, a few words must be written on the general notion of discretion in crime enforcement. Whether a particular decision in crime enforcement is a legislative, judicial, police or prison decision, the great likelihood is that the decision will never be reviewed through any judicial or administrative process.

1. *Unreviewed Discretion as the Norm*

Legislators, police, prosecutors, and prison officials have enormous discretion as to most tasks for which they are responsible. Contrary to popular belief, attempts to impose any sort of judicial or administrative review on the great majority of the decisions of these offices have been grandly unsuccessful. To date review of these decisions through the political process has only come haphazardly. In those few areas in which the court has intervened, the recent trend is for the court to retreat to a "hands off" policy.

In the past three decades legislative bodies have seen relatively few instances in which the courts have moved to strike down criminal law legislation. In states where legislatures have created volumes of

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 6.

new criminal statutes and redrafted entire criminal codes, the new legislation has withstood constitutional challenges despite the fact that many of the revised codes contain numerous overlapping provisions which criminalize the same conduct with widely varying penalties.¹³⁸ Even in such substantive areas as hate crimes,¹³⁹ which seem to be inherently suspect on First Amendment grounds, statutes have often been upheld. Courts have almost universally agreed that the legislature is free to shift power from the court as in the area of mandatory sentencing and sentencing guidelines.¹⁴⁰ Legal theories which at one time appeared to present courts with the opportunity to play a more dominant role in setting criminal law policy—vagueness,¹⁴¹ status,¹⁴² and sentencing proportionality¹⁴³—have generally run their course. Only in the death penalty have courts exhibited a desire for continued active supervision over legislative decision-making.¹⁴⁴

Similar conclusions are warranted regarding police discretion. The day-to-day, minute-to-minute decisions by the police have never been reviewed by the court. Police decisions regarding which crimes to investigate, which persons to pursue, and which persons to arrest

¹³⁸ See *infra* notes 216-27 and accompanying text.

¹³⁹ See generally Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320 (1994) (analyzing *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and its application to state bias crimes).

¹⁴⁰ See, e.g., *State v. Spinney*, 820 P.2d 854, 856-57 (Or. Ct. App. 1991) ("It is within the legislature's power to establish criminal penalties, whether mandatory minimum sentences or a range of possible sentences." *Id.*)

¹⁴¹ See John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985). See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 2.3 (2d ed. 1986).

¹⁴² See LAFAVE & SCOTT, *supra* note 141 § 2.14(f). But see *State v. Richard*, 836 P.2d 622 (Nev. 1992) (striking down Nevada and Las Vegas loitering laws).

¹⁴³ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding mandatory life sentence without possibility of parole for possession of 672 grams of cocaine). The Harmelin statute was held to be unconstitutional by the Michigan Supreme Court on the grounds that the statute violated the Michigan Constitution's prohibition of cruel or unusual punishment. *People v. Bullock*, 485 N.W. 2d 866 (Mich. 1992). See also *State v. Bartlett*, 830 P.2d 823 (Ariz. 1992), *cert. denied*, 113 S. Ct. 511 (1992).

¹⁴⁴ Beginning in *Gregg v. Georgia*, 428 U.S. 153 (1976), the United States Supreme Court has ruled on a staggering number of capital punishment cases. For every United States Supreme Court case on capital punishment, whether the case raises issues of racial discrimination, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987), execution of minors, e.g., *Stanford v. Kentucky*, 492 U.S. 361 (1989), or accomplice liability, e.g., *Tison v. Arizona*, 481 U.S. 137 (1987), there exists a corresponding body of state case law implementing and interpreting the United States Supreme Court opinions. See, e.g., *People v. Melton*, 750 P.2d 741, 777 (Cal.), *cert. denied*, 488 U.S. 934 (1988) and *Spencer v. State*, 398 S.E.2d 179, 185 (Ga. 1990), *cert. denied*, 500 U.S. 960 (1991) (discussing *McCleskey*); *ex parte Davis*, 554 So.2d 1111, 1113-14 (Ala. 1989), *cert. denied*, 498 U.S. 1127 (1991) and *State v. Jimenez*, 799 P.2d 785, 797 (Ariz. 1990) (discussing *Stanford*); *Jackson v. State*, 575 So. 2d 181, 190-93 (Fla. 1993) (discussing *Enmund v. Florida* and *Tison*); *Rouster v. State*, 600 N.E.2d 1342, 1350 (Ind. 1992) (discussing *Tison*).

have come under judicial review only in the most egregious situations.¹⁴⁵ Opinions by the Warren Court permitted judicial review of some police behavior; police were strongly encouraged to use search warrants,¹⁴⁶ required to inform arrestees of their rights,¹⁴⁷ and mandated to cease interrogation when requested by an arrestee.¹⁴⁸ If police did not follow evidence gathering protocol established by the courts, the evidence would be excluded in a subsequent trial.¹⁴⁹ It is doubtful that the exclusionary rule was ever more than a symbolic remedy,¹⁵⁰ but even the symbolism of the exclusionary rule has been quickly and consistently limited by the Burger and Rehnquist Courts.¹⁵¹ Developments in such procedural areas as standing,¹⁵² stop and frisk,¹⁵³ administrative searches,¹⁵⁴ automobile searches,¹⁵⁵ impeachment,¹⁵⁶ and post conviction relief¹⁵⁷ have all resulted in a continued narrowing of judicial review of police conduct. Even in areas in which judicial review is permitted, plea bargaining may moot judicial oversight of police conduct.

Nowhere in the criminal justice system of the 1960s was the use of discretion less visible and more abused than the discretion exercised by prison officials.¹⁵⁸ During the decade of the 1970s prisoners

¹⁴⁵ See, e.g., *Davis v. Mississippi*, 394 U.S. 721 (1969) (fingerprinting 25 African-American youths in order to match prints with those found at scene of rape violated Fourth Amendment.).

¹⁴⁶ *Katz v. United States*, 389 U.S. 347, 357 (1967) ("Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

¹⁴⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁴⁸ *Edwards v. Arizona*, 451 U.S. 477 (1981), *reh'g denied*, 452 U.S. 973 (1981).

¹⁴⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁵⁰ Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 598 (physical evidence suppressed in .69% of 7,484 cases sampled). See generally Donald Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986).

¹⁵¹ See, e.g., *United States v. Leon*, 468 U.S. 897, 920 (1984) (development of good-faith exception to exclusionary rule). See also WAYNE R. LAFAYE, *SEARCH AND SEIZURE* § 1.3 (2d ed. 1987).

¹⁵² *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹⁵³ *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

¹⁵⁴ *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989).

¹⁵⁵ *Texas v. White*, 423 U.S. 67 (1975), *reh'g denied*, 423 U.S. 1081 (1976).

¹⁵⁶ *United States v. Havens*, 446 U.S. 620 (1980).

¹⁵⁷ *Stone v. Powell*, 428 U.S. 465, 482 (1976) (state prisoner cannot be granted federal habeas corpus relief if prisoner has had full and fair opportunity in state courts to raise Fourth Amendment issues).

¹⁵⁸ The brutality of prison life can be seen at its worst in the Arkansas prison system. In *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), *aff'd sub nom. Hutto v. Finney*, 437 U.S. 678 (1978), *reh'g denied*, 439 U.S. 1122 (1979), Judge Henley documents a system in which inmate trustees used bribery, extortion and violence to effectively operate the Cummins facility. It does not appear that the Arkansas prison system stood alone in its lawlessness. See *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976),

sought to impose judicial review over virtually all actions taken by prison officials and, perhaps for a fleeting moment, it appeared that the prisoners might win. Lawsuits challenging the constitutionality of prison conditions usually began with a valid claim of prison overcrowding,¹⁵⁹ which then led to claims involving mail,¹⁶⁰ access to courts,¹⁶¹ access to lawyers,¹⁶² food, religion¹⁶³ and a host of other issues.¹⁶⁴ It became rather commonplace for federal courts to seize some portion of operational control of state prisons and jails.¹⁶⁵ Limitations were generally placed upon prison populations¹⁶⁶ and some-

aff'd sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978); Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977). See also MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 2.14 (2d ed. 1993); Michael S. Feldberg, Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977). For a defense of federal court intervention, see Rhodes v. Chapman, 452 U.S. 337, 352-61 (1981) (Brennan, J., concurring).

¹⁵⁹ See MUSHLIN, *supra* note 158, § 2.12. The theory is that overcrowding causes stress and increased violence and puts unbearable strains on prison programs. See Fisher v. Koehler, 692 F. Supp. 1519 (S.D.N.Y. 1988). In Rhodes, 452 U.S. at 348-50, the court held that overcrowding per se did not violate the Cruel and Unusual Punishment Clause. Serious hardships must be shown to have resulted from the overcrowding. *Id.* at 351-52.

¹⁶⁰ In Procunier v. Martinez, 416 U.S. 396 (1974), the Court limited prison regulations as they impacted prisoner mail. The Court viewed the issue from the perspective of the free world correspondent to the "legitimate and substantial" state interests in operating a prison system. *Id.* at 412. In Turner v. Safley, 482 U.S. 78 (1987), the Court upheld a Missouri ban on correspondence between inmates. In Thornburgh v. Abbott, 490 U.S. 401 (1989), the Court upheld the broad discretion of a warden to reject publications from entering the prison.

¹⁶¹ In Johnson v. Avery, 393 U.S. 483 (1969), Justice Fortas wrote for the Court that "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.* at 485. In Bounds v. Smith, 430 U.S. 817 (1977), the Court required that North Carolina inmates have access to a law library or an alternative means to assist them in accessing the courts. See MUSHLIN, *supra* note 158, § 11.02.

¹⁶² See Wolff v. McDonnell, 418 U.S. 539 (1974) (allowing prison officials to open mail from inmate's attorney in presence of inmate).

¹⁶³ In Cruz v. Beto, 405 U.S. 319 (1972), the Court held that an inmate retained substantial First Amendment rights to practice his religion. In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Court used a rational relationship test to justify restricting Muslim inmates at a New Jersey prison. See MUSHLIN, *supra* note 158, § 6.00 et seq.

¹⁶⁴ See, e.g., J. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 173 (3d ed. 1985) in which the author documents prison litigation in eight main areas: use of force, visitation and association rights, mail, isolated confinement, religious rights, legal services, disciplinary procedures and parole.

¹⁶⁵ In Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass 1973) *aff'd*, 494 F.2d 1196 (1st Cir. 1974), the court issued an injunction covering almost every aspect of prison life including the wattage of light bulbs. See also Rhem v. Malcolm, 377 F. Supp. 995 (S.D.N.Y. 1974), *modified*, 507 F.2d. 333 (2d Cir. 1974) (federal district court issued orders to close jail facilities); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971).

¹⁶⁶ See Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (requiring 60 square feet per inmate in dormitories); see also Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979). *But see* Bell v. Wolfish, 441 U.S. 520 (1979).

times a master was appointed to oversee prison operations.¹⁶⁷ New disciplinary procedures¹⁶⁸ and greater access of prisoners to the outside world were required by judicial decree.¹⁶⁹ Early on in prisoner rights litigation, some courts seem posed to find a constitutional right of the prisoner to rehabilitation¹⁷⁰ and even flirted with a concept of "least restrictive punishment."¹⁷¹ Both of these developments would have created a very different prison system through litigation than had been created through legislation and executive decree. In no other part of the criminal justice system was greater use made of judicial review over day-to-day matters. Even in noncriminal areas such as school desegregation, federal courts were usually satisfied with a court order that delivered children to the front door of the school and did not attempt to review what went on in the classroom.¹⁷²

In defense of federal court intervention into state prison management, states appeared to be unwilling to acknowledge that increasing crime and increasing prosecutions required a larger commitment of resources simply to house prisoners in a safe and sanitary way. Once prison litigation had forced states to build more prisons and once issues such as mail, visiting lawyer access, and medical treatment were resolved, federal courts agreed that most decisions on the daily care and treatment of prisoners were discretionary decisions of state officials. The United States Supreme Court, in cases such as *Bell v. Wolfish*,¹⁷³ reinforced the long held tradition that courts should not be too

¹⁶⁷ See, e.g., *Pugh v. Locke*, 406 F. Supp. 318, 331-32 (M.D. Ala. 1976).

¹⁶⁸ See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974) (requiring certain due process protections before good time could be lost); but see *Meachum v. Fano*, 427 U.S. 215, *rehearing denied*, 429 U.S. 873 (1976) (no liberty interest which would require due process protection is implicated when a prisoner is transferred from one prison to another prison). See, MUSHLIN, *supra* note 158, § 9.00 et seq.

¹⁶⁹ See *supra* note 158.

¹⁷⁰ See *Pugh*, 406 F. Supp. at 330; see also *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). But see *Padgett v. Stein*, 406 F. Supp. 287, 296 (M.D. Pa. 1975) ("[W]hether penal institutions should undertake to rehabilitate prisoners . . . is a social policy question [for] . . . the legislative and executive branches.").

¹⁷¹ See *Bell v. Wolfish*, 441 U.S. 520, 532-40 (1978).

¹⁷² See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-15 (2d ed. 1988).

¹⁷³ 441 U.S. at 562:

There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be

anxious to become involved in the day-to-day decisions of prison officials.¹⁷⁴ Although many prisons and jails remain under some degree of federal court control, the trend has been clearly to return to a "hands off" policy by the courts.

2. Trends Which Have Enhanced Prosecutorial Power

Although the discretion given to the legislature, to the police, and to prison officials is broad and immensely important, the prosecutor has become the most powerful office in the criminal justice system. The prosecutor's authority is evident in bail hearings,¹⁷⁵ grants of immunity,¹⁷⁶ and in trial strategy.¹⁷⁷ But in the areas of charging, bargaining, and sentencing, it has become clear that the prosecutor plays the pivotal role in the criminal justice process. Despite criticism,¹⁷⁸ plea bargaining continues unabated.¹⁷⁹ While few courts have rather

answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

¹⁷⁴ See *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981):

In discharging this oversight responsibility, however, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens.

But there seems to be no doubt that the "hands off" doctrine will never return. MUSHLIN, *supra* note 158, at § 1.03.

¹⁷⁵ A judge's decision as to bail is impacted by the charge which the prosecutor chooses as well as the prosecutor's argument as to the strength of the case and the arrestee's background. See, WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 12.1 (2d ed. 1992); PAUL B. WICE, *BAIL AND ITS REFORM: A NATIONAL SURVEY 15-17 (1973)*, cited in STEPHEN A. SALZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 711-12 (4th ed. 1992).

¹⁷⁶ See LAFAVE & ISRAEL, *supra* note 175, at § 8.11.

¹⁷⁷ See, e.g., *Richardson v. Marsh*, 481 U.S. 200 (1987) in which Justice Scalia, writing for the Court, discussed the broad discretion given to prosecutors to decide when to try defendants jointly. "Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Id.* at 209-10. See LAFAVE & ISRAEL, *supra* note 175, at §§ 17.1-17.3.

¹⁷⁸ See *infra* part III.B.2.b.

¹⁷⁹ See *infra* notes 236-38 and accompanying text. The United States Sentencing Commission reviewed 40,000 federal convictions and found that 85% of federal criminal convictions came as a result of plea bargaining. UNITED STATES SENTENCING COMMISSION, *SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS* 48 (1987).

unsuccessfully attempted to formulate "a common law of prosecutorial discretion,"¹⁸⁰ the authority of the prosecutor continues to grow.

Three closely related trends have been at work to promote the authority of the prosecutor. First, current criminal codes contain so many overlapping provisions that the choice of *how* to characterize conduct as criminal has passed to the prosecutor. In many cases the legislature has effectively delegated its prerogative to define the nature and severity of criminal conduct to the prosecutor. Legislative mandates regarding sentencing maxima, sentencing minima, and sentencing guidelines are dependent upon the substantive charge chosen by the prosecutor. In addition, prosecutors have the untrammelled authority to select the number of separate criminal acts for which the defendant will be charged. The prosecutors also determine whether to seek sentencing enhancements.¹⁸¹

Second, the increase in reported crime without a concomitant increase in resources dedicated to the prosecution and defense of criminal conduct has resulted in a criminal process highly dependent upon plea bargaining. There are very few restraints placed upon the prosecutor in the bargaining process.¹⁸² Third, the development of sentencing guidelines and a growth of statutes with mandatory minimum sentences have increased the importance of the charging decision since the charging decision determines the range of sentences available to the court.¹⁸³ These three interrelated trends are also buttressed by the fact that in a majority of the states the office of the local prosecutor is a state constitutional office which in itself guarantees a modicum of independence.¹⁸⁴

The trends which have reinforced the important historical role of the prosecutor have not created a transitory situation. Whether one agrees with the critics of the role of the prosecutor, it appears that the future belongs to the prosecutor. Proposals to guarantee greater justice for defendants or more efficient use of scarce resources must accept the fact that the prosecutor has become, and will remain, the preeminent office in the criminal justice system.

¹⁸⁰ See ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 52-75 (1981) (arguing that it is preferable to follow a course of common law development of rules for use of prosecutorial discretion rather than attempting to establish guidelines through rule-making process.).

¹⁸¹ See Knapp, *supra* note 12, at 682.

¹⁸² See *infra* part III.B.2.b.

¹⁸³ See *infra* part III.B.2.c.

¹⁸⁴ See *supra* notes 88-95 and accompanying text.

a. Charging Decisions

One might assume that criminal law policy is made by the legislature and implemented by the police, the prosecutor, the court, and the prison. The fact that common law crimes have been abated, and therefore courts can no longer create new crimes to meet new challenges,¹⁸⁵ would also seem to solidify the centrality of policy-making in the legislature. In practice, the legislature has abdicated much of its authority to the prosecutor. In the area of charging, prosecutorial decisions—such as whether to prosecute, how to prosecute, how long to sentence, and whether to dismiss charges—all contribute to the creation of the prosecutor as the real policy-maker within the criminal justice system. At best the legislature is a lesser partner whose role is to set the outer parameters of criminal law policy and to fund prisons.

The prosecutor's decision not to prosecute a case is virtually unreviewable. Although for some this authority "border[s] on anarchy,"¹⁸⁶ the case law in both federal and state jurisdictions have ignored the criticism and have only rarely constrained the decision in any meaningful way.¹⁸⁷ Likewise, decisions regarding diversion programs,¹⁸⁸ venue,¹⁸⁹ immunity,¹⁹⁰ and victim participation¹⁹¹ are left to

¹⁸⁵ See LAFAYE & SCOTT, *supra* note 141, § 2.1 at 74 ("And thus it is not surprising that as more and more states have enacted comprehensive new criminal codes in place of the miscellaneous collection of uncoordinated statutes, they have generally abolished common law crimes."). The Commentary to the Model Penal Code reported that since the "promulgation of the Model Penal Code, statutes specifically abolishing common law offenses have been enacted in twenty-five jurisdictions and have been proposed in ten." MODEL PENAL CODE § 1.05 cmt. at 75 (1984).

¹⁸⁶ Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 7 (1932) (discussion of the prosecutor's role in the Ideal of Law Enforcement).

¹⁸⁷ See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-83 (2d Cir. 1973) (The discretion of the prosecutor not to prosecute either federal or state officials following the Attica prison riot is not subject to review.). Some federal courts have distinguished the prosecutor's decision not to prosecute from the prosecutor's decision to dismiss a charge after the case has been commenced. See *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) (The prosecutor's decision to terminate a prosecution should be respected unless the decision is "clearly contrary to manifest public interest."), *cert. denied*, 425 U.S. 971 (1976). State court review of the prosecutor's decision to dismiss a charge may depend upon the state constitution or state statute. See *infra* note 233.

¹⁸⁸ See LAFAYE & ISRAEL, *supra* note 175, § 13.6.

¹⁸⁹ Many times the prosecutor will have no choice regarding where to prosecute a crime. In federal cases, the prosecutor has a choice of venue if the offense was "begun in one district and completed in another." 18 U.S.C.A. § 3237(a) (1994). See *United States v. Reed*, 773 F.2d 477 (2d Cir. 1985) (applying a "contacts approach" to determining venue). State venue questions are not easily classified. Some state constitutions determine venue while in other states, issues are governed by state statute. See LAFAYE & ISRAEL, *supra* note 175, § 16.1(c) at 340.

¹⁹⁰ See LAFAYE & ISRAEL, *supra* note 175, § 8.11.

¹⁹¹ See Abraham S. Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 LAW & CONTEMP. PROBS. 225 (1984). See also Sarah N.

the unreviewable discretion of the prosecutor. Even claims of selective enforcement are rarely successful.¹⁹² Attempts to convince prosecutors to publish the guidelines for making prosecutorial charging decisions, even in such prestigious studies as the *ABA Standards for Criminal Justice Prosecution Function and Defense Function*¹⁹³ and the American Law Institute's *Model Code of Pre-Arrest Procedure*,¹⁹⁴ have generally gone unheeded. When guidelines have been drafted, they have generally been so broad as to be of little predictive value.¹⁹⁵

After a decision about whether to prosecute is made, the major decisions by the prosecutor center on the choice and number of charges on which to proceed. It is with these decisions that the prosecutor begins to set crime enforcement policy. Over time, prosecutorial discretion has been enhanced because criminal codes have become "society's trash bin[s]."¹⁹⁶ This is a result of a legislative tendency to "make a crime of everything that people are against, with-

Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 30 ARIZ. L. REV. 85 (1988).

¹⁹² See *Wayte v. United States*, 470 U.S. 598 (1985). See also *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995).

¹⁹³ ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.4 (3d ed. 1993).

¹⁹⁴ MODEL CODE OF PRE-ARREST PROCEDURE § 10.3 (1975). Professors LaFave and Israel cite the reasons for controlling prosecutorial discretion through rulemaking:

(1) rules aid in the training of new assistant prosecutors and in the internal review of all prosecution decisions, so that office policy is consistently and efficiently carried out; (2) rules give greater substance to administrative or judicial appeal rights, since in the absence of such rules it is difficult for victims or defendants to discover and prove that they have been treated differently; (3) in some cases, it may also be appropriate for defendants or complainants to challenge prosecution policy itself (as opposed to failures to follow the policy) as being inconsistent with legislative intent or constitutional requirements; (4) rules permit the legislature to know exactly how much of the substantive criminal law is being actively enforced, against which types of offenders, and for what purposes, and this information permits more intelligent and realistic legislative action; (5) rules serve to reassure the public, complainants and defendants that the prosecutor is not above the law; and (6) in the rare cases in which nonprosecution represents de facto decriminalization (such as fornication and homosexuality offenses), potential offenders are entitled to know that their conduct will not be criminally punished, so they need not fear blackmail or harassment.

LAFAVE & ISRAEL, *supra* note 175, § 13.2(f) at 171 (quoting Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 296-97 (1980)).

¹⁹⁵ U.S. DEP'T. OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1980). The Justice Department Standards have been criticized as "general, malleable, and unhelpful." Vorenberg, *supra* note 4, at 1544. See also MINN. STAT. ANN. § 388.051(3) (West Supp. 1995) (requiring county attorneys to adopt written guidelines regarding charging and plea negotiation policies as of January 1, 1995); WASH. REV. STAT. ANN. §9.94A.440 (1992) (detailing considerations for decisions not to prosecute, decisions to prosecute, selection of charges and police investigation).

¹⁹⁶ Statement by a representative of the Federal Bureau of Investigation, quoted in the PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 107 (1967) (quoted in LaFave, *supra* note 4, at 533).

out regard to enforceability, [or] changing social concepts."¹⁹⁷ But it is the breadth of crime definition that is a major source of prosecutorial power. By choosing to create a large number of crimes, and by defining those crimes with the breadth proposed by the Model Penal Code, legislatures make it impossible to enforce all criminal statutes and, at the same time, make it possible for a single act to be charged under many overlapping provisions.

In May 1962, the American Law Institute approved the final draft of the Model Penal Code.¹⁹⁸ The intent of the drafters was to produce a model code which would serve as a comprehensive guide for drafting statutes in a broad array of criminal law subjects. The intent was to create a code and commentary which would permit state legislatures to re-think and then re-cast its criminal law. The intent was not to create a uniform criminal code, unlike the intent of the drafters of the Uniform Criminal Code, but to create a model from which state legislatures might draw.¹⁹⁹

In the past three decades, thirty-six states have adopted new criminal law codes.²⁰⁰ Although none of the new codes adopt the Model Penal Code without some local variations, most have been heavily influenced by the Model Penal Code. Most redrafted codes faithfully follow many of the Model Penal Code provisions.²⁰¹ Certainly the Model Penal code is rightfully seen as the most important development in American criminal law in this century.²⁰²

The revised state codes are more comprehensive and more uniform than the codes they replaced.²⁰³ But what the Model Penal Code did not do—and was never intended to do—was to restrict the criminalization of a particular act to one particular criminal code provision. Individual provisions of the Model Penal Code and the provisions in the state codes that relied on the Model Penal Code have significant overlap. For example, an agreement between two persons to commit an offense may fall within the solicitation,²⁰⁴ conspiracy,²⁰⁵ attempt,²⁰⁶ and accessory provisions.²⁰⁷ Statutory provisions on con-

¹⁹⁷ *Id.*

¹⁹⁸ MODEL PENAL CODE (Proposed Official Draft 1962).

¹⁹⁹ LAFAYE & SCOTT, *supra* note 141, at 4 § 1.1(b).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 3.

²⁰³ *Id.* at 4.

²⁰⁴ MODEL PENAL CODE, *supra* note 198, at § 5.02.

²⁰⁵ *Id.* § 5.03.

²⁰⁶ *Id.* § 5.01.

²⁰⁷ *Id.* § 2.06.

spiracy²⁰⁸ and burglary²⁰⁹ go far beyond analogous common law provisions. State RICO statutes often allow civil penalties in addition to traditional criminal penalties.²¹⁰

Overlap comes as a result of a number of distinct pressures. One was the pressure to create a code of sufficient breadth so as to permit convictions without undue complications. The attempt was to avoid the danger that too much detail causes—the type of “loophole” litigation found in the historical development in the law of theft.²¹¹ Another pressure came from the practical politics involved at both the level of the American Law Institute and at the state legislative level. Professor Louis Schwartz, Reporter for Part II of the Model Code, recalled a debate at the American Law Institute.

The preservation of those definitions of burglary and robbery in the Model Penal Code . . . was purely a political compromise. We recognize that you could analyze those things down and abolish robbery and burglary and so on. But we know ourselves what would happen to a proposed code that went to the legislature without a specific provision on robbery.²¹²

The irrationality of the politics of criminal code revisions can perhaps best be seen in the Arizona Criminal Code. When the Arizona Legislature adopted its revised Criminal Code, which borrowed heavily from the Model Penal Code, a majority of legislators refused to go on record as voting for a repeal of any sex offense statutes. In the Arizona Criminal Code there are two complete sections of statutes which criminalize certain forms of sexual conduct; the first section is new and uses Model Penal Code terminology; the second section is old and is a codification of common law offenses. The new provisions were intended by the Arizona Law Reform Commission to replace the old provisions.²¹³

The existence of overlapping provisions, which is inevitable to some degree, creates power in the office of the prosecutor. Most states' legislatures, by creating too many policy choices, have effectively abdicated public policy-making to the prosecutor since it is the prosecutor, and not the legislature, that has the final decision in determining which public policy, if any, is breached by an individual's conduct. Only in very limited circumstances, such as race discrimina-

²⁰⁸ *Id.* § 5.03.

²⁰⁹ *Id.* § 221.1.

²¹⁰ See, e.g., OR. REV. STAT. § 166.710-735 (1993).

²¹¹ See, e.g., Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521 (1988).

²¹² Statement by Louis B. Schwartz quoted in *Model Penal Code Conference Transcript—Discussion Two*, 19 RUTGERS L.J. 635, 642 (1988).

²¹³ ARIZ. REV. STAT. ANN. §§ 13-1401 to 1416 (1994).

tion²¹⁴ or vindictiveness,²¹⁵ will the court overturn a prosecutor's charging decision. It is clear that this division of authority does not run counter to federal constitutional requirements.

In *United States v. Batchelder*,²¹⁶ the defendant was convicted of being a felon in possession of a firearm. Two overlapping provisions of the Omnibus Crime Act of 1968 prohibited the identical conduct.²¹⁷ The defendant was convicted and sentenced under the provisions which authorized the greater punishment.²¹⁸ The Seventh Circuit affirmed the ruling of the trial court but remanded the case for resentencing.²¹⁹ The Seventh Circuit had "serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct."²²⁰ The Seventh Circuit saw three possible constitutional infirmities. First, the existence of two identical provisions resulted in a lack of fair notice for the defendant and therefore the statute may be unconstitutionally vague.²²¹ Second, the lack of fair notice implicated other due process and equal protection concerns such as "excessive prosecutorial discretion."²²² Third, and most interesting, the existence of two identical statutes "constitutes an impermissible delegation of congressional authority."²²³

In overturning the Seventh Circuit's decisions, the United States Supreme Court held:

This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.²²⁴

The Supreme Court refused to characterize the impact of the dual provisions as empowering "the Government to predetermine ultimate criminal sanctions."²²⁵ In response to the Seventh Circuit's

²¹⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). *But see* *Wayte v. United States*, 470 U.S. 598, 601-10 (1985).

²¹⁵ See generally Barbara A. Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127 (1983); see also C. Peter Erlinder & David C. Thomas, *Prohibiting Prosecutorial Vindictiveness While Protecting Prosecutorial Discretion: Toward a Principled Resolution of a Due Process Dilemma*, 76 J. CRIM. L. & CRIMINOLOGY 341 (1985).

²¹⁶ 442 U.S. 114 (1979).

²¹⁷ *Id.* at 115-16.

²¹⁸ *Id.*

²¹⁹ *United States v. Batchelder*, 581 F.2d 626, 636 (7th Cir. 1978), *rev'd*, 442 U.S. 114 (1979).

²²⁰ *Id.* at 633-34.

²²¹ *Id.* at 631.

²²² *Id.*

²²³ *Id.* at 631-34.

²²⁴ *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979) (citations omitted).

²²⁵ *Id.* at 125.

concern that the existence of the "impermissibl[e] delegation to the Executive Branch the Legislature's responsibility to fix criminal penalties,"²²⁶ the Supreme Court commented upon the broad discretion which resides in the institutions within the criminal justice system: "[t]he provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws."²²⁷

The prosecutor also controls the decision of the number of charges which a defendant will confront.²²⁸ A prosecutor may decide to prosecute a defendant for twenty burglaries, ten burglaries, or just one burglary. A prosecutor may decide to prosecute for conspiracy as well as for burglary.²²⁹ The number of charges may affect a jury's perception of the defendant and may ultimately affect the judge's sentence.

The broad discretion in the charging decision directly impacts sentencing in those jurisdictions which have mandatory sentencing, sentencing guidelines, or sentencing statutes with minimum and maximum sentences. By choosing to prosecute a robbery as an "armed robbery" the trial judge may be forced to sentence a defendant, if convicted, under a mandatory sentence provision which is applicable whenever a defendant commits a crime while armed.²³⁰ Prosecutorial decisions to charge a violation of a particular statute impacts sentencing in other ways.²³¹ Sentencing enhancement statutes, some of

²²⁶ *Id.* at 125-26.

²²⁷ *Id.* at 126. LAFAVE & ISRAEL, *supra* note 175, § 13.7, at 589-90. Note that the *Batchelder* reasoning presents three major fact patterns in which defendant's conduct may fall within two statutes. The first category is unobjectionable: a "statute defines a lesser included offense of the other and they carry different penalties . . ." The second category is more objectionable: "where [two] statutes overlap and carry different penalties . . ." The third category, identical statutes with different penalties, is highly objectionable. "There is nothing at all rational about this statutory scheme . . . It confers discretion which is totally unfettered and which is totally unnecessary."

²²⁸ *Id.*

²²⁹ In many jurisdictions it is possible for a defendant to be convicted and sentenced for both conspiracy and the underlying crime. See LAFAVE & SCOTT, *supra* note 141, § 6.5 (h), at 567. The Model Penal Code has limited the court's ability to sentence for both. MODEL PENAL CODE § 1.07(1)(a) cmt. at 109 (1985).

²³⁰ See, e.g., N.J. STAT. ANN. § 2C:43-6(c) (West Supp. 1992) (mandatory sentence of three years or one-third to one-half of total sentence, whichever is greater, for the use or possession of a firearm in certain offenses). See also Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 67-73 (1993) (determinate sentencing reform, which centers on multiple factors for sentencing, is undercut by mandating sentences that often focus on a single factor).

²³¹ See, e.g., CAL. PENAL CODE § 667.9 (West 1988). Professor Lowenthal distinguishes charge-based sentencing and conduct-based sentencing and concludes that charge-based

which fall into the "three strikes and you're out" category, require that a sentence be enhanced only if the prosecutor chooses to allege and prove prior convictions. In some jurisdictions "prior convictions" include multiple convictions during the same trial.²³² In a less direct way, the charging decision may later impact a prisoner's attempt for parole and may even affect the public's perception of the defendant. Indeed the charging decision may impact the defendant's perception of himself.

There are few areas in which inroads have been made upon the breadth of the prosecutor's charging decision. In many jurisdictions the court has the ultimate decision whether to permit a prosecutor to dismiss charges once the charges have been formally filed.²³³ A few states require a prosecutor to plead under the specific statute as opposed to the more general statute if possible. The West Virginia Code creates a nondiscretionary obligation to institute criminal proceedings against persons whom the prosecutor has reason to believe have violated a criminal statute.²³⁴ It is not clear what particular impact this statute has had.²³⁵ The Colorado Criminal Code permits a person to challenge the District Attorney's decision not to charge, but the Colo-

sentencing "gives state prosecutors enormous sentencing power because courts can consider leniency only if prosecutors permit it." Lowenthal, *supra* note 230, at 77.

²³² See, e.g., ARIZ. REV. STAT. ANN § 13-604(F)-(G) (1989); *State v. Hannah*, 617 P.2d 527 (Ariz. 1980) (a prior felony conviction can be used to enhance punishment even if the prior conviction is obtained after the commission of the principle offense and when two offenses are consolidated for trial, one conviction can be used for an enhanced penalty for the second conviction even though both convictions come in a single trial); see also *State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981) (at a trial for separate crimes on three occasions, convictions of earlier committed crimes can be used to enhance the later crime); GOLDSTEIN, *supra* note 180, at 15 (describing the California practice of "striking the priors").

²³³ At common law, the prosecutor had complete discretion to enter a *nolle prosequi*. See *Myers v. Frazier*, 319 S.E.2d 782, 792 (W. Va. 1984) (noting, however, that this common law rule was not followed in the Virginias); *Wilson v. Renfroe*, 91 So. 2d 857 (Fla. 1956), cited with approval in *State v. Jackson*, 420 So. 2d 320, 321-22 (Fla. Dist. Ct. App. 1982). It has been estimated that more than 30 states, through statute or judicial decision, require court consent to dismiss a charge. *United States v. Cowan*, 524 F.2d 504, 509-10 (5th Cir. 1975), cert. denied, *Woodruff v. U.S.*, 425 U.S. 971 (1976), cited with approval in *Myers v. Frazier*, 319 S.E.2d 782, 792 n.13 (W. Va. 1984). See generally Ethel R. Alston, Annotation, *When is Federal Court Justified, Under Rule 48(a) of the Federal Rules of Criminal Procedure, In Denying Government Leave to Dismiss Criminal Charges*, 48 A.L.R. FED. 635 (1980). Prior to the formal filing of charges, the discretion as to which crime to charge lies within the discretion of the prosecution. See *supra* notes 186-87 and accompanying text. See also GOLDSTEIN, *supra* note 180, at 5 ("[t]he tone has been less one of judicial restraint than of judicial withdrawal, treating the prosecutor as so integral and expert a part of the executive branch that he may not be interfered with by the judiciary").

²³⁴ *State ex rel. Bailey v. Facemire*, 413 S.E.2d 183, 187 (W. Va. 1991).

²³⁵ *Id.* See also *State v. Satterfield*, 387 S.E.2d 832, 834 (W. Va. 1989) ("the prosecutor's discretion is not unlimited. . . . [T]he line of demarcation between prosecutorial duty and prosecutorial discretion is probable cause.").

rado Supreme Court has warned that the statute does not permit a judge to substitute his judgment for that of the prosecutor. The court must find that the "district attorney's decision was arbitrary or capricious and without reasonable excuse" before the court will step in.²³⁶ The Oregon Criminal Code, which contains a nonexclusive list of criteria the prosecutor may consider in making plea agreements,²³⁷ has been interpreted as giving prosecutors wide latitude in decision-making—a latitude which seems only to be circumscribed by proof that the defendant was discriminated against by the prosecutor on the basis that the defendant was a member of a protected class.²³⁸ The Washington Criminal Code lists factors to be considered by prosecutors and police in exercising their discretion.²³⁹ In a few states, the State Attorney General has some supervisory control over local prosecutorial decisions.²⁴⁰ But calls to limit prosecutorial discretion in the charging decision have fallen on deaf ears.²⁴¹

b. Plea Bargaining

The charging decision is the basic source of prosecutorial authority, but the power to charge is enhanced by the prosecutor's role in plea bargaining and by recent trends in sentencing.

The way in which plea bargaining takes place varies from jurisdiction to jurisdiction. Plea bargaining may be explicit or implicit. It may involve the trial judge or remain a process in which only the prosecutor and defense counsel engage. Prosecutors may bargain with charge reductions which affect sentencing or may simply agree to recommend a sentence to the court or remain silent during sentencing.²⁴²

Proponents of plea bargaining generally argue administrative convenience and efficiency as justifications for the practice. Propo-

²³⁶ *Landis v. Farrish*, 674 P.2d 957, 958 (Colo. 1984).

²³⁷ *State v. Buchholtz*, 788 P.2d 998, 1000 (Or. 1990).

²³⁸ *Id.*

²³⁹ WASH. REV. CODE ANN. § 9.94A.440 (West Supp. 1996).

²⁴⁰ See ALASKA STAT. § 44.23.020 (Supp. 1995); CONN. GEN. STAT. ANN. §§ 51-275 to 51-277 (West 1985 & Supp. 1995); DEL. CODE ANN. tit. 29, § 2502 (1991); N.H. REV. STAT. ANN. § 7:6 (1988); R.I. GEN. LAWS § 42-9-1 & 42-9-4 (1993).

²⁴¹ See, e.g., KENNETH C. DAVIS, *DISCRETIONARY JUSTICE* 224-25 (1969). *But cf.* Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240 (1977) (analyzing the prosecutorial process in three countries, including Germany); cf. John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978) (questioning the validity of the conclusions in the Goldstein & Marcus article). Other suggestions to limit prosecutorial discretion include the appointment of special prosecutors and permitting private prosecutions.

²⁴² See HERBERT S. MILLER ET AL., *PLEA BARGAINING IN THE UNITED STATES* at v-vii, xii-xiv, xxxix, xl-xli (1978), quoted in SALTZBURG & CAPRA, *supra* note 175, at 788-91.

nents point to the guilty plea rate of 90% and conclude that plea bargaining is a simple fact of life.²⁴³ Other proponents believe plea bargains are more likely than trials to produce an accurate result.²⁴⁴ Other proponents see that plea bargaining relieves the uncertainty for both the prosecutor and the defendant, a good which should not be underestimated.²⁴⁵ For Judge Easterbrook, prosecutorial discretion in plea bargaining is simply part of the use of discretion in the criminal justice system which yields "the order of the market place, coordination of the acts of many thousands of people through a price system. The features of criminal procedure . . . are best understood as if designed to facilitate a market assessment and imposition of the price of crime."²⁴⁶

Opponents to plea bargaining doubt that plea bargaining always results in a more efficient system²⁴⁷ and point to experiences in Alaska²⁴⁸ and El Paso, Texas²⁴⁹ to support their conclusions.²⁵⁰ It is argued that without plea bargaining, prosecutors would limit the extent of the charges.²⁵¹ Opponents criticize plea bargaining on grounds of principle as well: plea bargaining gives the prosecutor the power to be both prosecutor and judge.²⁵² In place of plea bargaining, calls have been made for a system of jury waivers;²⁵³ others call for truncated trials.²⁵⁴ Some call for communities to fund the criminal

²⁴³ The classic statement to justify plea bargaining is found in Chief Justice Burger's opinion in *Santobello v. New York*, 404 U.S. 257, 261 (1971):

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

See also *Scott v. United States*, 419 F.2d 264, 271 (D.C. Cir. 1969) (Bazelon, J.).

²⁴⁴ LAFAVE & ISRAEL, *supra* note 175, § 21.1(d).

²⁴⁵ See, e.g., *People v. Selikoff*, 318 N.E.2d 784, 788-89 (N.Y. 1974).

²⁴⁶ Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 330 (1983).

²⁴⁷ See, e.g., Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 4, at 52.

²⁴⁸ See Michael L. Rubenstein & Teresa J. White, *Plea Bargaining: Can Alaska Live Without It?*, 62 JUDICATURE 266, 275-76 (1978).

²⁴⁹ See Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987).

²⁵⁰ But see Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 4, at 1045-46.

²⁵¹ See generally Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

²⁵² GOLDSTEIN, *supra* note 180, at 3-5.

²⁵³ Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 4, at 1087-93.

²⁵⁴ See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1022-24 (1983).

justice system to a degree that would permit the extinguishment of plea bargaining.²⁵⁵ For Professor Schulhofer, the analysis in support of broad discretion in the criminal justice system by Judge Easterbrook misses the hallmark of the criminal justice system: criminal procedure is not a market but rather is a “*political system*.”²⁵⁶ For some opponents of plea bargaining, society’s interests—as opposed to the interests of the prosecutor and the defendants—are compromised unnecessarily by plea bargaining.²⁵⁷

Until recent times, opponents of plea bargaining tended to view it as unnecessarily compromising rights of the defendant. Recently, however, plea bargaining has come under attack from those who believe it has resulted in insufficient punishment for offenders.²⁵⁸ Critics now include members of the victims’ rights movement who have seen plea bargaining as failing to extract justice from defendants, i.e., the victim’s preferences are not always followed by the prosecutor.²⁵⁹ Critics of plea bargaining spearheaded the Proposition 8 reform in California and successfully campaigned for the “Victims’ Bill of Rights,” but the initiative itself has not drastically altered the operation of plea bargaining.²⁶⁰

Calls for the abolition of plea bargaining have been heard and ignored for more than twenty-five years. For example, the National Advisory Commission on Criminal Justice Standards and Goals argued that plea bargaining should be prohibited “as soon as possible.”²⁶¹ For some, it seemed inevitable that a judiciary which believed the prosecutor too involved in “the competitive enterprise of ferreting out crime” to judge the sufficiency of a search warrant and required a judicially held probable cause hearing to justify holding a defendant, would soon find the need to monitor the use of discretion by the prosecutor.²⁶² Although the debate on the merits of plea bargaining will

²⁵⁵ See Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 221-22 (1983); Alschuler, *supra* note 254, at 936-69.

²⁵⁶ Schulhofer, *Criminal Justice Discretion as a Regulatory System*, *supra* note 4, at 44.

²⁵⁷ See Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978). See also Arenella, *supra* note 255, at 215-16.

²⁵⁸ CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS’ RIGHTS IN CALIFORNIA at xiv-xvi (1993) (listing five reasons why guilty pleas are considered reprehensible by some: “any sentence less than the full maximum allowed by law must be lenient; the lawyers who conduct it are unpopular; the worst examples are perceived as normal; it is poorly understood; in popular political debate, crime and justice have become bogeymen . . . [with] ‘good guys’ and ‘bad guys’ . . .”

²⁵⁹ *Id.* at xv-xvi.

²⁶⁰ *Id.* at 177-203.

²⁶¹ NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 3.1 (1973).

²⁶² See GOLDSTEIN, *supra* note 180, at 6-8.

undoubtedly rage into the next millennium, the likelihood of abandoning the plea bargain is almost non-existent. In fact, in the federal system, the system of plea bargaining has been given a boost by the United States Sentencing Commission Guidelines, which provide for a reduction in the allowable range of sentences from 25% to 30% for an offender who accepts responsibility for his criminal conduct. One clear method of accepting responsibility is the plea of guilty.²⁶³

Although the United States has a long history of plea bargaining, formal recognition of the important role that plea bargaining plays has come only in recent times.²⁶⁴ The United States Supreme Court did not analyze plea bargaining until 1970 in *Brady v United States*.²⁶⁵ After discussing the benefits which plea bargaining has for both the prosecutor and the defense, the Court concluded:

It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.²⁶⁶

Only a year later, in *Santobello v. New York*,²⁶⁷ the Supreme Court indicated the passive approach it would take as plea bargaining cases reached its docket: "plea bargaining' is an essential component of the administration of justice. Properly administered, it is to be encouraged."²⁶⁸ Subsequent decisions indicated that the court was willing to intervene in only the rarest of occasions into the prosecutor's role in plea bargaining.

Early in the development of the acceptable parameters of plea bargaining, defendants argued that prosecutorial vindictiveness was apparent whenever a prosecutor sought more severe punishment after plea negotiations failed. In *Bordenkircher v. Hayes*,²⁶⁹ the prosecutor offered to recommend a prison sentence of five years if Hayes pled guilty. If Hayes did not plead guilty, the prosecutor told Hayes that he would seek an indictment under the Kentucky Habitual Criminal Act which mandated a sentence of life imprisonment. Hayes chose to plead not guilty. Eventually he was found guilty and sentenced to a life term.²⁷⁰ In upholding Hayes' conviction, Justice Stewart created the atmosphere in which plea bargaining has been conducted ever

²⁶³ See SALTZBURG & CAPRA, *supra* note 175, at 796.

²⁶⁴ See generally Alschuler, *Plea Bargaining and Its History*, *supra* note 4.

²⁶⁵ 397 U.S. 742 (1970).

²⁶⁶ *Id.* at 752 (footnote omitted).

²⁶⁷ 404 U.S. 257 (1971).

²⁶⁸ *Id.* at 260.

²⁶⁹ 434 U.S. 357 (1978).

²⁷⁰ *Id.* at 358-59.

since. After first acknowledging that in times past plea bargaining had occurred as a "clandestine practice,"²⁷¹ Justice Stewart noted the centrality of plea bargaining in the criminal justice process.²⁷² The Court concluded that a plea bargaining promise must be kept.²⁷³ Earlier in *North Carolina v. Pearce*, the Court held that the prosecutor is not permitted to be vindictive in a second trial because the defendant has successfully attached his first conviction.²⁷⁴ But vindictiveness does not apply, said Justice Stewart, to the "give-and-take negotiation in plea bargaining."²⁷⁵ For the Court in *Bordenkircher*, "there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer."²⁷⁶

The Court in *Bordenkircher* had the opportunity to mandate active judicial supervision of the plea bargaining process. In 1978 the jurisprudence of plea bargaining was still sufficiently in its infancy that the Court could have required a plea bargaining system that placed more discretion in the trial court and away from the prosecution. The Court could have decided that a waiver of the myriad trial rights which a guilty plea requires was not a voluntary or intelligent plea except in limited circumstances. A broader due process standard than that in *Bordenkircher* might have forbidden any disparity between sentences of those who plead guilty and those who go to trial. This standard certainly would have cost the prosecutor his most effective tool to persuade a defendant "to forego his right to plead not guilty."²⁷⁷

Instead, the *Bordenkircher* court made it very clear that the role of the prosecutor was preeminent in the criminal justice system. Only on rare occasions would an appeals court become involved in overseeing the plea bargaining process.

Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification There is not doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though the discretion may be, there are undoubtedly constitutional limitations upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this

²⁷¹ *Id.* at 362.

²⁷² *Id.* at 361-65.

²⁷³ *Id.* at 365.

²⁷⁴ 395 U.S. 711, 725 (1969).

²⁷⁵ *Parker v. North Carolina*, 397 U.S. 790, 809 (1970), *cited in United States v. Bordenkircher*, 434 U.S. 357, 362-63 (1978).

²⁷⁶ *Bordenkircher*, 434 U.S. at 363.

²⁷⁷ *Id.* at 364.

case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution did not violate the Due Process Clause or the Fourteenth Amendment.²⁷⁸

Even the dissenting opinion in *Bordenkircher* admitted that the prosecution in the case would be able to reach the same result by filing the most serious charges possible before the bargaining process began.²⁷⁹ As Justice Blackmun noted, "The courts necessarily have deferred to the prosecutor's exercise of discretion in initial charging decisions."²⁸⁰ The dissent also noted that it is the voters who ultimately decide whether the charging policy followed by the prosecutor is a fair policy.²⁸¹

Courts have acknowledged the broad discretion which prosecutors exercise and yet have not assumed judicial review of the exercise of discretion is either required or advisable. Little has come from calls from organizations, such as the American Law Institute and the American Bar Association, for administrative rules as a check on potential abuse of discretion by prosecutors.

c. Sentencing Reforms

A criminal justice system in which prosecutorial discretion consists mainly of charging discretion and plea bargain discretion remains a system in which the prosecutor is the preeminent actor. However, in those states in which the sentencing powers of the trial judge have not been constrained through sentencing guidelines or sentencing minima, the prosecutor's authority is theoretically subject to greater control.²⁸² In practice, the judiciary has generally contented itself with playing a rather passive role in the plea bargaining process and accepting the bargain struck between the prosecutor and the defendant.²⁸³ When the courts play a more active role in sentenc-

²⁷⁸ *Id.* at 364-65.

²⁷⁹ *Id.* at 368 (Blackmun, J., dissenting).

²⁸⁰ *Id.* at 368 n.2 (Blackmun, J., dissenting).

²⁸¹ *Id.*

²⁸² See generally Standen, *supra* note 4, at 1502-05.

²⁸³ GOLDSTEIN, *supra* note 180, at 55-56. Goldstein observes:

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. This is evident in the effect of separation-of-powers considerations on the outcome of cases. All the leading appellate opinions reverse the trial judge when he refuses to accept the prosecutor's decision. While upholding the idea of judicial review, they apply a standard that makes it doubtful that anything but an egregious decision by the prosecutor could properly be disregarded. Their actions reflect a belief that they are unable, as a practical and a legal matter, to compel the prosecutor to abide by their decision. "Few subjects" said Chief Justice Warren Burger, then a circuit judge, "are less adapted to judicial review than the exercise by the Executive of his discretion" in these matters. The point has been repeated often and has led re-

ing, or when courts have little or no care for uniformity or disparity in sentencing, the results have triggered accusations that sentences are overly lenient, perceptions of sentencing disparity caused by the luck of case assignment, and sentences which appear to be overtly stringent but result in minimal time spent in custody.²⁸⁴

By the 1970s the public and its elected representatives began to rally for sentencing reform which would limit judicial discretion in sentencing, thereby limiting sentence disparity and forcing guilty defendants to serve longer prison sentences.²⁸⁵ The reform movement, which has influenced both state and federal practices, has been successful on both counts: judicial discretion has been limited and more persons are now being sentenced to prison for longer periods. Two important and predictable results have emerged from the reform movement: increased prosecutorial discretion and overcrowded prisons. Prosecutorial discretion has increased because of the increased premium placed on the charging decision and the plea bargain decision. Through these decisions, the prosecutor can often dictate the limited range of judicial discretion allowed by statute or sentencing guidelines.²⁸⁶ The increase in prison population due to harsher sentencing guidelines and the increased use of mandatory minimum sentences by legislatures has resulted in increased capital and operating budgets for corrections agencies and the need to permit early (and often unsuccessful) release for prisoners in order to comply with federal court orders or to avoid the likelihood of federal court intervention on overcrowding grounds.²⁸⁷ The "back-end" release by prison officials, parole boards or through executive clemency fly in the face of public desire for harsher sentences and "truth-in-sentencing."²⁸⁸

Commentators have paid most attention to the federal sentencing guidelines.²⁸⁹ The Sentencing Reform Act of 1984 established the United States Sentencing Commission which drafted guidelines to become effective on November 1, 1987. Because of constitutional challenges to the guidelines, nationwide application actually began in

formers to minimize the judicial role and to look instead to legislation or to prosecutorially established guidelines.

²⁸⁴ *But see* Standen, *supra* note 4, at 1502-05.

²⁸⁵ *See* Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655 (1993).

²⁸⁶ *See* Standen, *supra* note 4, at 1505-17.

²⁸⁷ *See supra* notes 46-53 and accompanying text.

²⁸⁸ *See* Knapp, *supra* note 12, at 681-89.

²⁸⁹ Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 649 (1993).

January 1989.²⁹⁰ Criticism of the federal guidelines has been brutal.²⁹¹ As noted by Professor Orland, "Unqualified praise for the U.S. Sentencing Commission appears to emanate from only one source—the U.S. Sentencing Commission itself."²⁹²

By now the main features of the federal guidelines are well-known. In order to "ensure reasonable uniformity in sentencing by narrowing wide disparity,"²⁹³ the 1987 guidelines featured a 258-box sentencing grid. A base number results from a matrix which includes the offense level and criminal history level. The base number is then adjusted by factors including victim characteristics, related uncharged conduct, and defendant's acceptance of responsibility. The base number determines the range of sentences which the trial judge may impose.²⁹⁴

The debate, which both predated and postdated the adoption of the guidelines, has included lengthy discussions of the role of the prosecutor in the era of the guidelines. Most commentators believe the guidelines decrease judicial discretion in sentencing²⁹⁵ and result in an "increase in the already swollen power of prosecutors."²⁹⁶ The general consensus is that although there has been no definitive study to date, guidelines have enlarged prosecutorial discretion.²⁹⁷ Com-

²⁹⁰ UNITED STATES SENTENCING COMMISSION, *THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 1* (1991) (hereinafter *SENTENCING COMMISSION REPORT*).

²⁹¹ See *supra* note 5. See also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, *supra* note 4 (arguing the unnecessary aggregation of atypical cases); Andrew von Hirsch & Judith Greene, *When Should Reformers Support Creation of Sentencing Guidelines?*, 28 WAKE FOREST L. REV. 329, 334 (1993) ("Not only are the Federal Commission's guidelines fundamentally flawed in a number of respects, but they also have made the situation worse than it probably would have been in the guidelines' absence."); Charles J. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988) (guidelines fail to take into account prison overcrowding).

²⁹² Frankel & Orland, *supra* note 285, at 664. Others have supported the federal sentencing reforms. See, e.g., David W. Yellen, Comment, *Two Cheers For A Tale of Three Cities*, 66 S. CAL. L. REV. 567 (1992).

²⁹³ *SENTENCING COMMISSION REPORT*, *supra* note 290, at 6.

²⁹⁴ SALZBURG & CAPRA, *supra* note 175, at 1129.

²⁹⁵ See Albert W. Alschuler, *Monarch, Lackey, or Judge*, 64 U. COLO. L. REV. 723 (1993) (a policy of restricting judicial but not prosecutorial discretion is incoherent); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 502 (1992) ("when judicial discretion is constrained, there is an increase in prosecutorial charge bargaining"); Standen, *supra* note 4, at 1505 ("sentencing guidelines give the prosecutor the power to establish the parameter of plea bargaining").

²⁹⁶ Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 70 GEO. L.J. 225, 234 (1981), cited in Frankel & Orland, *supra* note 285, at 665.

²⁹⁷ See, e.g., Standen, *supra* note 4, at 1506. But see Frankel & Orland, *supra* note 285, at 666: "Would Guidelines enlarge prosecutorial discretion while constricting the discretion

missioner Nagel has remarked that "prosecutors circumvent the guidelines by negotiating pleas to below guidelines sentences in about 25% to 35% of the cases . . . In 20% to 35% of the cases resolved through a negotiated plea, the prosecutor covertly negotiates a downward departure from the guidelines, [a decision] not subject to appellate review."²⁹⁸

Professor Alschuler, a longtime foe of plea bargaining, has referred to sentencing under the federal guidelines as "a prosecutor's paradise."²⁹⁹ Commentators have concluded that "plea bargaining remains a core unreachable problem that has made substantial inroads in the guidelines' effort to reduce sentence disparity."³⁰⁰ These conclusions are not disproved by studies of the United States Sentencing Commission.

Sentencing reform in the states began before the federal movement and continues today.³⁰¹ Some commentators have claimed that state sentencing reform has continued in spite of the federal experience. Indeed in a number of states, sentencing reform became a reality only after legislators and others were assured that the state reform looked nothing like the federal model. In other states, reform movements were defeated by opponents who dragged out the horrors of the federal system.³⁰²

The studies of the federal scheme, in the words of Judge Frankel, allow "[t]he people who always hated plea bargaining and wanted it abolished [to] still hate it."³⁰³ The same is true in the state sentencing reform efforts. State reforms, which vary both in methodology and success, have as their centerpiece a narrowing of judicial discretion

of the judges? . . . The scholarly critics talk as though the answer is now established. But they do not present very powerful evidence for that conclusion."

²⁹⁸ Letter from Commissioner Ilene H. Nagel to Marvin Frankel (Aug. 3, 1992), *cited in* Frankel & Orland, *supra* note 285, at 669.

²⁹⁹ Alschuler, *The Failure of Sentencing Guidelines*, *supra* note 4, at 926.

³⁰⁰ Frankel & Orland, *supra* note 288, at 668; *but see* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 232 (1989) ("The Guidelines have brought a significant order and consistency to the prosecutorial charging and bargaining decisions that have an effect on sentencing.").

³⁰¹ Reitz, *supra* note 289, at 645-50. *See* David Boerner, *The Role of the Legislature in Guidelines Sentencing In "The Other Washington"*, 28 WAKE FOREST L. REV. 381 (1993); 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 (1993); Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U. C. DAVIS L. REV. 695 (1992) (comparing state sentencing reform to the federal experience); Schulhofer & Nagel, *supra* note 300, at 232 (comparing federal and state guidelines); Ronald F. Wright & Susan P. Ellis, *A Progress Report on the North Carolina Sentencing and Policy Advisory Commission*, 28 WAKE FOREST L. REV. 421 (1993).

³⁰² Knapp, *supra* note 12, at 679-81.

³⁰³ Frankel & Orland, *supra* note 285, at 666.

either through the action of the legislature or the actions of a sentencing commission.³⁰⁴ In some states the attempt at sentencing reform has "abolished most discretionary release from prison and developed typical case offense classifications."³⁰⁵ The theory is to transfer discretion at the back-end of the system from parole boards and prison administrators to the front-end and to the judges. Reforms then limit the front-end discretion of the judges.³⁰⁶ In practice, the trial judge, of course, is not the only actor in front-end decision-making. Through charging and bargaining decisions, particularly in states with statutory minimum sentences, the prosecutor remains the center of the decision-making. It is still too early to judge the effectiveness of state sentencing reforms, although the Minnesota³⁰⁷ and Oregon³⁰⁸ attempts at reform seem to be given high marks. But even in the reformed state systems, the prosecutor will continue to play a dominant role. The flaw in the reformed sentencing statutes remains the fact that judicial sentencing can never move beyond case level accountability and accept system accountability; i.e., judges worry about individual cases and are ill-equipped to create a predictable sentencing system in which resource allocation is a serious issue.

The Federal Sentencing Guidelines seem to have increased the power of the prosecutor, although the issue is not likely to be resolved for years to come. State reforms, which are not uniform from state to state, seem to provide a prosecutor with at least as much power as before the reforms. The push to front-end discretion is beneficial if the push is intended to relate sentencing to available resources. But it is the prosecutor, and not the judge, who is in the position to determine how best to use available resources to the best advantage for the criminal justice system.

C. CRITIQUES OF THE ROLE OF THE PROSECUTOR

One cannot discuss prosecutorial discretion without inevitably being drawn into the debate concerning the nature of discretion, the conflict between the due process model and the crime control model of criminal justice, the role of economic analysis in criminal justice, and even the legacies of the Warren, Burger, and Rehnquist Courts. The supporters and detractors of prosecutorial discretion all begin

³⁰⁴ Knapp, *supra* note 12, at 681-86.

³⁰⁵ *Id.* at 681.

³⁰⁶ *Id.* at 684.

³⁰⁷ Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parrent's "Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines,"* 75 MINN. L. REV. 727, 753 (1991).

³⁰⁸ Kirkpatrick, *supra* note 302, at 712.

with a particular vision of criminal justice which then impacts their views on charging, bargaining, and sentencing. A few take the position expounded by Professor Weisberg in which he questions whether the "insular, finely tuned universe of criminal procedure jurisprudence" plays an important role in the political arena of criminal justice.³⁰⁹

Some supporters of the broad role of prosecutorial discretion do so from the practical point of view that a system of lessened prosecutorial discretion would result in a need for heightened resources for the inevitable increase in criminal trials.³¹⁰ Other supporters, such as Judge Easterbrook, see the current state of prosecutorial discretion as an efficient method of resolving criminal cases and one in which the efficiency of plea bargaining does not come at the cost of less accurate determinations of guilt.³¹¹ Of course for supporters of plea bargaining this does not mean that the current system is flawless. For example, Professors Scott and Stuntz have urged reforms to plea bargaining by referencing lessons learned from the law of contracts.³¹² Professor Standen has rejected the broader notion of sweeping reforms to limit prosecutorial discretion but concludes that the federal sentencing guidelines have led to problems of monopsony. Discretion cannot be eliminated but can be accommodated by dispersing discretion. Judges cannot be bound by the sentencing guidelines.³¹³

Detractors take many approaches. Some ask the question of Professor Arenella: "Does the process of negotiation where the parties settle the dispute themselves promote the substantive criminal law's goals as well as the process of adjudication where a disinterested third party has the authority to make a binding decision?"³¹⁴ Some answer the question along the lines of Professor Schulhofer:

With trials in open court and deserved sentences imposed by a neutral factfinder, we protect the due process right to an adversarial trial, minimize the risk of unjust conviction of the innocent, and at the same time further the public interest in effective law enforcement and adequate punishment of the guilty. But plea negotiations simultaneously undercuts all of these interests Plea bargaining is a disaster. It can be, and should be, abolished.³¹⁵

³⁰⁹ Robert Weisberg, *Criminal Procedure Doctrine: Some Versions on the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832, 838 (1985).

³¹⁰ See *supra* notes 247-50 and accompanying text.

³¹¹ Easterbrook, *supra* note 246, at 330.

³¹² Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949-66 (1992).

³¹³ Standen, *supra* note 4, at 1476.

³¹⁴ Arenella, *supra* note 255, at 218.

³¹⁵ Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992).

Professor Alschuler, a long time critic of prosecutorial discretion, particularly as it manifests in plea bargaining, has argued that plea bargaining is not inevitable and that it is not beyond the financial means of the states to abolish the current system of plea bargaining.³¹⁶

Critics of discretion in the prosecutorial charging decision, such as Professor LaFave, have argued that much of prosecutorial discretion is unnecessary; a reform of substantive criminal law could eliminate some crimes and some statutory overlap.³¹⁷ Some critics of plea bargaining, such as Professor Davis, have urged a consideration of the German model of magistrate review as a way to control prosecutorial discretion.³¹⁸ Some critics of sentencing guidelines, such as Professor Lowenthal, have urged reconsideration of mandatory minimum sentencing statutes as a way to return a modicum of sentencing discretion to the sentencing judge.³¹⁹

Sometimes barely concealed in the debate on discretion and its fine points are what may be the real issues: why does the United States have a criminal justice system which incarcerates minorities at a disproportionately high rate? Why does the United States have such a high rate of incarceration? Why do the American people believe the criminal justice system is too lenient whereas commentators expound on the increasing harshness of the system?³²⁰

Lost in the debate on discretion is the fact that the public, while not indifferent to the concerns of individual justice, are more sensitive to the need to stem the tide of crime. Lost in the debate is the fact that prosecutor and judge have been given very different roles in the criminal justice system. Courts are uniquely qualified to do justice in the individual case. The court, by tradition, by training, by resource allocation, and by procedure must fall toward the end of Professor Packer's due process model of criminal justice.³²¹ Courts are doomed to march through the docket one case at a time, one defendant at a time, one victim at a time. Each judge is fated to take the responsibility for each case, for justice falls on only one set of shoulders. Court attempts to produce broad policy decisions which reach far beyond

³¹⁶ Alschuler, *supra* note 254, at 936.

³¹⁷ LaFave, *supra* note 4, at 532.

³¹⁸ DAVIS, *supra* note 241, at 224-25.

³¹⁹ Lowenthal, *supra* note 230, at 61.

³²⁰ See, e.g., Alschuler, *supra* note 295, at 733-34.

Today, after what has probably been the most disastrous decade in the history of American penology, we continue to wonder whether anyone will address the obvious problems of the American criminal justice system—an unwieldy, over-proceduralized system that threatens ever-more monstrous penalties in order to persuade defendants to abandon the most basic of their rights.

³²¹ HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153 (1968). For criticism of Packer's views, see Arenella, *supra* note 255, at 209-28.

the facts of the individual case and far beyond its docket, are inherently suspect. On the other hand, Professor Packer's crime control model, which appears to be the guiding force behind most prosecutorial decisions, always runs the risk that individual justice may receive short shrift. And off to the side sits the legislature whose definition of crimes and decisions on sentencing influence the choices available to both the prosecutor and the judge.

Certainly an overly lenient judiciary can impact crime control and an overly cynical prosecutor can undermine public perceptions of individual justice. But it is not helpful to view prosecutors and judges as vying for the same authority. The judge is first and foremost the protector of rights in the individual case. The prosecutor is first and foremost an elected policy-maker whose decisions are meant to impact crime in the community. At times it may be necessary to have the due process judge determine whether the crime control prosecutor has overstepped her bounds; but the prosecutor's view regarding allocation and expenditure of resources to impact crime control should be viewed by the judge as extraordinarily influential, if not controlling. In fact this appears to be the state of the law regarding plea bargaining.

But simply to acknowledge that the role of the sentencing judge must primarily focus upon the individual case does not answer the criticisms of the current state of sentencing law. One theme that can be distilled from the critics, in the words of Professor Alschuler, is that "a policy of restricting judicial but not prosecutorial discretion is incoherent."³²² One reason that plea bargaining is perceived as posing a stumbling block to sentencing reform³²³ is that calls to regularize prosecutorial discretion have been unsuccessful. The major flaw in the attempts to limit prosecutorial discretion is increasing procedural rights for the defendants with the rights to be enforced by the courts. Leniency by the prosecutor is unlikely to be appealed by either party and "if appealed, courts are ill-equipped to second-guess refusals to charge and to assess the provability of unfiled or dismissed

³²² Alschuler, *supra* note 291, at 723.

³²³ See Schulhofer & Nagel, *supra* note 300, at 233-34 ("Although it is acknowledged that plea bargaining poses a major stumbling block to the success of sentencing reform in both the state and federal systems, few legislative initiatives even addressed this problem."); Standen, *supra* note 4, at 1505 ("If the essential condition for the maintenance of market parameters on plea bargains is the presence of some independent means to control the bargains of prosecutors, then conceivably, external and independent sentencing guidelines could replace judicial sentencing discretion."); Frankel & Orland, *supra* note 285, at 668 ("These evaluations suggest that plea bargaining remains a core unreachable problem that has made substantial inroads in the guideline effort to reduce sentence disparity.").

charges.”³²⁴ It is time to regularize prosecutorial discretion through the market; a prosecutor with limited resources will use those resources efficiently. If the resources are used inefficiently, the prosecutor will be turned out of office by the electorate.

The issue becomes how can the prosecutor become a more responsible policy-maker for crime control and how can the judge become better at ensuring due process. The second question—the role of the trial judge in the criminal justice system—has been the source of much commentary. The public policy role of the prosecutor has received much less attention and will be the focus of the following discussion. Some thoughts will be proffered on the intersection of the two functions.

IV. THE PROPOSAL

A. THE PARAMETERS OF CHANGE: WHAT IS LIKELY TO CHANGE AND WHAT IS NOT

The American criminal justice system does not respond well to suggestions for fundamental change. For example, calls to limit prosecutorial discretion by the interposition of a charging magistrate have fallen on totally deaf ears.³²⁵ Even calls for more active control of prosecutorial discretion through rule-making have made little headway.³²⁶ One cannot simply ignore history, tradition and practical politics when suggesting change.

If change were ever easy, one would never be forced to settle for a middle ground. If one looked at the current system and decided that crime had become an evil that refused to contain itself within the arbitrariness of state and local boundaries, one could call for the elimination of state control of criminal justice and place the responsibility for investigation, prosecution, and punishment in the hands of the federal government. One would argue that the United States Attorney General with control over the Federal Bureau of Investigation, the United States Federal Attorneys, and the Bureau of Prisons is the only official able to create a uniform, national policy of crime control. Such a proposal has a certain appeal for a few, and in fact is an extension of the current trend toward the “federalization” of crime enforcement;³²⁷ but such a proposal has no hope of enactment. At the other end of the spectrum, it seems unlikely that crime will ever be a totally localized evil. The great number of local jurisdictions have neither

³²⁴ Frase, *supra* note 301, at 375.

³²⁵ DAVIS, *supra* note 241, at 224-25.

³²⁶ See *supra* notes 193-95 and accompanying text.

³²⁷ See, LAFAVE & ISRAEL, *supra* note 175, § 1.2(a) at 2.

the need nor the resources to be totally autonomous with particular regard to investigation and punishment. There is no trend to localizing prisons despite the fact that county jails often feel the brunt of state prison overcrowding. County jails become backlogged before prisoners are released. Even a suggestion that the local prosecutor should have administrative supervision over local police agencies would require the elimination of the elected office of sheriff or the transfer of the office of police chief away from city councils to the office of local prosecutor.³²⁸ These changes are not likely to occur in the near future.

To argue effectively for change, one must first identify what needs to be changed and yet admit that which is unlikely to be changed. What must be changed? Prosecutors must make decisions which take into account finite prison resources. From the prosecutors' perspective, current prison funding practices create effectively unlimited prison budgets. Prosecutors simply continue to prosecute individuals despite whether the level of imprisonment will force the state prison to spend more money than its budget permits. From the legislative perspective, the current prison funding practice takes from the legislature the ability to balance competing funding requests against demands of the prison system. Prosecutors must set enforcement priorities to make the best use of limited resources and must be bound by those decisions. Legislatures must be able to make funding choices at the start of the fiscal year that will not be in need of dramatic overhaul as the fiscal year proceeds.

What else must be changed? Prosecutors do not face intensive review by either the court or the electorate or any other medium. As noted above, courts are not equipped to make the type of broad enforcement choices which prosecutors currently make. The current dispersal of responsibility does not permit the electorate to look to one elected official for leadership in crime enforcement. If prosecutors were responsible to the electorate for the effective use of resources to fight and punish crime, the electorate would be better informed and better able to exercise review of the actions of the prosecutor. Change is needed to force prosecutors to accept this responsibility and change is needed in data gathering so that the prosecutor and the electorate can better determine whether established prosecutorial policies best reflect local values. With the necessity of establishing enforcement priorities will come the impetus to draft

³²⁸ See, e.g., Patricia Nelson, *Town Cooperation Gets a Push*, BOSTON GLOBE, March 24, 1995, at 1 (the 351 independent towns and cities in Massachusetts cause problems for police coordination).

concrete guidelines to govern prosecutorial decision-making. Looking to the prosecutor for leadership in crime control is consistent with the history of law enforcement in the United States.³²⁹

Prosecutors currently have few incentives to assist in the development of crime prevention programs or to participate in the use of alternative sanctions. Change is needed to encourage prosecutors to become involved in alternative programs and to convince the electorate that the alternative programs are effective and have a proper part to play in an overall program of crime enforcement.

Public perception that the criminal justice system is meant to be manipulated for personal gain must be changed. The public perception is that plea bargaining assists everyone—the prosecutor, the defendant, the judge, and defense counsel—except the interests of the public.³³⁰ It is to be hoped that public confidence can come from a commitment by the prosecutor to create enforcement policies in an open environment and then to follow those policies. The commitment to firmness includes a shift to front-end discretion. The “truth-in-sentencing” movement in the states may be criticized as being naive and no more effective than discretion exercised by parole boards or other agencies with discretion to release prisoners, but public confidence building calls for sentences which will be served.³³¹ If longer sentences are demanded by the public, it must be understood that longer sentences do not come cheaply.

In order to accomplish changes in prosecutorial responsibility for the effective use of limited prison resources, meaningful review of prosecutorial discretion by the electorate, the creation of written guidelines, prosecutorial participation in alternative sentencing programs, and the emergence of public confidence in the criminal justice system, there must also be an awareness of what is unlikely to change.

The preeminent role of the prosecutor in the criminal justice system is unlikely to change.³³² The temper of the times calls for the reduction of judicial involvement in broad policy-making.³³³ The history of the office of prosecutors,³³⁴ the constitutional direction of the United States Supreme Court in cases, such as *Batchelder*³³⁵ and *Bordenkircher*,³³⁶ and the elected nature of the office of prosecutor all

³²⁹ See *supra* part III.A.1.

³³⁰ See, e.g., McCoy, *supra* note 258.

³³¹ See *supra* note 12.

³³² SALTZBURG & CAPRA, *supra* note 175, at 798.

³³³ See *Missouri v. Jenkins*, 115 S. Ct. 2038, 2054 (1995).

³³⁴ See *supra* part III.A.1.

³³⁵ See *supra* notes 216-27 and accompanying text.

³³⁶ See *supra* notes 268-80 and accompanying text.

point to a continued expansive role for the prosecutor. Even if the trends toward mandatory sentencing and sentencing guidelines were to end at the state level, the role of the prosecutor would still be secure.

Local control over crime policy is unlikely to change. Despite the increase in the rate of multi-jurisdictional crimes and the increase in sophisticated crimes such as computer crime and international banking crimes, there has been no attempt to move the criminal justice system away from control by locally elected officials. Well founded objections to the idea of an elected prosecutor have been voiced for many years without apparent impact. The movement toward appointed judges, non-partisan selected judges, or judges appointed and then subject to a vote of retention (the "Missouri Plan") have not found analogous developments in the election of local prosecutors.³³⁷ Local control of crime policy means that there will continue to exist both very large and very small prosecutors' offices. Local control means that proposals for change must account for the idiosyncracies of size, sophistication and style found among prosecutor offices.

Funding of prosecutors' offices by local agencies and funding of prisons by state government is not likely to change. Many local jurisdictions find jail budgets stretched to their limits by the increased level of crime and by the back-up of convicted prisoners whose transportation to a state facility is temporarily blocked by the overcrowding at the state institution.³³⁸ Absent large block grants from the state to the local governmental unit, or absent the creation of new revenue sources, it seems unlikely that local government can accept fiscal responsibility from the state for the punishment of prisoners. For most local jurisdictions, the housing of long-term prisoners by the local jurisdiction would be uneconomical.

B. HALLMARKS FOR CHANGE: A PROPOSAL

Because of the great variations in the size, funding, management, and traditions in prosecutors' offices, it is impossible to create a proposal ready-made to serve all jurisdictions. However, certain hallmarks for change can be discerned.

1. *Linking Discretion to Resources*

Prosecutorial discretion must be linked directly to the availability

³³⁷ For a discussion of the Missouri Plan, see Laurence Baum, *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 Ky. L.J. 645 (1988).

³³⁸ See BUREAU OF JUSTICE STATISTICS, *supra* note 7, at 5.

of prison resources. One way to create the link³³⁹ is for the legislature to nominate an existing agency or create a separate agency with the following tasks: to inventory the current level of available prison space; to document the prospects for supervised releases; to determine the prison and release supervision needs for each county; and to provide research for the legislature and for the electorate on the effectiveness of the criminal justice system on a state-wide and county-wide basis.

During the first year of its existence, the agency would determine the capacity of current prisons. The capacity of the state's prisons cannot be determined by simply listing current beds, but also must take into account the staffing needs. The temptation for the legislature will be to place as many prisoners as it can into its current prisons. A determination of prison capacity will not be made without controversy; there are no absolute standards to apply. The capacity of the prison would also be affected by any existing state or federal court orders. The agency would not require that a prison have certain educational or vocational programs save those programs such as health care which may be required by federal or state constitutional or statutory requirements. Again, during the first year a major task of the agency will be to hire research staff and create data bases. In order to allocate resources effectively to the local jurisdictions, the allocation agency must consider such factors as population trends, probation and other supervision, unemployment, past crime data, and educational statistics that might impact the level of criminal activity within a jurisdiction. Once the state legislature determines the resources available for the next fiscal year, the allocation agency must make a tentative distribution of resources. Each prosecutor would be given ample time to comment upon the method of allocation, the level of allocated resources, and the effect the level of resources would have upon prosecutorial decisions.

2. *Requiring Prosecutorial Guidelines*

Prosecutors must create a plan which details how finite resources will be used. Since the day-to-day use of resources is a local decision to be made by the local prosecutor, it is up to the prosecutor to take her intimate knowledge of local conditions and to devise a plan to combat

³³⁹ Other ways exist to link prosecutorial discretion to resource availability. One could give block grants to the county to purchase all its prison needs. Such a system would privatize prisons and create competition. One could propose that all sentences are provisional until the end of the fiscal year when sentences would become fixed in light of available resources. Both these suggestions require change at such a fundamental level as to be impractical. For similar reasons it does not seem practical to suggest that all states revert to the federal model of criminal justice administration with the state attorney general supervising all prosecutions and control over prisons.

crime within the local jurisdiction. The proposal retains the centrality of the prosecutor in the criminal justice system but requires that the prosecutor identify goals and work toward those goals within a limited budget. The efficacy of the prosecutor's local plan will be audited by the state allocation agency, and armed with the information provided by the allocation agency, the electorate will better be able to review the prosecutor's effectiveness and compare the prosecutor's strategy to the strategy of any political challenger.

Local prosecutors would be required to devise a strategy for prosecution within the local jurisdiction. The prosecutor would set out her philosophy of enforcement. She would determine for which crimes deterrence is a major issue. If the prosecutor eschews a utilitarian view of punishment and links punishment to purely retributive purposes, she must determine the punishment that is deserved for designated criminal acts. If the prosecutor sees incarceration as basically a means to isolate the prisoner from society, she must determine the degree of isolation that can be afforded. The prosecutor should also announce the discounts available for cooperation and guilty pleas. Given the degree of discretion that a prosecutor has regarding charging decisions (and therefore the direct impact a prosecutor has upon sentencing) it is unacceptable for a prosecutor to claim that the degree of retribution deserved is the maximum penalty permitted by the legislature. Although this response may be constitutionally sufficient under *United States v. Batchelder*,³⁴⁰ it is unlikely that a prosecutor would have resources to take this position in every prosecution. It is possible that a prosecutor would create a charging matrix which might appear to be similar to matrices in sentencing guidelines except that the starting point on the matrix would be an actual event rather than a particular crime. As discussed above, to approach sentencing from the starting point of a particular crime already assumes a judgment about the culpability of the particular defendant rather than the severity of the act itself. Currently, a judge constrained by sentencing guidelines may consider the nature of the underlying act and the character of the defendant only after the range of discretion has been limited by the crime charged. There may be other ways in which the prosecutor might set out charging and bargaining guidelines, including reference to descriptions of common cases or a listing of factors that must be considered when charging. A consistent policy of charging and bargaining presumes a level of administrative control within the prosecutor's office which may not currently exist.

All sentences meted out to defendants within the local jurisdic-

³⁴⁰ 442 U.S. 114 (1979).

tion would be chargeable against the prosecutor's allocation. The prosecutor would be forced to be conscious of available resources at every stage of the proceedings. Resource allocation questions would exist when the prosecutor decides to proceed with an investigation, proceed with formal charges, propose a diversion program, offer a plea bargain, or recommend a sentence to the court. Resource allocation issues would be present when a decision is made to seek extradition of a defendant from another state, or whether to defer to a federal prosecution. It is possible that the proposal, for perhaps the first time, encourages prosecutors, if they are to err, to err on the side of lesser punishments. But even this projection may well be wrong: a prosecutor might find that a very severe charging policy at the least encourages more plea bargains and, at the most, has a greater deterrent impact upon potential offenders.

The requirements of the proposal do not place unrealistic demands upon either large or small prosecution offices. The main requirement is that prosecutors are required to state in advance how the exercise of discretion will be structured. In the past, prosecutors have rarely created rules for self-regulation of discretion despite (or perhaps because of) the calls for regulation by commentators. But by linking the exercise of prosecutorial discretion to the availability of resources, the prosecutor, for the first time, needs the prosecutorial guidelines as managerial tools. It would be in a prosecutor's self-interest to set out prosecutorial policy in detail. For smaller prosecutors' offices, it may be necessary or convenient for offices to cooperate with one another to draft prosecutorial guidelines. The allocation agency may also serve as a resource for the guidelines effort.

Two very serious issues regarding prosecutorial guidelines remain. First, should prosecutors be bound to follow state or county rule-making procedures when creating guidelines? Second, will the guidelines create rights in the accused? Since one goal of this proposal is to create more public awareness and review of the actions of the prosecutor, an open rule-making process is necessary. There is no reason to believe that the rules created by the prosecutor are inherently less susceptible to an open process than other agencies. Whether state rulemaking procedures are the best way to guarantee openness is an issue for each state legislature. Unless an accused can prove discrimination in charging and prosecuting based upon an unacceptable criterion such as race or gender, the prosecutorial guidelines should not serve as a basis for attack. Failure of the prosecutor to follow her own guidelines is a political issue for the electorate. This

approach retains the current law of *Batchelder*.³⁴¹

3. *Encouraging Prosecutor Participation in Crime Control and Sentencing Alternatives*

The proposal attempts to provide the prosecutor with incentives to exercise discretion in a predictable manner. From a personal perspective, the prosecutor who is the best policy-maker and policy-enforcer should be reelected. From an institutional point of view, the state must find a way to reward those counties which can control crime and thereby use a disproportionately low level of prison resources. Prosecutors should attempt to use programs of alternative sentencing and crime prevention. It may be necessary for the state to allocate "savings" to the county for use in programs such as education, which arguably have tangential impact upon the crime rate. But there is a serious problem that must be confronted: many crime prevention programs may not bear fruit for a lengthy period of time. There is no singular way to approach this issue, which is really no different than similar policy issues, such as funding for school lunch programs. Public education, awareness, and common sense may be the only antidotes to short term thinking. On the other hand, prosecutors who insist on prison resources which go beyond the routine allocation may have to use county resources to purchase space out-of-state or use county jail facilities for housing convicted felons. Both of these alternatives may be improper under state law and, at the very least, might cause serious practical problems.

4. *Collecting and Analyzing Criminal Justice Information*

If the electorate is to become more responsible reviewers of prosecutorial conduct, they will need hard data of the prosecutor's accomplishments during her term. If the prosecutor is to receive an appropriate allocation of resources, and if the allocation agency is to treat jurisdictions fairly, criminal justice information must be well-collected and expertly analyzed.³⁴² But the proposal and its record keeping requirement will also assist the state legislature in its policy-

³⁴¹ *Id.*

³⁴² See, e.g., N.H. REV. STAT. ANN. § 7:40 (1988):

7:40 STATISTICAL ANALYSIS CENTER. There shall be a statistical analysis center under the supervision of the attorney general. The center shall provide complete, accurate, and current criminal and juvenile justice statistics to public officials and law enforcement operational, managerial, and planning personnel. The attorney general shall oversee and coordinate the work of the center in maintaining, coordinating, and improving the state criminal and juvenile justice statistics system; analyzing and publishing criminal justice data; and supervising the management and administrative statistics program.

making. After reviewing the research that will flow from the reporting and predicting activities of the allocation agency, the legislature can make a reasoned decision in its choice to slight one program to benefit another. If the legislature concludes that prosecutors are too lenient or too strict in an area of crime, the legislature can impose sentencing minima or maxima or narrow the available range. If it appears that certain crimes are underused or overused by prosecutors, changes in the statutory definitions of crime can be proposed. If certain prosecutorial policies appear to have a greater impact than others, the legislature can mandate that the program be used throughout the entire state.

Information will also assist in the difficult task of coordinating the various offices involved in crime prevention, prosecution, and punishment. Information which might indicate the weaknesses and strengths of prosecutorial policy may also shed light on police policy.

5. *Restating the Role of the Trial Court*

The role of the trial court must remain, as it is now, as the guarantor of individual justice. It would be very surprising if the current role of the trial court changed a great deal under this proposal. Courts will be no more constrained in their discretion than they are now. Depending upon implementing legislation, it may be that courts will be asked to ensure that each defendant is sentenced consistent with the prosecutor's guidelines. Again, it is the prosecutor who must set enforcement policy and determine how best to use available resources; but it is the court which guarantees that justice is done in the individual sentence before it.

6. *Providing for the Unexpected*

Crime is not entirely predictable. For example, a small rural county might find itself with a prosecution of a large drug conspiracy which has centered itself within the jurisdiction. Within the proposal there must be an emergency provision whereby a local jurisdiction may seek prison resources beyond its allocation. In other areas, such as the Federal Speedy Trial Act, emergency provisions are included to cope with the unusual.³⁴³ The danger is that the claims of the unusual become too usual. At that point, the system returns to one in which the prosecutor no longer has a stake in the efficient use of finite resources. In jurisdictions with large caseloads, it is less likely that one set of events will disrupt the prosecutor's avowed strategy.

Despite the problems of "back-end" discretion, it may be that in a

³⁴³ 18 U.S.C. § 3161(h)(8) (1994) (interest of justice exception).

true emergency situation, very selected use of "back-end" discretion may be at least a partial and very unusual solution.

Exempting certain crimes such as murder from the allocation system is one way to avoid the difficulty of providing for the unexpected situation. Although the predictability of the murder rate and the relative small numbers of murders are not likely to cause dire problems, it may be helpful in commanding public confidence that the public knows that certain crimes are outside the allocation.

7. *Creating a Process for Change*

As prosecutors become more actively involved in crime prevention, sentencing alternatives, and data collection and analysis, a better understanding of the operation of the entire criminal justice system will emerge. It is difficult, of course, to predict what will be learned. It may be that we learn that crime rates are unresponsive to either harsher sentences or prevention programs. It may be that we learn that local prosecutors are incapable of accepting the role of chief policy-maker on criminal justice matters. Some states may learn that local officials are willing and able to be effective policy-makers while other states may find that complicated functions such as crime control and detection are best handled at the state level.

This proposal advocates for the creation of an atmosphere of constant change and constant evaluation.

C. OBSTACLES TO CHANGE: PRACTICAL AND OTHERWISE

No one proposal can be tailor-made for all states and all counties. The previous section suggests the main characteristics that an individual plan for linking prosecutorial discretion to the availability of resources should contain. This section is concerned with the main obstacles that any plan is likely to encounter.

The first set of obstacles centers on the office of the prosecutor. Since approximately twelve percent of prosecutor offices currently have written prosecutorial guidelines,³⁴⁴ why should we believe that prosecutors will draft new guidelines? The easy response is that prosecutors will be directed by legislation to draft guidelines. In addition, prosecutors will see that it is in their best interest to be seen formally as the chief criminal justice personage in the jurisdiction and guidelines are the price to pay. Similarly, past reluctance of some prosecutors to participate in criminal justice data and analysis will hopefully give way to the necessity to use resources more efficiently. It should be noted that the federal sentencing guidelines have operated, in some

³⁴⁴ See *supra* note 134 and accompanying text.

ways, as a set of prosecutorial guidelines, and as Schulhofer and Nagel have reported, the sentencing guidelines have brought a degree of consistency to plea bargaining in the federal system.³⁴⁵

The office of the prosecutor presents some other obstacles to change. Since many prosecuting offices have fewer than ten employees,³⁴⁶ many will not have the personnel to create guidelines and analyze data. In addition, personnel turnover in some offices is high³⁴⁷ and in some offices the prosecutor is only a part-time official.³⁴⁸ The statewide allocation agency should be seen as a clearinghouse and resource center for local prosecutors in assisting with compliance.

Another set of obstacles centers on the political nature of the office of prosecutor. There is a danger when crime policy is controlled locally that the prosecutor will act unfairly or feel undue pressure because of political ties. The simple fact is that this is our current system. There is no reason to believe political pressures would be worse under the proposal. In fact, current prosecutorial discretion is virtually unlimited; under the proposal, the use of discretion will be tempered by the availability of resources. Closely related to this obstacle is the broader objection that the prosecutor will do what is politically expedient. We have chosen to put the prosecutor in the midst of politics and in doing so we have chosen to interpret her motive not as "What do I do to be re-elected?", but as "How do I operate my office so as to respond to the desires of my community?" What the proposal does is give the electorate better information by which to judge the prosecutor's effectiveness. If the prosecutor always opts for a short term solution, this can be a point of contention in re-election. If the electorate wishes to choose short term responses over long term responses to crime, this is the choice of the voters.

It is conceivable that at election time the prosecutor will blame an unsuccessful tenure on the failure of the legislature to provide adequate resources or the failure of the police to detect crime. Detection is generally police work and the police are not supervised by the prosecutor. Like many crime prevention issues, the focus will be on the benefit of short term versus long term thinking. This is quintessentially a political issue. If the electorate is willing to pay for more expensive but more immediate solutions, it can make the choice. A well conceived policy of crime prevention must compete in the political arena for approval. A well informed electorate is all that can be hoped for. At the least, under the proposal, the prosecutor will have a

³⁴⁵ Schulhofer & Nagel, *supra* note 300, at 286.

³⁴⁶ See *supra* note 118 and accompanying text.

³⁴⁷ BUREAU OF JUSTICE STATISTICS, *supra* note 7, at 3.

³⁴⁸ See *supra* notes 108-09 and accompanying text.

greater incentive than that which currently exists to work cooperatively with other segments of the criminal justice system.

It is also conceivable that a prosecutor will attempt to evade the spirit of the proposal with rhetoric about the need to punish all the defendants to the absolute limit. Under the proposal, this is a fair debate for the voters. If the voters wish to prosecute beyond the level of resources allocated by the state, the county can prosecute at the heightened level if it is willing to bear the additional costs. The fiscal debate becomes one involving the prosecutor and the local county board of supervisors.

In addition, the proposal gives the legislature the opportunity to recapture control over its own budget. It also gives the legislature the ability to take back the operation of its prisons from the federal courts where the source of federal intervention has been the overall lack of state resources. The legislature would have better information so that it can alter the amount of resources or amend the criminal code if necessary.

Two areas of concern remain for the legislature. The first is that the state legislature will cap prison budgets but permit prosecutorial discretion to continue to increase incarceration rates. Increased information should make state legislatures more effective and more responsible policy-makers. If state legislatures shirk their duties regarding prison resources, federal courts may still intervene. The debate on prosecutorial discretion and the availability of resources is fundamentally a political debate, but it is a debate set in the context of the Eighth Amendment prohibition of cruel and unusual punishment.

The second concern in the legislative area centers on the impact of local control upon statewide uniformity of enforcement. Currently local prosecutors determine which crimes will take priority. The proposal simply makes this fact more public. But if the legislature believes that certain crimes should be enforced on a statewide basis, it may find methods to accomplish this goal. For example, if a legislature fears that freedom of expression would fall victim to local control over prosecution, the legislature, where it is legally possible to do so, might give enforcement of pornography laws to the state attorney general. Other measures, such as mandatory sentences, might achieve some degree of uniformity even though the prosecutor still retains a great deal of discretion in states with mandatory sentencing provisions.

Prosecutors in state systems have been elected officials for most of our history. With crime a problem of serious interest to voters, it

seems a bit ironic that one obstacle to the implementation of the proposal may be voter apathy. Do voters care enough to educate themselves on the record of the prosecutor? Currently, responsibility for criminal justice issues is so dispersed as to limit the ability of the voters to look to the prosecutor for leadership. Once the leadership is established, and once the data has been gathered on the prosecutor's record, the state should determine whether the review by the electorate is being taken seriously. If the review role of the electorate is not effective, state consideration of an appointed public prosecutor system or other alternatives should occur.

For some critics, the underlying problem in the American criminal justice system is the overzealous use of prison as a punishment. For these critics, any change which will not result in less use of incarceration is doomed to failure. Yet there is no assurance that this proposal will result in less use of imprisonment as a punishment. On the one hand, the percentage of state budgets actually dedicated to incarceration is low when compared to other expenditures such as education. On the other hand, states are finding it difficult to free up discretionary funds to enlarge further state prison systems. The proposal asks the political question of the voters: how much incarceration are you willing to afford?

Another obstacle to change is that by publicizing prosecuting priorities, some persons may be educated as to the actual rate of detection and punishment. It is not unusual for the public to overestimate the chance of detection and the severity of punishment;³⁴⁹ the problem is substantially no different than what currently exists. However, the chance that certain criminal conduct might actually be encouraged by public awareness is outweighed by the voters' need to review the prosecutor's performance.

Practical problems concerning multi-jurisdictional crimes can be solved by the allocation agency. Other problems, such as crime that occurs near the end of the fiscal year, can be met with some imagination. If the county is rewarded when the prosecutor uses less than the annual allocation, there is less incentive for a prosecutor to go on a "sentencing binge" at the end of the year. If the prosecutor is faced with an increase in crime at year's end, either the rise in year-end crime is an annual phenomenon for which there can be planning or the rise in crime presents an emergency situation for which the prosecutor should be able to "borrow" within limits for the next year's allocation. Such practical issues can be resolved with experience, but prosecutors must realize that priority setting and planning are serious

³⁴⁹ NIGEL WALKER, *SENTENCING IN A RATIONAL SOCIETY* 86-87 (1st American ed. 1971).

objectives which should not be lightly regarded.

The final obstacle in implementation is a problem endemic to all criminal justice research: how does one measure success? Rarely in criminal justice research is there a situation which creates a controlled experiment.³⁵⁰ Rarely can one isolate one or more factors and say conclusively that these factors have caused a change in conduct. Perhaps the most obvious example of the difficulty in criminal justice research comes when one attempts to use recidivism rates to judge a program's effectiveness.³⁵¹ Difficulty in interpretation of data is not an excuse for refusing to collect and analyze data. As the criminal justice system collects more data and as the public becomes more involved in the review function, sophistication by the analysts and by the voters will improve.

V. CONCLUSION

There is little doubt that the prosecutor plays a pivotal role in the criminal justice system. Through charging decisions, plea bargains, and sentence recommendations, the prosecutor sets enforcement policy for her jurisdiction. She is not, however, forced to face the full cost of prosecutorial decisions. In the vast majority of jurisdictions, the cost of prosecution is borne by the county, whereas prison costs are the state's fiscal responsibility.

One result of this "split-funding" practice is a system in which no one public official can be held responsible for the successes or failures of law enforcement. In the current system, the prosecutor has every reason to prosecute to the fullest, has no incentive to become an active participant in crime control programs, and has no incentive to draft prosecutorial guidelines. The current system also creates an environment in which the electorate cannot effectively monitor the actions of the prosecutor.

Most attempts to monitor, regularize, or constrain prosecutorial discretion seek to do so by means of greater judicial oversight. These attempts have failed because they intend to place greater policy-making functions with the judiciary. Prosecutors should remain the chief policy-maker in a criminal justice system which historically has preferred local control of crime enforcement. To make the prosecutor a more responsible policy-maker, and to make the prosecutor more accountable to the voters, the prosecutor must be held accountable for the effective use of limited prison resources. To achieve this end, a state agency should be created to allocate prison resources fairly

³⁵⁰ *Id.* at 92-93.

³⁵¹ NIGEL WALKER, *CRIME AND PUNISHMENT IN BRITAIN* 242-60 (rev. ed. 1968).

among local counties. Based on the allocation, prosecutors must create enforcement policies which set out prosecutorial priorities. If fewer prison resources are used than were allocated, the local county should receive a windfall. If the prosecutor needs additional resources, the county should provide the additional funds except in emergency situations. Over time the allocation agency will be able to collect data which will assist prosecutors in setting enforcement policy as well as assist the electorate in its decision to retain or dismiss the incumbent prosecutor.