

Prosecutorial Guidelines

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Reformers are increasingly aware of the central role prosecutors have played in driving up the U.S. prison population. Yet few if any reform efforts have sought to directly restrict prosecutorial power. This chapter argues that reformers should design binding charging and plea bargaining guidelines to limit who prosecutors can charge, what they can charge them with, and what sentences they can demand at trial or during plea bargaining. Such guidelines could advance public safety, reduce the role of race and other impermissible factors, and help smartly reduce our prison population size.

INTRODUCTION

In his widely watched TED talk, former Suffolk County (Boston) prosecutor Adam Foss talks about a case he received when he was a junior prosecutor, barely two years out of law school.¹ A young man had stolen several computers from a major retailer, and with little to no guidance from superiors, Foss decided to work out a reparation plan with the store in lieu of charging the kid with a crime. Several years later, Foss runs into the young man at a party, where the man explains that he got his life back on track after his run-in with Foss and that he now had a management position at a bank, something that would have been impossible with a criminal record.

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1. Adam Foss, *A Prosecutor's Vision for a Better Justice System*, TED (Feb. 2016), https://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system.

It is, as Foss himself would quickly admit, a story that is at once heartwarming and terrifying. Heartwarming, of course, because it has a happy ending. Terrifying because there are so many ways it could have gone wrong. What if Foss had been less lenient—because internal policies or external politics incentivized him to be harsh, or simply because it was close to lunch or the Celtics had lost the night before?² A chance at rehabilitation would have been squashed. On the other hand, by his own admission, Foss was not sure if his approach would work. He had no formal training on risk assessment, nothing to help him decide if his on-the-fly diversion program would work. What if he guessed wrong, and the young man went on to commit a serious violent crime that could have been avoided had Foss locked him up when he had the chance?

The prosecutor's job is a legal one, and so it is one that must be staffed by lawyers. But we give prosecutors tremendous discretion so that they can “do justice,” and part of justice—perhaps the biggest part, at least in today's political climate—is preserving public safety. Unfortunately, determining how to effectively promote public safety is *not* something that lawyers are trained to do. Safety is a matter of psychology and public policy, not of case law or statutory interpretation. It is not taught in law schools, and it is not part of continuing legal education. As it stands right now, prosecutors make “public safety” decisions without adequate training, based on instinct and institutional knowledge. And that “institutional knowledge” is just the aggregation of those same problematic instincts, handed down over time.³

That prosecutors may misuse their discretion due to a lack of training is troubling in and of itself, but it is not the only reason why we should be concerned about how unregulated prosecutorial discretion is. There are also numerous “structural” reasons that likely push prosecutors to wield their discretion in excessively punitive ways. If nothing else, the politics of prosecutorial elections make the risks of being lenient far greater than the risks of being harsh: fear of being blamed for the next “Willie Horton” will trump the Blackstonian ideal of “better ten guilty men go free.”⁴ Moreover, while prosecutors are elected and

2. See, e.g., Zoë Corbyn, *Hungry Judges Dispense Rough Justice*, NATURE (Apr. 11, 2011), <http://www.nature.com/news/2011/110411/full/news.2011.227.html>; Emily Deruy, *Judge's Football Team Loses, Juvenile Sentences Go Up*, THE ATLANTIC (Sept. 7, 2016), <https://www.theatlantic.com/education/archive/2016/09/judges-issue-longer-sentences-when-their-college-football-team-loses/498980/>.

3. Cf. Ronald F. Wright, “Prosecutor Institutions and Incentives,” in the present Volume. Nothing here should be seen as denigrating prosecutors, who strive like everyone else to make the best decisions they can. As we will shortly see, *all* professionals involved in making diagnostic calls find the task hard to accomplish without substantial guidance.

4. 4 WILLIAM BLACKSTONE, COMMENTARIES *352; see *infra* note 17.

(generally) funded at the county level, prisons are maintained and paid for by the state, which creates a serious “moral hazard” problem (i.e., when an individual has an incentive to act in a costly manner because someone else bears the costs). Prisons are “too cheap” for prosecutors who can ignore the financial costs of locking people up while reaping the political benefits of being “tough on crime.” And in many urban counties, prosecutors may be more responsive to politically powerful suburbs, which feel the benefits of reduced crime but experience few of the costs of aggressive enforcement, leading prosecutors to err on the side of punitiveness.

The idea of regulating prosecutorial discretion should not be that controversial, since there is no other actor in criminal justice who has so much power yet is subjected to so little oversight. Many states, for example, have constrained judges through sentencing guidelines and other structured sentencing laws, and parole boards are increasingly required to use actuarial risk-assessment tools.⁵ Yet no effort has been made to restrain prosecutors, despite the fact that their power is greater than that of judges or parole board members. If we are concerned about judges misusing discretion, why not prosecutors as well? As one reformer joked—although, in the end, his point is bracingly serious—“one premise of mandatory minimums is that prosecutors are competent to decide appropriate sentences until they become judges.”⁶ In other words, I am not suggesting that prosecutors are uniquely fallible (or infallible), only wondering why if we do not trust someone’s discretion when she is a judge, we still assume she used it well in her earlier career as a prosecutor? Especially since there are so many more chances to misuse it, and often with more serious consequences.

In this brief chapter, I will argue that while prosecutorial discretion is essential, *unregulated* discretion is not. We can, and should, regulate how prosecutors act. I propose that states should adopt charging and plea-bargaining guidelines that are legally binding on county prosecutors. Such guidelines would help ensure that prosecutors charge based on evidence about public safety and risk, not based on their gut instincts; that prosecutors rely on race and other problematic factors far less frequently; that the public have more say in how prosecutor offices balance the various error costs of being too harsh or insufficiently aggressive; and that states are better able to rein in the

5. See, e.g., Douglas A. Berman, “Sentencing Guidelines,” in Volume 4 of the present Report; John Monahan, “Risk Assessment in Sentencing,” in Volume 4 of the present Report.

6. @gnewburn, TWITTER (Oct. 9, 2015, 7:23 AM), <https://twitter.com/gnewburn/status/652489497742077952>. See generally Erik Luna, “Mandatory Minimums,” in Volume 4 of the present Report.

moral hazard problem posed by state-funded prisons. Guidelines could also help level the playing field between prosecutors and public defenders, and they would inject necessary transparency into the part of the criminal justice system that is the most critical, complex, and opaque.

I. THE POWER OF PROSECUTORS

It is hard to understate how much power prosecutors have. They have almost-unreviewable authority over choosing whether to charge someone with a crime or drop all charges, whether to charge that person with a felony or a misdemeanor, whether to divert the person to treatment, whether to charge an offense that carries a mandatory minimum. The only real restraints on prosecutors are the facts of the case, the statutory definitions of crimes, and whatever sort of voluntary, internal policy limits the office chooses to impose on itself. In fact, given the centrality of plea bargaining, the pressures of expanded pretrial detention, and the underfunding of public defense,⁷ prosecutors are limited less by the *provable* facts of the case and more by what defendants *fear* could be provable; and given how much criminal codes have expanded over the years⁸—New York state alone has approximately 20 different forms of assault crimes⁹—statutory definitions impose few limits as well.

Given how much discretion they have and the political pressures they face, it is not surprising to find out that prosecutors have been central to driving up prison populations, especially since crime began its steady decline in the early 1990s. My analysis of felony filing data in state courts in 34 states between 1994 and 2008 demonstrated that almost all the growth in prison populations during that time came from prosecutors filing more cases against a shrinking pool of arrestees.¹⁰ While the total number of crimes and thus the total number of arrests fell, the total number of felony cases rose, to such an extent that the probability that an arrest turned into a felony case nearly doubled. Little else changed during that time: the chance that a felony case resulted in a prison

7. For discussions of these issues, see Jenia I. Turner, “Plea Bargaining,” in the present Volume; Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume; and Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in the present Volume.

8. See generally Douglas Husak, “Overcriminalization,” in Volume 1 of the present Report; Stephen F. Smith, “Overfederalization,” in Volume 1 of the present Report.

9. See N.Y. PENAL LAW § 120.

10. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. L. REV. 1237, 1250 (2012); John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (Jan. 23, 2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?ab-abstract_id=1990508.

admission remained fairly constant,¹¹ as did the amount of time spent behind bars. Data from the Bureau of Justice Statistics' National Judicial Reporting Program shows a similar pattern. Between 1994 and 2006, total arrests nationwide fell by 3%, with arrests for index violent crimes falling by 21%, for index property crimes by 29%, and for drug trafficking and distribution by 5%—yet the number of guilty verdicts in state courts rose by over 30%.¹²

As many states attempt to smartly reduce their prison populations in this time of low crime, high incarceration, and continuing post-financial-crisis fiscal austerity, it is disappointing that none has sought to regulate the power of prosecutors. None of the reform bills that have been passed by state legislatures has directly limited the power prosecutors have to charge defendants, although some have done so indirectly (like by raising the minimum threshold for felony theft or felony drug cases). Perhaps the most graphic example of this oversight was Hillary Clinton's proposed "end to end" criminal justice reform plan, which included reforms aimed at police and parole authorities but said nothing about prosecutors: more "end *and* end" than "end *to* end."¹³

Although our distinct lack of data on prosecutors' offices makes it hard to say exactly why they have become more aggressive, some theories do stand out. First, some of this expansion in prosecutorial aggressiveness is surely due to changes in staffing and funding. From 1974 to 1990, as crime rates rose, the number of line prosecutors grew by only 3,000, from 17,000 to 20,000. From 1990 to 2007 (the last year with data), the number of line prosecutors grew three times as fast, from 20,000 to 30,000, even as crime *fell*. Moreover, the

11. In theory, we would like to look at trends in convictions per felony case and then in admissions per conviction, but little usable conviction data exists. However, what data we do have suggests that almost all cases that move forward from arrest to prosecution result in a guilty plea, so likely little changed in terms of the fraction of felony filings yielding guilty verdicts. See THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 (2010), <https://www.bjs.gov/content/pub/pdf/fdluc06.pdf>.

12. Arrest data comes from the BJS's online data tool, <https://www.bjs.gov/index.cfm?ty=dataool&surl=/arrests/index.cfm>. NJRP guilty verdict data from the first table in SEAN ROSENMERKEL, MATTHEW DUROSE, & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES (2009), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf>. The NJRP uses data from prosecutors' offices, not courts, and thus serves as an independent check on my case-filing results. Note, however, that the NJRP has not been conducted since 2006. The declines in arrests for index crimes and drug trafficking are likely more relevant to trends in prison populations than that in total arrests, given the offenses that tend to land people in prison (as opposed to, say, jail or probation).

13. See, e.g., Annie Karni, *Clinton Promises 'End to End' Criminal Justice Reform in Pitch to Black Voters*, POLITICO (Oct. 2, 2016), <http://www.politico.com/story/2016/10/hillary-clinton-charlotte-speech-criminal-justice-reform-229023>.

percentage of prosecutor offices with at least one full-time prosecutor rose from 45% in 1974 to 85% in 2007.¹⁴ In other words, large urban offices hired more line prosecutors, and more-rural offices professionalized. Although we have little data on prosecutor caseloads, various proxies—crimes per prosecutor, arrests per prosecutor, prison admissions per prosecutor—all show the same pattern: less that *individual* prosecutors were working harder or becoming more aggressive during the 1990s and 2000s, more that the growing number of prosecutors kept finding cases to prosecute, even as arrests declined.

At the same time, we systematically underfund indigent defense.¹⁵ Approximately 80% of those facing prison or jail time qualify for a government-provided counsel, yet we spend very little on these lawyers, especially when compared to prosecutors.¹⁶ Not only are prosecutor budgets larger, but prosecutors have access to all sorts of free assistance that public defenders often must pay for. Unlike defense attorneys, for example, prosecutors can offshore most of their investigatory responsibilities to the police. An adversarial legal system only works if the two sides are genuine adversaries—and given the staffing and funding disparities between prosecutors and defense counsel, that is simply not the case in the United States right now.

Moreover, as noted earlier, there is a powerful moral hazard problem that runs through our criminal justice system. Prisoners are held by the state, but they come from the counties: the number of people entering state prisons is determined by the charging decisions of county-level prosecutors. Critically, these prosecutors do not have to think about the costs their decisions impose on the states, since states do not charge prosecutors or counties for the people they send into the state prison system. In fact, the incentives are perhaps even worse. While the state pays for prisons, the counties pay for jails and probation—the sanctions imposed on misdemeanants. Upcharging someone with a felony thus not only gives a prosecutor more tough-on-crime political capital, but it *saves* his district money.

14. See, e.g., PFAFF, LOCKED IN, *supra* note 10.

15. See generally Primus, *supra* note 7.

16. See PFAFF, LOCKED IN, *supra* note 10; John F. Pfaff, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html>. In 2007, state and local governments spent about \$5.5 billion on prosecutors compared to \$4.5 billion on public defenders. But one study from North Carolina suggests that prosecutors budget may effectively *triple* when we take into account police and other local, state, and federal investigatory services that they can use at no cost. N.C. OFFICE OF INDIGENT DEFENSE SERVICES, NORTH CAROLINA'S CRIMINAL JUSTICE SYSTEM: A COMPARISON OF PROSECUTION AND INDIGENT DEFENSE RESOURCES (2011), <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/ProsecutionOfIndigentDefense.pdf>.

This free rider/moral hazard problem in turn interacts dangerously with what is perhaps most famously known as the “Willie Horton Effect.”¹⁷ The error costs that prosecutors face are asymmetrical. A single errant act of leniency produces a clear, identifiable political cost: a political opponent can point to the offender and victim and state, “Because you were soft on Alan, Bob ended up stabbed.” Overly aggressive punishment, however, does not have the same costs. It is much harder to establish that Alan is needlessly in prison, that if released sooner he surely would not offend again. Even if counties had to pay for the people they send to state prison, prosecutors are politically incentivized to be pre-emptively tough; that this toughness is actually free only magnifies this effect.

In other words, there are identifiable, structural defects in the design of our criminal justice system that explain why prosecutors continued to send people to prison in such large numbers even as crime steadily fell. Many of these are problems that charging and plea-bargain guidelines would directly address. Guidelines would help level the playing field between public defenders and prosecutors. They would also help states address the impact of expanded staffing when they have little control over county-level hiring decisions,¹⁸ and they could be designed to limit the extent to which prosecutors can free-ride off state-funded prisons. These structural issues alone thus make a strong case for exploring how to design guidelines for prosecutors.

II. THE HUMAN NEED FOR GUIDELINES

Even putting aside all the structural problems discussed above, however—and we should definitely *not* put those aside—charging and plea guidelines make sense from a behavioral perspective as well. When prosecutors are deciding what charges to file against a defendant and what punishments to seek, moral (i.e., retributive) issues play a role, but I would expect public-safety concerns generally matter much more. And public safety is a complex policy question, one that few prosecutors are well-trained to answer. Most lawyers do

17. Willie Horton was an inmate in Massachusetts who in 1986 absconded from a weekend-leave program. A year later he brutally raped a woman and assaulted her boyfriend. Horton was an outlier—more than 99% of those allowed to go home on leaves returned without incident. But in 1988, Horton’s case was used in an infamous attack ad launched by George H.W. Bush in his successful presidential campaign against Massachusetts Gov. Michael Dukakis. Although the impact of the ad on the outcome of the election has been overstated, politicians quickly learned its lesson: Even smart leniency is politically costly, but severity is not.

18. In most states, the central state government provides some funding to local prosecutor offices, giving them some control over things like staff size. But counties still retain a significant degree of discretion here. STEVE W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005 (2006), <https://www.bjs.gov/content/pub/pdf/psc05.pdf>.

not have formal training in psychology or other quantitative behavioral fields coming into law school, and law schools rarely if ever provide any training on these topics.¹⁹ As Adam Foss points out in his TED talk, we call on young prosecutors with little training to make these calls; to the extent they rely on the “expertise” of more-senior prosecutors, that expertise is itself informal, and is based on a system with problematic feedback.²⁰

Furthermore, a growing body of evidence shows that decision-makers in criminal justice are often vulnerable to troubling swings in behavior. One famous study found that Israeli judges were more likely to grant prisoners parole the sooner after eating they had to decide: hunger led to harshness.²¹ Another, more recent study suggested that judges were more likely to sentence juvenile defendants harshly the Monday following an unexpected loss by their undergraduate alma mater’s football team.²² Of course, none of these judges would admit this was happening. It is all subconscious—but no less prejudicial to the defendant because of that. And while studies of such effects generally focus on judges, there is no reason to assume prosecutors are any more immune to the same impulses (judicial decisions are just more public, and thus easier to study).

More comprehensively, and more unavoidably, is the problem of implicit racial bias (IRB). Even people who believe they are making race-blind decisions frequently turn out to be taking race into account.²³ As far as I can tell, there are no studies that explicitly measure IRB in prosecutors. But one study finds evidence of IRB among defense attorneys who take on capital cases, which seems like a group that would self-select along lines that would *minimize* IRB if that were possible; that these lawyers are nonetheless vulnerable to it

19. Only about 5% of law school applicants have undergraduate degrees in psychology, and under 10% in some sort of relevant behavioral science—and that is an upper bound on those who would be able to evaluate the risks posed by a criminal defendant without further assistance. See *Undergraduate Majors of Applicants to ABA-Approved Law Schools*, LSAC, [http://lsac.org/docs/default-source/data-\(lsac-resources\)-docs/2014-15_applicants-major.pdf](http://lsac.org/docs/default-source/data-(lsac-resources)-docs/2014-15_applicants-major.pdf).

20. Foss, *supra* note 1. Prosecutors only see the people who both fail to stop offending and who fail to avoid arrest for some new offense. This is not a random sample of those they previously prosecuted, much less of those who engage in criminal behavior, making it hard for them to assess what factors predict recidivism or desistance.

21. See Corbyn, *supra* note 2.

22. See Deruy, *supra* note 2.

23. Cf. L. Song Richardson, “Police Use of Force,” in Volume 2 of the present Report.

strongly suggests that prosecutors are as well.²⁴ Making matters worse, the political pressures that push prosecutors to be tough on crime—like the fear of a “Willie Horton”-type mistake—interact with IRB in deeply troubling ways: prosecutors (like everyone else) may fear the costs of leniency more for groups they are subconsciously biased against, further amplifying racial disparities in their charging and pleading decisions.

That prosecutors are not necessarily good at making risk assessments should come as no surprise. We consistently see that even people with extensive formal training—psychologists and psychiatrists making mental-health assessments, medical doctors making medical diagnoses—succumb to systematic errors, and that these errors are often successfully corrected (or at least mitigated) by actuarial models.²⁵ To be fair, these models are not without controversy, especially within the realm of criminal justice, and if poorly designed, they can certainly reinforce racial and other problematic biases that run through the criminal justice system.²⁶ But prosecutors are already vulnerable to these biases and pressures, so the question is comparative: which approach is *better*? And the answer generally points toward guidance, that prosecutors would be well served by guidelines that help them choose who to charge and how aggressively to do so.

Given the structural and behavioral problems prosecutors face, it should be clear why giving them unfettered, unstructured discretion raises serious concerns. It is true that some offices may have their own internal guidelines, but these are inadequate. First, they are likely based far more on tradition and assumption than rigorous empirical models looking at risk. Second, they lack the force of law and thus need only be followed when it is in the office’s self-interest to do so; legally binding guidelines, as mentioned above, could give public defenders some much-needed assistance.

24. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004). For a general discussion of IRB, see Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009). See also Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012). Note that there is little direct evidence about IRB in prosecutors, although it is surely the case that it affects them.

25. See, e.g., Robyn M. Dawes, David Faust, & Paul E. Meehl, *Clinical Versus Actuarial Judgment*, 243 SCI. 1668 (1989).

26. See, e.g., BERNARD E. HARCOURT, *AGAINST PREDICTION* (2006); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

Finally, internal guidelines are not designed with public input. Any sort of charging or plea decision reflects a wide range of values, not just about public safety, but about how to prioritize various crimes, about what defendants or what circumstances deserve mercy or compassion, and which ones demand increased severity. Internal guidelines simply reflect the prosecutor office's internal take on these issues. This is troubling on its own terms, but particularly so when we realize that prosecutor offices are often called upon to enforce the law in areas that do not have a strong political voice. District attorneys are elected by county voters, and at least in urban counties the safer, wealthier suburbs often play a major role in selecting the prosecutor, even though crime tends to be concentrated in the poorer areas of the more-urban parts of the county. This creates a dangerous divide: the more-powerful suburban voters feel the benefits of reduced crime (they feel safer whenever they go into the city, for example) but none of the social costs that may come from aggressive enforcement—it is not their families or friends who suffer when prosecutors file charges in cases that should have been dismissed, or when prosecutors seek out harsher sanctions than necessary.²⁷ Our nation's ongoing struggle with racial discrimination and segregation only amplifies this effect, creating a persistent racial divide between the suburbs and cities. Publicly enacted guidelines would require a public debate about how prosecutors should tackle crime, and would thus enable underrepresented groups to play a bigger role in shaping the policies that disproportionately affect them.

I will not belabor the arguments for guidelines. They are not the only approach, but there is much to be said in their favor. What, then, should they look like?

III. A (VERY) BRIEF HISTORY OF PLEA-BARGAINING GUIDELINES

This idea of prosecutorial guidelines is not some sort of abstract academic flight of fancy—they exist in the field. Admittedly, in just one state, just for pleas (not for charging), and for only a small set of crimes, but they exist. And it quickly becomes clear that expanding these guidelines to cover charging and diversion decisions, as well as a far wider set of offenses, should not be all that difficult.

27. See, e.g., PFAFF, LOCKED IN, *supra* note 10; John F. Pfaff, *Why Do Prosecutors Go After Innocent People?*, WASH. POST (Jan. 21, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/01/21/why-do-prosecutors-go-after-innocent-people/?utm_term=.8cff6a635e75; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

Since the 1970s, the New Jersey Supreme Court has wrestled with the Legislature over the extent to which mandatory minimums and other sentencing laws reallocated sentencing authority from the judiciary to the executive.²⁸ In 1998, in *State v. Brimage*,²⁹ the court required the state attorney general to develop binding guidelines to regulate the pleas that prosecutors could offer defendants charged with any of six major drug crimes.³⁰ Revised in 2004, the *Brimage* guidelines look very much like the sentencing guidelines that restrict judges around the country.³¹ Each offense has a grid, with offense severity on the left axis and the defendant's prior criminal history on the top axis. Each severity-history pairing has a range of permissible pleas—three ranges, actually, depending on when in the case the plea is accepted (the quicker the deal, the more favorable the terms are for the defendant). Each box on the grid also contains aggravated and mitigated options, which the prosecutor can offer only if he establishes certain aggravating or mitigating factors. Figure 1 provides one of the *Brimage* tables as well as part of the worksheet for assessing aggravators and mitigators, which should both look familiar to anyone who has seen sentencing guidelines before.

Figure 1: The *Brimage* Guidelines

TABLE 3 OFFENSES UNDER N.J.S.A. 2C:35-6 (USING A JUVENILE IN A DRUG-DISTRIBUTION SCHEME)							
Criminal History Category							
	OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term
A.	2C:35-6 no weapons defendant less than 3 years older than juvenile used/employed	Pre-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54
		Initial Post-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60
		Final Post-Indictment	21 27 33	27 33 39	33 39 45	45 51 57	51 57 63
B.	2C:35-6 no weapons	Pre-Indictment	24 30 36	30 36 42	36 42 48	48 54 60	54 60 66
		Initial Post-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Final Post-Indictment	33 39 45	39 45 51	45 51 57	57 63 69	63 69 75
C.	2C:35-6 weapons	Pre-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Initial Post-Indictment	36 42 48	42 48 54	48 54 60	60 66 72	66 72 78
		Final Post-Indictment	39 45 51	45 51 57	51 57 63	63 69 75	69 75 81

28. See, e.g., *State v. Leonardis*, 363 A.2d 321 (N.J. 1976); *State v. Lagares*, 601 A.2d 698 (N.J. 1992); *State v. Vasquez*, 609 A.2d 29 (N.J. 1992); *State v. Brimage*, 706 A.2d 1096 (N.J. 1998).

29. *Brimage*, 706 A.2d 1096.

30. Following a similar holding in *Vasquez*, 609 A.2d 29, the attorney general had developed model guidelines but allowed county prosecutor offices to ultimately design their own. In *Brimage*, 706 A.2d 1096, the court held that these county-level decisions introduced too much inconsistency and required the attorney general to design one set for the entire state.

31. See OFFICE OF THE ATT'Y GEN., STATE OF N.J., *BRIMAGE* GUIDELINES 2 (2004 REVISIONS); REVISED ATTORNEY GENERAL GUIDELINES FOR NEGOTIATING CASES UNDER N.J.S.A. 2C:35-12 (Sept. 15, 2004), <http://www.state.nj.us/oag/dcj/agguide/directives/brimagerevision.htm>.

SCHEDULE II

AGGRAVATING AND MITIGATING FACTORS

(Consult Brimage Guidelines 2 for definitions and rules regarding "double counting")

Defendant Name _____

Promis Number _____

AGGRAVATING FACTORS	Points	Yes	No	Insufficient Facts	Value
1. <u>Community Impact.</u>					_____
a. Children were present in premises; OR	2	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Offense occurred in a drug-free park, public housing, or public building zone; OR	2	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Offense occurred in a designated "Quality of Life" special enforcement zone	3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
2. <u>Bail Violation.</u>					_____
Offense occurred while on bail or defendant has committed a bail violation after arrest in present case (3 points or 4 points if defendant was fugitive or failed to appear in court in present case)	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
3. <u>Risk of Injury to Officers or Others.</u>					_____
a. Offense involved threatened violence; OR	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Resisting arrest; OR	3 to 5	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Flight or Eluding; OR	4 or 5	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Attempted destruction of evidence/hindering apprehension	3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
4. <u>Organization.</u>					_____
a. Part of a sophisticated drug-distribution operation; OR	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Defendant is involved in organized criminal activity; OR	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Middle or upper-echelon participant in a drug-distribution scheme; OR	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Defendant substantially influenced another person in committing the offense; OR	3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
e. Defendant contributed special skills to the criminal conduct	3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
5. <u>Profiteering.</u>					_____
a. Criminal conduct provided a substantial source (3 points) or primary source (4 points) of income or livelihood; OR	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Offense involved actual distribution for money (2 points, or 3 points if sale to undercover officer or informant); OR	2 or 3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Defendant is eligible for anti-drug profiteering penalty	4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

AGGRAVATING TOTAL

Sadly, I have been unable to find any formal analyses of the impact of the *Brimage* Guidelines on plea outcomes in New Jersey, despite the growing attention reformers are paying to prosecutorial power. Some anecdotal evidence, however, seems to be positive. The Attorney General's Office has subsequently adopted guidelines to cover shoplifting and aggravated sexual assault of a minor, indicating that it finds them appealing—although none of the subsequent guidelines are as rigorous as the *Brimage* Guidelines.³² And some informal discussions of the guidelines suggest they have improved plea bargain consistency.³³

Perhaps one reason why the *Brimage* Guidelines have received so little attention is because of the idiosyncrasies of New Jersey, which is one of only four states where county prosecutors are appointed instead of elected. The New Jersey attorney general appoints and retains county prosecutors, which gives guidelines issued by his office authority they would lack in other states. This is not an irrelevant point, but it is more a red herring than it seems at first. It does not mean that other states could not adopt guidelines, only that they would likely have to follow a different, and slightly more difficult, path.

It is true that if the attorney general in New York suddenly issued charging and plea guidelines, local prosecutors—who do not report to him—would likely ignore them. However, if the *courts* insisted that the prosecutors follow the guidelines, they would have no choice. In every state, courts sign off on plea deals; if courts permit defense attorneys to appeal prosecutorial violations of the guidelines, or if they refuse to accept pleas whenever such concerns arise, prosecutors would find themselves compelled to follow the guidelines.

To me, this means that guidelines would have to originate with the legislature, not the attorney general or governor. In states where prosecutors do not report to the attorney general, courts would likely view legislatively written guidelines as legitimate and thus binding. Even guidelines written by the attorney general would likely be enforced by the courts as long as the AG's authority came from a statute. After all, judges already follow legislatively adopted sentencing guidelines that constrain their *own* power; why would they resist enforcing similar guidelines that limit *prosecutors'* power?

32. See, e.g., Memorandum from John J. Farmer, Jr., Att'y Gen., to All County Prosecutors and All Municipal Prosecutors, Attorney General Guidelines—Prosecution of Shoplifting Offenses (Jan. 16, 2001), <http://www.state.nj.us/lps/dcj/agguide/shoplift.pdf>; Memorandum from John J. Hoffman, Acting Att'y Gen., to Elie Honig, Dir., Div. of Crim. Justice, and All County Prosecutors, Uniform Plea Negotiation Guidelines to Implement the Jessica Lunsford Act, P.L. 2014, c. 7 (May 29, 2014), http://www.state.nj.us/lps/dcj/agguide/lumsford_act.pdf.

33. Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

Another possible reason why the *Brimage* Guidelines have not been discussed more is their complexity. Although they cover only six drug offenses, the guidelines run to over 100 pages, including separate offense grids for each crime. This seems to argue against expanding them to cover not just more crimes but more of the decision points that prosecutors face. But like the role of appointed prosecutors in New Jersey, this concern is easily overstated. State sentencing guidelines, for example, consistently cover the entire criminal code with just one or two grids; surely prosecutor guidelines could be designed in a more streamlined manner as well. And much of the detail in the *Brimage* Guidelines, like the lists of aggravators and mitigators, and how prosecutors are to calculate and use prior history scores, are fairly universal in scope; adding more offenses would not require adding much more detail or explanation. In many ways, developing guidelines is like the pharmaceutical industry: creating the first pill or the guideline for the first crime requires tremendous work, but the second pill/crime guideline comes much more quickly.

IV. THE CASE FOR FAR-REACHING GUIDELINES

So far, the only real-world example of prosecutorial guidelines looks only at pleas, but I think it is essential to apply them far more expansively. Recall the story told by Boston prosecutor Adam Foss at the start of this piece. With little training or oversight, Foss successfully worked out an alternative sanction for a young man charged with theft.³⁴ Although Foss made the right call in that case, it starkly illustrates that guidelines that focus only on plea bargains enter the picture late in the game: prosecutors make multiple critical decisions with little to no rigorous assistance long before the case gets to the plea-bargain phase, decisions that are often more important than the final plea outcome. After all, the resolution to Foss's story is that the young man obtained a management position at a bank—an outcome that almost certainly would have been impossible had the man simply been convicted of felony, or perhaps even a misdemeanor, regardless of the sanction imposed by the final plea deal.

That New Jersey's guidelines focus solely on pleas and sentencing is due in no small part to their unique procedural history.³⁵ These guidelines are a promising start, but we should aim higher. It is hard to understate how many decisions relatively young line prosecutors are called on to make: whether to charge or dismiss, whether to divert or move the case forward, whether to

34. Foss, *supra* note 1.

35. *Brimage* was ultimately based on a separation of powers argument. Sentencing has long been a judicial power, and the state supreme court was concerned about how mandatory minimums reallocated that authority to the executive. Charging, however, has always been a core executive decision and thus was not part of the discussion in *Brimage*.

charge with a felony or a misdemeanor, whether to charge the felony with or without the mandatory minimum, whether to file one or six different charges against a defendant, and so on. And—critically—there is no reason to view the final sentence as the only thing that needs regulation from a policy perspective. Given all the collateral costs, both formal and informal, that can come from a conviction, the decision about whether to prosecute at all may be more significant than (or at least as significant as) the final punishment.³⁶ In fact, just the decision to arraign someone can impose serious costs, if the defendant cannot make bail and suffers through a lengthy period of pretrial detention. Just think of the story of Kalief Browder, who committed suicide at age 22 after spending over three years of pretrial detention at Rikers Island in New York City only to have all the charges against him dropped.³⁷

Guidelines will promote accuracy and consistency. They will make prosecutor offices more transparent. They will target idiosyncratic shocks like hunger and persistent ones like implicit racial bias. And they can help regulate structural problems like the moral hazard created by state-funded prisons. These concerns exist at every stage of the prosecutorial process, and thus should be regulated at every stage as well.

Of course, because of this, charging and plea guidelines will be more complex than sentencing guidelines, since they will need to cover a wider range of choices. But that is actually an argument *for* such guidelines, not *against*. The complexity of such guidelines—which, as we will quickly see, can be made quite manageable—reflects just how knotty the underlying moral and policy issues are. This does not prevent us from thinking about what comprehensive guidelines would look like.

Decision to charge. The guidelines should include a risk-needs assessment tool to determine if public safety (and justice—a close, but not always perfect, correlate) requires the case to move forward at all. Guidelines here could include rules such as defendants with low enough risk scores must have their cases

36. The Council of State Governments' new tool displaying the collateral legal consequences of a conviction for each state provides a breathtaking view of how many conditions exist nationwide. See COUNCIL OF STATE GOVERNMENTS, <https://niccc.csgjusticecenter.org/map/>. Even without formal impediments, a conviction makes it harder to get a job, and simply going through the criminal justice system imposes real costs on both the defendant and his family and friends. See, e.g., Gabriel J. Chin, "Collateral Consequences of Criminal Conviction," in Volume 4 of the present Report.

37. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>. See generally Stevenson & Mayson, *supra* note 7.

dismissed unless certain aggravating factors exist (where aggravators could relate to public-safety issues or retributive values or resource-management concerns). Conversely, the guidelines could hold that some offense/risk combinations could require charging absent certain mitigators.

Diversion. For those cases moving forward, the guidelines could determine who is eligible for diversion to a drug- or other alternate-treatment court.³⁸ Right now, such decisions turn on the prosecutor's subjective sense of who would be amenable to treatment, even though this seems like the sort of quasi-medical diagnosis for which objective guidance would be quite important and helpful.

Charging. Assuming the defendant does not have his case dismissed and does not qualify for diversion, the guidelines could then assist in selecting the appropriate charge. They could hold that certain acts must be charged as misdemeanors if certain mitigators exist, or as felonies if certain aggravators exist. Guidelines could also impose some structure about what felony charges prosecutors can file, like stipulating that an offense with a mandatory minimum cannot be filed if there is a similar offense without a mandatory, absent certain aggravators. The guidelines could even transparently balance various competing normative goals of punishment, requiring certain minimum charges on retributivist grounds even if actuarially too harsh from an incapacitation perspective, or conversely refusing to permit certain severe charges even when they seem morally justifiable due to a lack of any public-safety justification.³⁹

Plea bargaining. Once the charges are selected, the guidelines—like those in New Jersey—can specify the appropriate plea, or range of pleas (including both the in/out decision about prison or jail vs. probation, as well as the length of any such sentence), again shaped by various aggravating and mitigating factors, and again explicitly accounting for both public-safety and justice concerns.

At first blush, guidelines like these may sound almost impossible to create and implement, but it should be possible to design them in a way that would be easy for prosecutors to use, even when caseloads are high. In practice, almost all these decisions could be made at one time. When the prosecutor's office takes over the case, it can gather the necessary information for the risk-needs tool, and almost everything flows directly from that information. The risk score and prior history, along with the offense, may say that charges need to be filed; the needs score may say that the defendant is unlikely to succeed in the available

38. Cf. Richard C. Boldt, "Problem-Solving Courts," in the present Volume; Michael Tonry, "Community Punishments," in Volume 4 of the present Report.

39. For a discussion of the goals of punishment, see Jeffrie G. Murphy, "Retribution," in Volume 4 of the present Report; Daniel S. Nagin, "Deterrence," in Volume 4 of the present Report; and Shawn D. Bushway, "Incapacitation," in Volume 4 of the present Report.

diversion programs; the case file and prior history may point to a felony over a misdemeanor, but the risk score along with other evidence may then lead the guidelines to point to a lower level of felony within the set of viable charges.

It is worth stressing the somewhat counterintuitive point that these guidelines do not actually change *what* prosecutors do every day, just *how* they do it. Prosecutors already are called on to assess risk, and amenability to treatment, and how those relate to both incapacitation and deterrence and moral blameworthiness; and they are already required to balance all the various competing goals of the criminal justice system. And—let us be completely clear here—they are *already* doing so using a proprietary actuarial model: the one in their head. It is a model so proprietary that the prosecutor himself does not really have access to it (as the implicit racial-bias research makes so abundantly clear); but it is a model nonetheless. Guidelines, then, are less a change in substance than in form—although a change in form that may lead to systematically more consistent, rational, and just outcomes.

V. A FEW CHALLENGES TO THINK ABOUT— BUT WHICH MAKE THE ARGUMENTS EVEN STRONGER

Although there are clearly strong arguments for imposing structure on what prosecutors do, there are also important questions of implementation that deserve attention. Should the guidelines, for example, be presumptive or binding? Guidelines could say “you must charge [conduct] as a misdemeanor, unless [set of conditions] hold, in which case you *may* dismiss the charges,” or they could replace the *may* with *must*. The former are presumptive—the prosecutor *can* dismiss but does not *have* to—while the latter are binding. Most sentencing guidelines (other than the pre-*Booker* federal guidelines) are presumptive.⁴⁰ For prosecutors, however, there could be an argument for some asymmetry: presumptive for severity (“may charge a more severe offense”) but binding for leniency (“must impose a lesser charge”). The politics of punishment (perhaps best exemplified by the “Willie Horton Effect”) generally push prosecutors toward severity and away from leniency;⁴¹ presumptive severity and mandatory leniency could mitigate this effect.

40. See generally Berman, *supra* note 5.

41. See PFAFF, LOCKED IN, *supra* note 10; John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951 (2016).

In other words, binding guidelines could provide important political cover. A prosecutor may think a case should be dismissed, but he also knows both that he faces political blowback if the defendant recidivates and that neither he nor his county bear any of the costs of locking the person up in prison. For prosecutors, incarceration is both cheap and politically safe, pushing prosecutors to err on the side of severity. Binding guidelines, however, give a prosecutor a certain amount of plausible deniability: “I wanted to charge the defendant, but the model forced me not to.” Leniency is riskier under a presumptive system, where the prosecutor still has to decide whether to be lenient. Given the asymmetric pressure of the politics of crime, binding leniency and presumptive severity may actually enable prosecutors to make the choices they would *prefer to make* were the public less emotionally reactive to sensationalistic outlier cases.

Guidelines will also have to be designed in such a way that they permit the outcomes to change with new information. The risk tool may say “do not dismiss” at the start of the case, but as prosecutors and police investigate further, they may uncover information that shifts the assessment to “dismiss.” Prosecutors should be required to periodically update the model with new, relevant evidence—where “relevance” is now determined not by the contestable subjective beliefs of the prosecutors but by the specific requirements of the model.

This updating approach highlights the benefits of using public guidelines as opposed to internal ones that only the prosecutor’s office knows about. With a public model, the defense attorney could easily “double-check” the prosecutor’s work, imputing any new information the defense attorney learns of and seeing how that changes the recommended outcome. Right now, all a defense attorney can say is, “I think you’re ignoring/undervaluing this exculpatory/mitigating evidence,” but with guidelines it is more possible to show that such evidence is *in fact* being undercounted. Even if prosecutors are loath to update the model, public models would allow defense attorneys to do so.⁴²

There is also the challenge of how to “calibrate” the guidelines. One concern people raised with the *Brimage* Guidelines, for example, was that they effectively “suburbanized” plea deals. Prior to the adoption of the guidelines, urban prosecutors generally offered much more favorable deals to people arrested for the covered crimes than suburban prosecutors. The guidelines, however, set their defaults along lines that were more suburban than urban, forcing urban

42. Of course, the use of model cannot stop *Brady* violations, when the prosecutor fails to turn over exculpatory evidence to the defense, but the fact that models can not cure all ills is not a strong argument against using them.

prosecutors to impose sentences harsher than they would have before adoption.⁴³ This is not a problem with guidelines *per se* but with how they are written and implemented—but it is a problem that deserves attention, especially in states that hope to use guidelines to rein in prison growth. Rural areas tend to wield disproportionate power in state capitals, and rural places tend to favor tougher punishments than more-urban areas, introducing the risk that guidelines, if not carefully designed, could make sentences tougher, not smarter.⁴⁴

Obviously, there are other implementation issues as well. For example, how and when could the defense challenge what he sees as misuse or misapplication of the standards? And what burden of proof should prosecutors have to meet when including evidence, particularly aggravating evidence, in the assessment?⁴⁵ But none of this is intractable; none, I think, poses a serious threat, at least in the abstract. Politics, of course, could make some of these issues hard to resolve in practice, but none is conceptually, which is where we need to start.

CONCLUSION

Given the nature of their task, prosecutors need discretion—but that discretion does not need to be unfettered. For various political, structural, and behavioral reasons, prosecutors are primed to wield their discretion in overly aggressive ways. One systematic way to confront these problems would be to design guidelines that provide some structure at each critical decision point in the prosecutorial process, from the decision to charge at all to what sanction to seek following a conviction or plea. We already impose detailed, binding, publicly debated guidelines on judges around the country. Although perhaps more complicated to design, such guidelines are all the more essential for prosecutors.

43. Wright, *supra* note 33.

44. See, e.g., Alan Greenblatt, *Rural Areas Lose People But Not Power*, GOVERNING (Apr. 2014), <http://www.governing.com/topics/politics/gov-rural-areas-lose-people-not-power.html>; Josh Keller & Adam Pearce, *This Small Indiana County Sends More People to Prison than San Francisco and Durham, N.C., Combined—Why?*, N.Y. TIMES (Sept. 2, 2016), <https://www.nytimes.com/2016/09/02/upshot/new-geography-of-prisons.html>.

45. Guidelines, for example, might state that punishments can be aggravated when the victim was “particularly vulnerable.” How convincingly must the prosecution establish that the victim met the “particularly vulnerable” definition?

RECOMMENDATIONS

While reformers increasingly appreciate the central role that prosecutors play in driving criminal justice outcomes, they have taken few steps to directly regulate the discretion that gives them so much power. There are several steps we can take to start imposing some restrictions on prosecutorial discretion and power.

1. **Fund indigent defense.** Perhaps the easiest way to regulate prosecutorial aggressiveness would be to ensure that their adversaries are adequately funded. Of the nearly \$200 billion state and local governments spend on the criminal justice system, only about \$4.5 billion goes to indigent defense, despite 80% of those facing prison time qualifying for a state-provided lawyer. With better funding, public defender offices and other providers of indigent defense could better check prosecutorial behavior.
2. **Address the “prison moral hazard” problem.** As things stand now, county prosecutors do not have to take into account any of the costs of felony incarceration, since those costs are all borne by the state, not the county. In fact, making things worse, less-severe punishments, like jail or probation, often are incurred by the county: being harsher is cheaper. States could make prosecutors take into account the costs they are imposing on the state in various ways, such as charging them for bed space or introducing some sort of “cap and trade” system for bed space in prisons (which would force counties with high demand for incarceration to purchase bed space from less-punitive counties).
3. **States should adopt binding charging and plea bargaining guidelines.** Guidelines that restrict when prosecutors can bring charges, what types of charges they can file, and what sorts of pleas they can demand would accomplish several goals. First, they would help prosecutors make better calls about how to advance public safety by providing actuarial risk/needs assessments. They would also ensure greater consistency in charging decisions and limit the impact of racial and other biases. And they could be designed to limit unwarranted harshness in either charges filed or sentences sought.