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David Boerner

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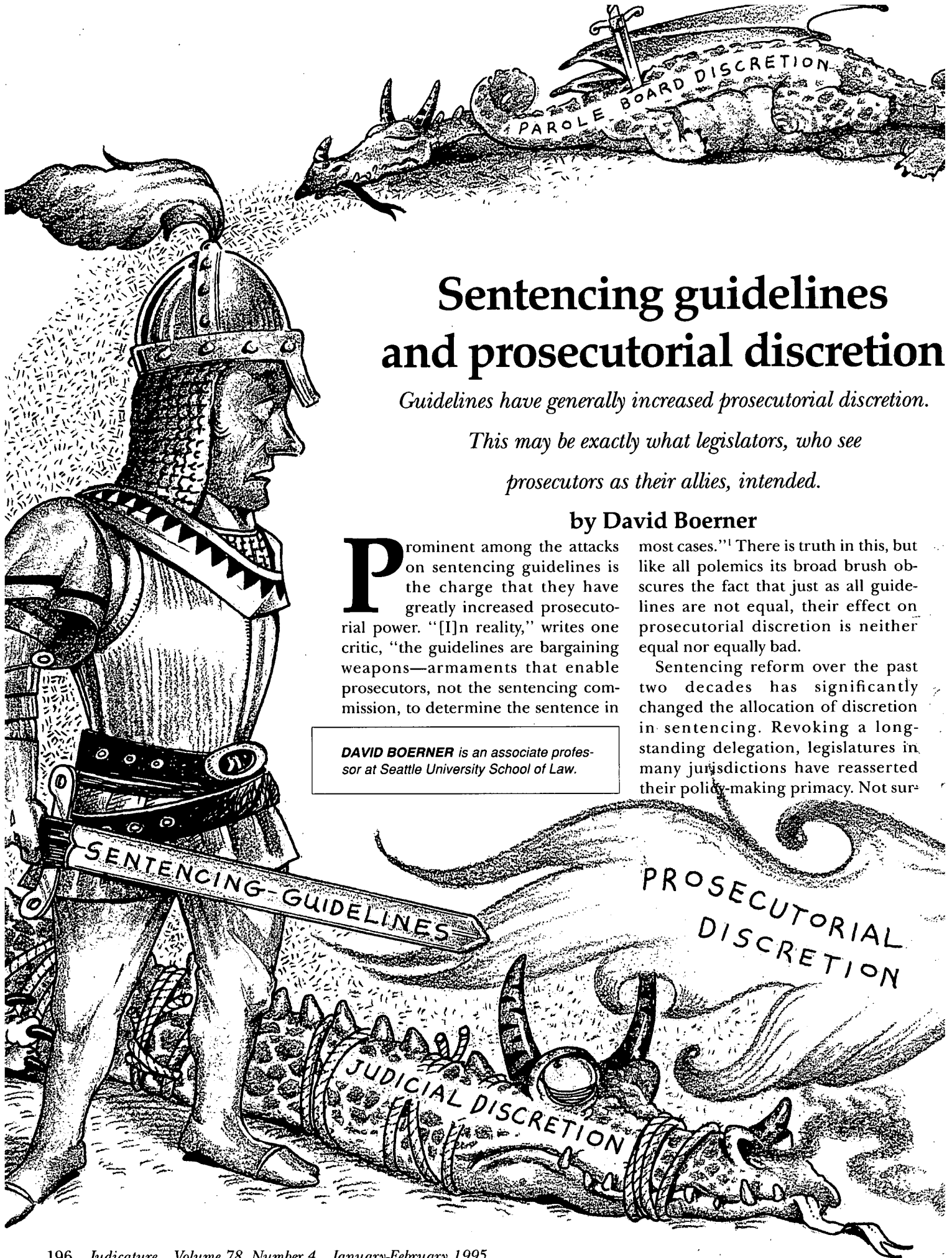
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# Sentencing guidelines and prosecutorial discretion

*Guidelines have generally increased prosecutorial discretion.*

*This may be exactly what legislators, who see prosecutors as their allies, intended.*

by David Boerner

Prominent among the attacks on sentencing guidelines is the charge that they have greatly increased prosecutorial power. "[I]n reality," writes one critic, "the guidelines are bargaining weapons—armaments that enable prosecutors, not the sentencing commission, to determine the sentence in

most cases."<sup>1</sup> There is truth in this, but like all polemics its broad brush obscures the fact that just as all guidelines are not equal, their effect on prosecutorial discretion is neither equal nor equally bad.

Sentencing reform over the past two decades has significantly changed the allocation of discretion in sentencing. Revoking a long-standing delegation, legislatures in many jurisdictions have reasserted their policy-making primacy. Not sur-

DAVID BOERNER is an associate professor at Seattle University School of Law.

prisingly, both the structure and the details of these reforms vary widely. They are, after all, local resolutions of complex issues, each produced in its own political environment. While their range is wide, these reforms share two common characteristics.

First, they have significantly circumscribed judicial discretion in sentencing and, in many cases, have abolished the release discretion of parole authorities. Second, by increasing the importance of the defendant's criminal behavior and decreasing the importance of the defendant's personal

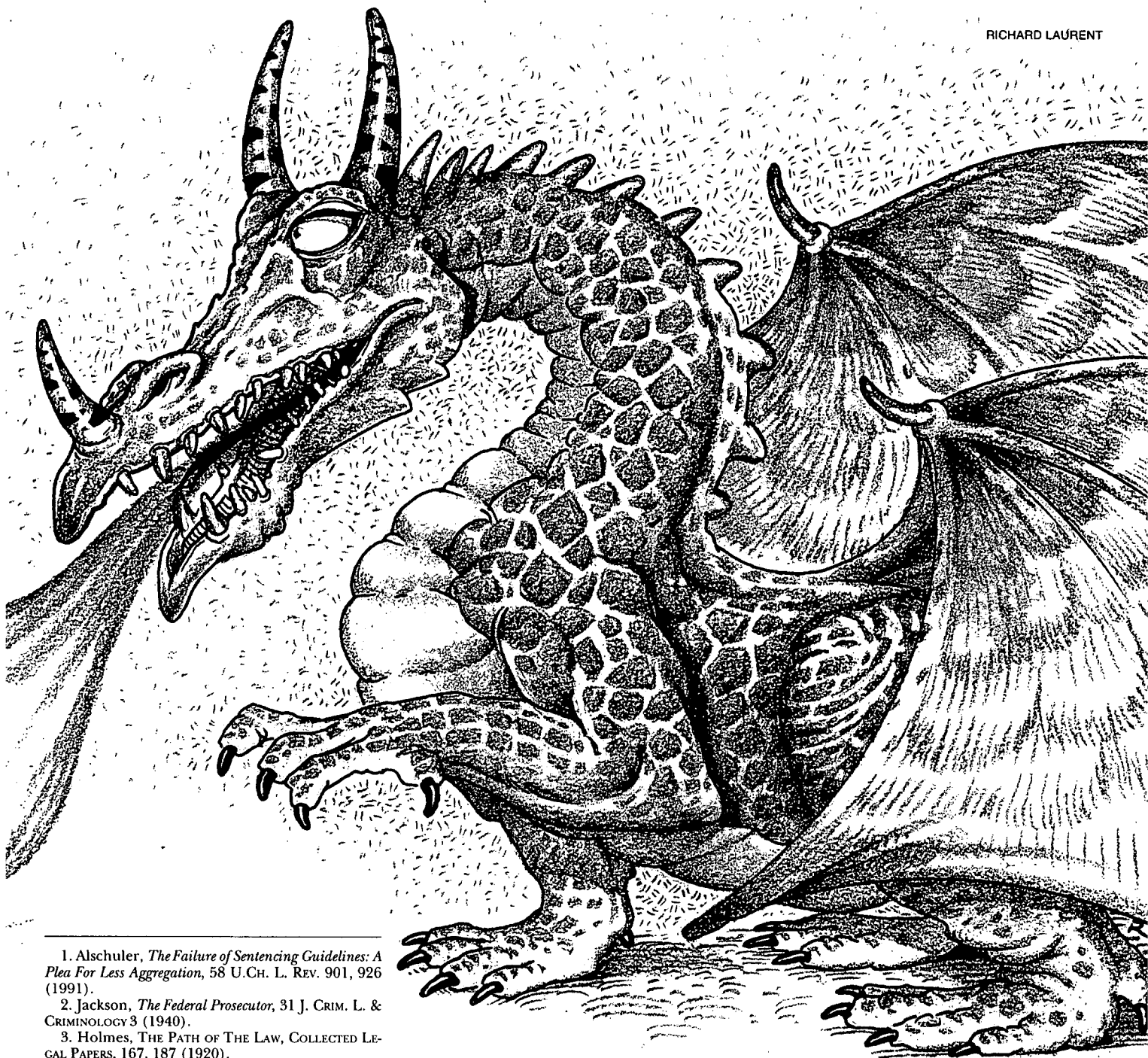
characteristics, they increase the importance of the crime of conviction in determining the sentence. This shifts the balance between prosecutors and defendants, since much that can be said in the defendant's favor is no longer relevant, while the crime-related information prosecutors control retains its relevancy.

Increasing the importance of the defendant's criminal conduct in determining the ultimate sentence undoubtedly increases the power of prosecutors. Prosecutors have discretion over the nature and number of

charges to be filed and whether those charges are to be amended or reduced before conviction. This, of course, is not new. Justice Robert Jackson's statement that "[t]he prosecutor has more control over life, liberty and reputation than any other person in America"<sup>2</sup> was as true when he said it more than a half century ago as it is today.

What has changed is the relative power of the prosecutor. To use Holmes' dragon metaphor,<sup>3</sup> in jurisdictions that have adopted sentencing guidelines, three dragons of discretion have been dragged onto the plain.

RICHARD LAURENT



1. Alschuler, *The Failure of Sentencing Guidelines: A Plea For Less Aggregation*, 58 U. CH. L. REV. 901, 926 (1991).

2. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3 (1940).

3. Holmes, *THE PATH OF THE LAW*, COLLECTED LEGAL PAPERS, 167, 187 (1920).

One (release discretion of parole boards) has been killed and one (judicial sentencing discretion) has been significantly constrained. The remaining dragon (prosecutorial discretion), however, continues to roam the plain unrestrained.

### Shifts in discretion

These shifts in discretion were not a surprise. The legislatures that created these reforms and the commissions that implemented them were aware of what they were doing. Commentators had warned that guidelines would "increase the powers of prosecutors"<sup>4</sup> and "impair the tempering role...exercised by the judiciary."<sup>5</sup> Thus, guidelines would "risk relocating discretion in ways that are unintended and possibly perversely counterproductive."<sup>6</sup> The few existing empirical studies all confirm, to no one's surprise, that prosecutors continue to exercise their discretion under sentencing guidelines.<sup>7</sup> Yet in only two jurisdictions, the United States and the State of Washington, was the issue of prosecutorial discretion explicitly addressed. Why? The answer may lie in our understanding of the nature of prosecutorial discretion and in the reasons for sentencing reform.

First, there is the widely shared view that enforcement discretion cannot be externally regulated. As Kenneth Culp Davis, the most astute student of discretion, put it a quarter century ago,

[the] universally accepted assumptions... are that the prosecuting power must, of course, be discretionary, that statutory provisions as to what enforcement officers 'shall' do may be freely violated without disapproval from the public or from other officials, that determinations to prosecute or not to prosecute may be made secretly without any statement of findings or reasons, that such decisions by a top prosecutor...usually need not be reviewable by any other administrative authority, and that decisions to prosecute or not to prosecute are not judicially reviewable for abuse of discretion.<sup>8</sup>

There is little evidence that these assumptions have changed.

The second reason for continued prosecutorial discretion is that legislators see prosecutors as their allies in achieving the substantive ends reforms are designed to produce. They thus

see prosecutorial discretion as less in need of constraint. Whether or not this perception is accurate, it influenced legislators as they created and modified their guidelines. Sentencing guidelines are reforms, produced by dissatisfaction with existing sentencing practices and a desire to change those practices. The reforms are pragmatic, concerned more with results than form, more with the consequences of shifts in power than the location of that power. Thus, for many reformers the claim that prosecutorial power has increased and the power of others decreased is beside the point. What is important is whether the shifts in power produced the intended results.

### Taming the dragon

Examining the two guidelines systems that have addressed prosecutorial discretion provides insights into both the validity of this thesis and the influence of those attempts. Their differences and the different effects they have may indicate whether the dragon of prosecutorial discretion can be tamed, or at least made more useful.

First, however, the issue of statutorily mandated sentences must be addressed. Where legislatures accompany guidelines with mandatory sentencing provisions, as Congress has, then the offense conviction dictates the sentence, and those who determine what that offense will be have absolute power over the sentence. The issue is whether this was intended. In all probability, Congress was quite aware of how mandatory sentences would enhance prosecutorial power and intended precisely that result.

Nothing inherent in sentencing guidelines requires mandatory sen-

tences, which are fundamentally at odds with the idea that guidelines should structure but not eliminate judicial sentencing discretion. All of the state guidelines systems are presumptive, not mandatory, and they represent a rejection of mandatory sentences as unwise and ineffective.<sup>9</sup> In the state of Washington, for example, when the legislature adopted sentencing guidelines, it prospectively repealed provisions requiring mandatory minimum sentences for all crimes involving deadly weapons and for habitual criminals. This reduced the power prosecutors had to influence the ultimate sentence. In this context, at least, they lost, not gained, power when guidelines replaced the former regime.<sup>10</sup> However, the fact that most commentators see Washington's judgment as wiser than that of Congress is irrelevant to the effect of presumptive sentencing guidelines on prosecutorial discretion.

Washington's guidelines addressed the issue of prosecutorial discretion. They included detailed "Standards For Charging and Plea Dispositions"<sup>11</sup> but prefaced them with the statement: "These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state."<sup>12</sup> Not surprisingly, the courts have honored this injunction,<sup>13</sup> and the standards have had no noticeable effect on prosecutorial discretion.<sup>14</sup>

Washington's guidelines also established a mechanism for judicial review of plea bargains. They require disclosure of "the nature of the agreement

4. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PENN. L. REV. 550, 577 (1978).

5. Schulhofer, *Due Process of Sentencing*, 128 U. PENN. L. REV. 733, 755 (1980).

6. Tonry and Coffee Jr., *Hard Choices: Critical Trade-Offs in The Implementation of Sentencing Reform Through Guidelines*, in Tonry and Zimring, eds., *REFORM AND PUNISHMENT*, 155, 159 (1983).

7. See Nagel and 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 (1992); Tonry, *Structuring Sentencing*, 10 CRIME AND JUST. 267, 311-315 (1988).

8. Davis, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY*, 188-189 (1969).

9. See Tonry, *Mandatory Penalties*, 16 CRIME AND JUST. 243 (1992).

10. In 1992, Washington's voters, exercising the power of initiative, enacted with a 76 percent affirmative vote a "three strikes and you're out" amendment to the sentencing guidelines that requires a mandatory life sentence upon the third conviction of a violent felony. Washington's legislature considered but failed to enact a similar provision in the 1992 legislative session.

11. RCW 9.94A.430-.460.

12. RCW 9.94A.430.

13. See *State v. Lee*, 69 Wash. App. 31, 847 P.2d 25 (1993).

14. A number of Washington's prosecutors have adopted internal policies that structure the charging and bargaining discretion their deputies exercise. There are indications that these policies have been effective within those offices, but that issue is beyond the scope of this article.

and the reasons for the agreement” and provide that the judge “shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards.” If not, the court shall inform the parties “that they are not bound by the agreement and that the defendant may withdraw the...plea of guilty...and enter a plea of not guilty.”<sup>15</sup> In addition, existing law gave judges the “clear discretionary authority to refuse to accept a plea bargain” including “the right to refuse or allow the dismissal or amendment of the charges.”<sup>16</sup>

While no formal studies have been conducted, there are no indications these provisions have had any effect. The reasons are probably institutional. Judges share Davis’s assumptions and doubt their ability to evaluate the reasons the parties offer. They also conceive of their role as passive, responding to issues presented in an adversarial manner by the parties appearing before them. Once a plea agreement has been reached, the adversary system ceases to operate. Both the prosecutor and the defense attorney want the plea agreement to be implemented, and neither will argue that the plea agreement is not “consistent with the interest of justice” or “the prosecuting standards.” The obvious beneficial effect of a guilty plea on the judge’s docket also presents a significant incentive against rejection of the plea agreement. Perhaps we should not be surprised that Washington’s judges have not exercised the authority the legislature gave them. At the same time, there is little reason to believe that authorizing judges to review prosecutorial discretion will have significant systematic effects.

The federal guidelines took a more oblique approach. Expressing the fear

that a conviction-based system would enhance prosecutorial power inappropriately, they are based on the defendants’ “relevant conduct,”<sup>17</sup> what judges determine the defendant actually did rather than what he or she has been convicted of. All states based their guidelines on the conviction of offense. The major reason for the decision in Washington, and probably in the other states, was the question of basic fairness. It was seen as wrong to

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## Legislators see prosecutors as their allies in achieving the substantive ends reforms are designed to produce.

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sentence a person for crimes the prosecutor either could not or chose not to prove. At the same time, the legislature was aware that existing practices frequently resulted in convictions of offenses that did not accurately reflect what the defendant had actually done. They believed that a conviction-based system was more likely than a real offense system to achieve the twin goals of fairness and accuracy. These differing approaches present an opportunity for comparison.

### A conviction-based system

It is safe to say that from the legislature’s perspective an ideal result is for every defendant to be convicted and sentenced for what he or she has done, no more and no less. A legislature seeking this goal is likely to look past whose discretion is enhanced and whose is curbed and concentrate on what would most effectively achieve its goal. A conviction-based system increases prosecutorial accountability for their charging and bargaining decisions. Under a real-offense system, which existed in the states before guidelines, prosecutors were able to offer defendants what were in effect illusory bargains. An offer of the dis-

missal or reduction of charges, while apparently benefiting the defendant, in fact cost the prosecution nothing since judges could, and did, sentence defendants for what they actually did. In addition to denying defendants the benefit of their bargain, this practice had the effect of misrepresenting a defendant’s criminal history. Prosecutors were spared public accountability for these offers of dismissals or reductions because they could accurately state that sentencing judges could impose sentences based on what the defendant actually did. If judges failed to do so, it was their fault and not the prosecution’s. Prosecutors could employ their discretion to effectively manage their workload and to achieve a variety of other goals without accountability for the consequences. As Daniel Freed has pointed out, when the federal

sentencing guidelines retained this system they allowed prosecutors to continue to exercise the unconstrained power it permits.<sup>18</sup>

The incentives in a conviction of offense-based system run in the opposite direction. Prosecutorial decisions have real consequences, and prosecutors are responsible for those consequences. Crimes that prosecutors could not or chose not to prove cannot influence sentences. This creates incentives for accurate charging decisions and against charge reductions, incentives that are particularly salient to elected prosecutors. A legislature concerned with accurate convictions is thus more likely to achieve that result with a conviction-based system than with a real-offense system.

### Excessive severity

While a conviction-based system does create incentives against excessive leniency, the fact that it contributes to an increase in relative prosecutorial power arguably offers the opportunity for excessive severity. This presents a definitional issue—what constitutes excessive severity? Here there is fundamental disagreement. Most commentators see the sentences produced by

15. RCW 9.94A.090(1).

16. State v. Haner, 95 Wn.2d 858, 861, 631 P.2d 381 (1981).

17. See Wilkins Jr. and Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S. C. L. REV. 495 (1990).

18. Freed, *Federal Sentencing In The Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L.J. 1681, 1714 (1992).

current sentencing guidelines, both federal and state, as excessively severe from the standpoint of any penological purpose. Legislators and the public do not. Legislators seek accuracy; they do not believe it unjust to convict people of the crimes—all the crimes—they have committed. In their eyes, justice is served when defendants are convicted of these crimes and receive sentences they deem appropriate.

From this perspective, excessive severity occurs only when the exercise of prosecutorial discretion results in sentences longer than intended by the legislature. This can occur in multiple ways; together they present what Stephen Breyer called the “intractable sentencing problem.”<sup>19</sup> First, the nature of criminal codes is such that it is possible to split one criminal episode into a number of crimes. The resulting problem of multiplicity of charges is not new and has been seen as an issue resolved by determining what the legislature’s intent was.<sup>20</sup> Guidelines accentuate this problem because they translate multiple convictions into increased presumptive sentences.

Second, there is the widely shared perception that while multiple related crimes are more serious than single crimes, the increase in punishment should not be directly proportionate. It is difficult to discern a principle that requires what can be seen as a volume discount, but this perception is widely shared. Determining what the appropriate increase should be is no simple task. Here again the problem is not new. All guidelines reject the former solution of leaving the issue of whether to make some or all of the sentences run consecutively or concurrently to the sentencing judge’s discretion. Their solutions vary, but all enhance the power of prosecutors because the presumptive sentence increases with the number of convictions. None, however, grant prosecutors the broad discretion judges formerly exercised.

Third is the problem of manufactured sentences. While ordinarily the decision as to how many crimes to commit is the defendant’s, there are situations where enforcement techniques are the effective determiners. For example, when someone sells drugs to an undercover law enforce-

ment officer, the number of sales is ordinarily limited only by the officers’ persistence. The knowledge that increasing the number of sales will result in increased sentences provides the incentive to continue making buys until a sentence is achieved that the officer, or the prosecutor directing the investigation, believes appropriate. This is not a theoretical possibility. In Washington, where the solution to the multiple offense issue is to treat all current convictions after the first as if they were prior offenses, a number of prosecutors have express policies that encourage law enforcement to make the number of buys from “major dealers” necessary to obtain the maximum presumptive sentences available under the guidelines.<sup>21</sup> One would have to be exceptionally naive not to suspect that this possibility has not occurred to police and prosecutors in other guidelines jurisdictions. The same possibilities exist where the guidelines make sentences turn on the quantity of drugs involved<sup>22</sup> or the location of the transaction.

### An antidote

Here judicial review can provide an antidote. Washington’s guidelines permit judges to depart from the presumptive sentence ranges for a number of reasons, including in situations where “[t]he operation of the multiple offense policy...results in a presumptive sentence that is clearly excessive” or “clearly too lenient.”<sup>23</sup> Appellate courts have approved mitigated exceptional sentences based on this provision to counter enforcement discretion that enhanced the presumptive sentence.<sup>24</sup> This is an example of how guidelines can simultaneously constrain judicial discretion while employing it to respond to the consequences of the shift in dis-

cretionary power that accompanies that constraint. The decision to do so, however, is the legislature’s. All legislative bodies do not see the issue the same way.

Congress and the U.S. Sentencing Commission address the related issue of a prosecutor’s perceived need to reward defendants who provide information or other assistance from a different perspective. Congress has authorized, and the commission has implemented, a system in which the determination of whether a “substantial assistance” discount is to be granted is left solely in the unreviewed discretion of the prosecutor.<sup>25</sup> Its effect is to give to the prosecutor the sole key to leniency. It was the judgment of Congress and the commission, not anything inherent in the nature of sentencing guidelines, that enhanced this aspect of prosecutorial power. They saw the usefulness of prosecutorial discretion as being furthered by increasing its power, not taming it. No state has seen the issue the same way.

This brings us back to where we began. Sentencing guidelines are among the tools legislatures can use to influence, if not completely tame, the dragons of discretion in the criminal justice system. How those tools will be used depends on the values of our legislatures. Sentencing guidelines did not create those values, and they cannot transcend them. How effective the tools will be depends on the values and the skill of those who design and employ them. ☞

19. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *HOFSTRA L. REV.* 1, 25 (1988).

20. See e.g., *Gore v. United States*, 357 U.S. 386, 389 (1957) (“Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility...these are peculiarly questions of legislative policy.”)

21. See e.g., *State v. Lewis*, 115 Wn.2d 294, 305, 797 P.2d 1141 (1990).

22. See e.g. *U.S. v. Rosen*, 929 F.2d 839 (1st Cir.), cert. denied 112 S.Ct 77 (1991) (defendant negotiated and paid for 30 pounds of marijuana, federal agents loaded his car with 150 pounds, sentence

based on 150 pounds was affirmed).

23. RCW 9.94A.390(1).

24. *State v. Sanchez*, 69 Wn. App. 255, 261 (1993) (“...the difference between the first buy, viewed alone, and all three buys were initiated and controlled by the police. All three involved the same buyer, the same seller and no one else. All three occurred inside a residence within a nine-day span of time. All three involved small amounts of drugs. The second and third buys had no apparent purpose other than to increase Sanchez’s presumptive sentence.”)

25. See *supra* n. 18, at 1710-1712.

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