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PLEA BARGAINING AND VICTIMS: FROM CONSULTATION TO GUIDELINES

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Though long expected by legal professionals to play the role of "good Victorian children" (i.e., "seen but not heard"),[1] victims are increasingly demanding, and receiving, a more active role in the processing of criminal cases. Change has been most apparent at the sentencing phase, where victim impact statements have become commonplace.[2] However, as many victims and their advocates recognize, the actual sentence imposed is often effectively preordained, or at least substantially shaped, by the terms of a plea agreement.[3] As a result, the victims' rights movement has also shown a keen interest in creating a meaningful role for victims in the plea bargaining process.[4]

How best to structure the victim's role remains a matter of debate. One possibility, advocated, for instance, by Professor George Fletcher, would be to give the victim a veto over any proposed plea agreement.[5] This proposal, however, has been subject to considerable criticism for its subordination of public to private interests in the resolution of criminal cases, as well as for various practical difficulties in its implementation.[6]

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1. I borrow the observation from *Kenna v. U.S. Dist. Court for the Central District of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006).

2. *See, e.g.*, Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT'G REP. 5, 9 (2006) (discussing common use of victim statements in federal capital trials).

3. Michael M. O'Hear, *Victims and Criminal Justice: What's Next?*, 19 FED. SENT'G REP. 83, 86 (2006); *see also* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 808 (2006) (detailing practical importance of plea bargaining in federal sentencing guidelines system) [hereinafter O'Hear, *Intent*].

4. *See, e.g.*, Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 868–69 (proposing amendment to Federal Rules of Criminal Procedure to require prosecutor to consult with victim regarding plea bargaining).

5. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 248 (1995).

6. *See, e.g.*, Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1606–07 (1996); Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 847–48 (1995).

Another, far more modest approach, advocated, for instance, by Professor Sarah Welling, would be to grant the victim an opportunity to express his or her views on any proposed plea agreement at the change of plea hearing.[7] However, by this point in the criminal process, the plea agreement has already gained considerable momentum, and even when the victim raises significant concerns, the judge may be quite reluctant to reject the agreement, which would require everyone to expend more effort on a case that otherwise appeared ripe for prompt resolution.

Yet another proposal—and the one of principal interest for present purposes—would address the latter concern by requiring prosecutors to consult with victims *before* entering into a plea agreement. Such a requirement, which has already been made the law in at least twenty-two states,[8] offers an opportunity for more meaningful victim participation than would be available through a right to speak at the plea hearing alone. However, the consultation requirement has been resisted in other jurisdictions as costly and ineffective in practice.[9] Moreover, even where the requirement does exist on paper, it is not clear that prosecutors adhere to it in a rigorous, meaningful fashion.[10]

Difficulties surrounding the consultation requirement highlight fundamental problems, not with victims' rights, but with the broad scope of discretion enjoyed by American prosecutors. Victim participation is readily assimilated at sentencing because sentencing is a discrete, public proceeding in which a public official (the judge) makes a decision that is based on predetermined criteria and typically justified with some specificity. Victim participation is not so readily incorporated into plea negotiations because such negotiations are private, ad hoc interactions in which the relevant public official (the prosecutor) makes decisions without public explanation based on criteria that are often unarticulated. Such a practice is not conducive to participation that victims perceive to be effective and prosecutors perceive to be efficient.

In order to provide a framework for more meaningful plea

7. Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 304 (1987). About one-third of states expressly permit victims to be heard at plea proceedings. U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, VICTIM INPUT INTO PLEA AGREEMENTS 2 (2002), *available at* http://www.ojp.usdoj.gov/ovc/publications/welcome.html [hereinafter OVC].

8. OVC, *supra* note 7, at 2.

9. *See, e.g.*, Allen Edgar, *Commentary*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 505, 507–10 (2004) (opposing adoption of consultation requirement in Canada).

10. *See* OVC, *supra* note 7, at 2 ("Because most states provide no consequences for non-compliance with [consultation] laws, however, crime victims are still frequently left out of the plea agreement process.").

bargaining consultation, victims' rights advocates should make common cause with those who seek greater transparency and accountability in the exercise of prosecutorial discretion. To some, this might seem an unexpected alliance, for the victims' rights movement has long enjoyed a close and mutually beneficial relationship with law enforcement professionals[11]—professionals who will assuredly not welcome fresh constraints on their discretion. But the simple facts are that the American criminal justice system is dominated by plea bargaining, and plea bargaining is dominated by prosecutors.[12] It is hard to see how the goal of creating a robust role for victims in this system can be achieved without some cost to the actor whose power now predominates—the prosecutor. Followed to its end, the logic of victims' rights must necessarily lead to some level of conflict with prosecutorial preferences.

To move from the abstract to the concrete, I will argue in this Article for the adoption of prosecutorial charging and plea bargaining guidelines *as a victims' rights measure.* Although prosecutorial guidelines are not a new idea,[13] their proponents have not fully appreciated the ability of such guidelines to advance the interests of victims in fair, respectful treatment. The case for guidelines has been made on several other grounds,[14] which need not be detailed here at length. My present purpose is not to provide a comprehensive argument for prosecutorial guidelines (or, for that matter, to respond comprehensively to objections), but rather to complement the work done elsewhere with an additional perspective that may make what I believe to be an already strong case even more compelling.

Part I explains why we should care about victims' views of the

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11. Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 242–43 (2005).

12. O'Hear, *Intent, supra* note 3, at 808.

13. *See, e.g.*, Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 381 (1979) (noting "need to establish some form of guideline system for prosecutors" in addition to judges).

14. *See, e.g.*, Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 4–7 (1971); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. (forthcoming 2007); Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 194 (2004); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 778 (1980); Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1104–05 (2005). In addition to guidelines, others have also argued for other methods of constraining prosecutorial discretion, such as a requirement that refusals to charge be accompanied by a statement of reasons. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 205–07 (1969). My proposal here, as sketched below in Part III.A, also involves an explanation requirement.

criminal justice system, and in particular, whether they perceive the system to be procedurally just. Part II elaborates on the potential contributions of a consultation requirement to procedural justice, as well as the reasons that such a requirement, standing alone, may fall short of expectations. Part III proposes the use of advisory prosecutorial guidelines as a means to strengthen the consultation requirement and otherwise enhance perceived procedural justice. Part IV addresses a variety of potential objections to my proposal.

I. THE CASE FOR PROCEDURAL JUSTICE FOR VICTIMS

Although victims are not formally parties in criminal litigation, many perceive themselves to have unique and compelling interests in "their" cases, interests that warrant some particular consideration of their views in resolving the cases. This desire for meaningful participation appropriately triggers concerns over the traditional practice of excluding victims from the plea negotiation process. At the same time, as in any discussion of an enhanced role for victims in criminal procedure, we must be wary of the danger that criminal justice will be degraded into a system of private vengeance. Yet, attentiveness to victim interests in plea bargaining does not necessarily imply full-blown privatization. Indeed, as this Part will show, in seeking to provide greater procedural justice for victims, we may simultaneously advance several important *public* interests. These public interests encompass both utilitarian considerations (such as crime control) and the reaffirmation of victim dignity in ways that resonate with more retributive ways of thinking.

In making these claims, I rely to a great extent on a well-established body of social psychology research on procedural justice. The principal findings of this research, which I have discussed in greater detail elsewhere,[15] may be characterized as follows. First, a person's perception of the fairness of an official decision (here, the prosecutor's decision to make or accept a particular plea offer) does not depend solely on the outcome, but also on various attributes of the process used to reach the outcome.[16] Those attributes include (1) whether the people involved had an opportunity to tell their side of the story ("voice"); (2) whether the authorities were seen as unbiased, honest, and principled

15. O'Hear, *supra* note 14.

16. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 196 (2002); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, *in* 30 CRIME & JUSTICE 283, 286 (Michael Tonry ed., 2003).

("neutrality"); (3) "whether the authorities involved [were] seen as benevolent and caring" ("trustworthiness"); and (4) "whether the people involved [were] treated with dignity and respect."[17] The perception of voice, neutrality, trustworthiness, and respect can promote people's acceptance of decisions that they believe to be incorrect or substantively unfair.[18] Indeed, in many settings, perceptions of procedural fairness exert greater influence over acceptance than do the outcomes themselves.[19] Second, the extent to which decision-making processes are perceived as fair helps shape beliefs regarding the legitimacy of the legal authorities responsible for the decision.[20] And third, the perception that legal authorities have legitimacy enhances the sense that the "authorities are entitled to be obeyed."[21] Fair procedures thus promote cooperation with the authorities and compliance with their directives, as well as the development of a more general sense of obligation to obey the law.[22]

The social psychology research thus suggests several public benefits that may result from treating victims with procedural justice during plea negotiations. Procedural justice likely enhances the acceptance of bargained outcomes, potentially diminishing the tendency of some victims to seek vengeance outside the criminal justice system. Procedural justice also fosters cooperative attitudes towards the authorities and promotes general law-abidingness. These benefits, moreover, may be more significant than might first appear. Despite the common stereotype of blameless victims and random victimization, many victims are themselves involved in criminal activity, live in neighborhoods with high crime rates, or are otherwise at high risk for involvement in or exposure to additional offenses.[23] As to such victims in particular, there may be important law enforcement benefits that

17. Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 380 (2003).

18. *See generally* Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 65 (Joseph Sanders & V. Lee Hamilton eds., 2000) (discussing procedural fairness in broad terms).

19. *Id.* at 71.

20. Tyler, *supra* note 16, at 286.

21. *Id.*

22. *Id.* at 297.

23. *See* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 155 (2002) ("Offenders and victims, as groups, tend to share important socioeconomic characteristics. They are disproportionately young, poor, and black.").

result from perceptions that legal authorities are worthy of respect and cooperation. (One need only think of the "anti-snitching" movement found in many minority communities to appreciate the consequences of a breakdown in respect for the authorities.)

Like ripples on a pond, perceptions of fair treatment and acceptance of outcomes may also spread from victims to a broader public. This may occur by word of mouth, or, in more high-profile cases, through media coverage. The public generally distrusts and dislikes plea bargaining,[24] which creates important legitimacy problems for a criminal justice system dominated by the practice. For this reason, as many leading commentators have argued, action should be taken to improve public perceptions of plea bargaining and thereby enhance public confidence in the system.[25] The challenge in doing so, however, is that the public has little direct knowledge of how plea bargaining actually works and little reason to trust the self-serving reassurances of insiders that the system really does justice. Victims' denunciations of plea agreements, especially when publicized in high-profile cases, cannot help matters. Conversely, when a victim feels well-treated by the system and makes such views known to the press, members of the public may feel that they have a more reliable basis for concluding that the plea agreement at issue really did resolve the case appropriately.

Moving beyond the legitimacy concerns of the social psychology paradigm, there may be additional public benefits flowing from procedural justice. Victim voice plays a crucial role in the procedural justice model, and voice opportunities may convey important information to prosecutors before a plea deal is agreed to and acquires what may be unstoppable momentum. The information may bear on a defendant's guilt, e.g., if a victim impact statement contains information that is incidentally exculpatory as to the person being prosecuted for the crime. A growing body of scholarly literature has identified wrongful convictions as a significant problem in the American plea bargaining system;[26] some such convictions may be prevented by providing prosecutors with additional information beyond what is contained in the police reports that are typically relied on in formulating plea offers.[27]

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24. *See* Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQ. 590, 590–91 (2004) (discussing research on public attitudes towards plea bargaining).

25. *See, e.g.*, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 109–10 (2005).

26. *See, e.g., id.* at 81.

27. *See, e.g., Plea Bargaining from the Criminal Lawyer's Perspective: Plea Bargaining in*

Moreover, beyond enhancing the accuracy of guilt determination, additional information may also help prosecutors make better decisions as to sentences. While prosecutors do not formally select the sentence to be imposed after acceptance of the guilty plea, the plea agreement will typically shape the sentence in important ways, such as by calling for the dismissal of particular charges and thereby decreasing the applicable maximum or minimum sentence, or by obligating the prosecutor to recommend a particular sentence or sentencing range. In light of the power that the prosecutor can exercise over the sentence, the public has an important interest in ensuring that the prosecutor has enough information during plea negotiations to determine an appropriate outcome for the case. Potentially useful information from victims may pertain both to the *severity* and to the *type* of sentence imposed. A victim's information regarding the defendant's conduct and the resulting harm will help the prosecutor to ensure that the sentence is proportionate to the crime. A victim's information may also help the prosecutor to better appreciate the need (or lack thereof) for a restitutionary component to the sentence, the need (or lack thereof) for an incarcerative component to prevent revictimization, and the psychological value to the victim of a full, public acceptance of responsibility by the offender.

Procedural justice for victims can thus advance several well-recognized public ends of the criminal justice system, including effective crime control, accurate guilt determination, and proportionate punishment. At the same time, we should not forget that while public ends are indeed paramount in criminal justice, those public ends also encompass some measure of solicitude for victim well-being per se. The availability of restitution for victims in many criminal cases provides an obvious illustration. At a deeper level, a basic concern for victims arguably animates the practice of retribution, which is unquestionably a core—perhaps *the* core—purpose of criminal punishment.[28] More specifically, as Jean Hampton has asserted in her highly influential theory of punishment, "[R]etribution is actually a form of compensation to the victim."[29] This claim follows from Hampton's observation that the

Wisconsin, 91 MARQ. L. REV. 357, 361 (2007) (remarks of former Milwaukee County District Attorney E. Michael McCann, describing reliance on police reports that are sometimes biased or inaccurate).

28. *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 846–47 (2002) (discussing widespread recognition of retributivism as a dominant theory of punishment).

29. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*,

sorts of wrongs that merit retribution are those that implicitly express a denigration of the victim's essential value as a person.[30] The point of the retributive response, then, is to express a contrary message:

> [R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.[31]

Viewing the criminal justice system as retributive in this victim-affirming sense resonates nicely with the common intuition (now reflected in so much victims' rights legislation) that victims have a legitimate stake in the sentencing process, and that victims are appropriately aggrieved when a sentence seems disproportionately light relative to the offense.

If the public ends of criminal law really do include vindicating the value of the victim, then providing procedural justice to victims would advance that end in important ways. As the social psychologists have recognized, one reason that we care so much about fair procedures is that they communicate positive messages as to social standing.[32] Alternatively, if one prefers, like Hampton herself, to draw on the Kantian tradition of moral reasoning, then procedural justice is still readily linked to the recognition of individual worth.[33] The connection is central, for instance, to Jerry Mashaw's influential "dignitary" theory of process.[34] Mashaw notes that voice contributes to individual feelings of self-respect,[35] while a lack of voice implies a loss of control and may be

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39 UCLA L. REV. 1659, 1698 (1992).

30. *Id.* at 1686.

31. *Id.* *See also* DUBBER, *supra* note 23, at 154 ("[T]he point of the *entire* criminal law . . . is to vindicate the victim's right to autonomy.").

32. Tyler & Lind, *supra* note 18, at 76 ("When one is treated politely and with dignity and when respect is shown for one's rights and opinions, feelings of positive standing are enhanced. On the other hand, undignified, disrespectful, or impolite treatment by an authority carries the implications that one is not a full member of the group.") (citation omitted).

33. Hampton, *supra* note 29, at 1667–68.

34. For the most detailed elaboration of Mashaw's theory, see generally JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

35. *Id.* at 200.

seen as a denial of self-worth.[36] Moreover, in addition to voice, Mashaw also highlights the dignitary significance of notice and explanation in connection with government decisions:

> [Incomprehensible processes] take away the participants' ability to engage in rational planning about their situation, to make informed choices among options. The process implicitly defines the participants as objects, subject to infinite manipulation by the system. To avoid contributing to this sense of alienation, terror, and ultimately self-hatred, a decisional process must give participants adequate notice of the issues to be decided, of the evidence that is relevant to those issues, and of how the decisional process itself works. In the end, there also must be some guarantee, usually by articulation of the basis for the decision, that the issues, evidence, and processes were meaningful to the outcome. This reason giving is necessary, both to redeem prior promises of rationality, and to provide guidance for the individual's future planning. In this latter aspect, reason giving confirms the participant, even in the face of substantive disappointment, as engaging in an ongoing process of rational and self-regarding action.[37]

The case for procedural justice for victims, then, arises from both a concern for utilitarian ends, including crime control, and also a desire to complement the dignity-affirming agenda of retributive punishment.[38] To be sure, procedural justice also comes with various costs, perhaps most notably in the form of additional administrative burdens for prosecutors—a matter of particular concern in the present context, for plea bargaining is usually justified as a necessary expedient for overburdened criminal justice officials. The costs, however, are better assessed after we have in mind a more specific proposal for implementing procedural justice, the development of which is my

36. *Id.* at 178.

37. *Id.* at 175–76.

38. This is not to claim, however, that victim participation in plea bargaining necessarily contributes to the resolution of victims' psychological trauma, which may actually be heightened by engagement with criminal justice processes. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 296 n.35. As Professor Beloof has argued, however, the potential risks to some victims do not constitute a persuasive reason to withhold from all victims the option of participating. *Id.*

project in the next two Parts.

II. THE CONSULTATION REQUIREMENT: POTENTIAL AND PITFALLS

At first blush, mandatory consultation would seem a clearly useful way to enhance perceived procedural justice. Requiring a prosecutor to obtain the victim's views before consummating a plea deal guarantees the victim some measure of voice in the process—voice that may be considerably more meaningful than an opportunity to speak at the plea hearing or at sentencing, by which time, in many cases, the most important decisions have already been made.

Yet, mandatory consultation has also been subject to a variety of important criticisms, which essentially reflect two distinct concerns. First, consultation diverts scarce criminal justice resources that could be better spent elsewhere.[39] There is, of course, the time spent directly soliciting and receiving victim input, which, depending on the circumstances and individuals involved, may or may not be a lengthy process. Even when the exchange is brief, however, it may represent a significant burden in routine, high-volume cases, in which many prosecutors are accustomed to plea "negotiations" that last no more than a few minutes. Perhaps even more important, though, are the ancillary logistical difficulties. Many victims will be hard to track down, slow to respond to letters and phone messages, or unable to visit the courthouse or prosecutor's office during regular working hours. Consulting with such victims may not only require considerable effort on the part of the prosecutor, but also may entail repeated continuances and fruitless court appearances. Such delays are not only costly to the lawyers and court personnel, but they may also represent a great unfairness to a defendant waiting in pretrial detention for resolution of a routine, low-level case. Indeed, in some cases, the victim himself or herself may actually wish more for prompt resolution than for an opportunity to weigh in on the proposed plea deal.

Such concerns may be alleviated by adopting some sort of "reasonable efforts" proviso that effectively excuses the prosecutor from consulting with victims who present logistical challenges. But, this response may undermine the practical value of the consultation requirement; the victims who respond promptly to messages and get themselves to prosecutors' offices on a timely basis will probably do a pretty good job of making their voices heard with or without mandatory

39. *See, e.g.*, Edgar, *supra* note 9, at 508–09.

consultation.

Alternatively, a prosecutorial office may lessen the administrative burdens by hiring a victim coordinator to handle the logistics and perhaps even the consultation itself. However, a capable paraprofessional staff will not come without its own costs. Moreover, there may be significant risks of error or misunderstanding when victim-prosecutor communications go through an intermediary.

A second broad area of concern is that of disappointed expectations. As one critic, Allen Edgar, has put it:

> Many victims already think the prosecutor is supposed to represent them and expect their impact statement to affect the outcome of sentencing. When these expectations go unfulfilled, as they usually do, victim dissatisfaction increases, not just with the sentencing process but with the criminal justice system as a whole. Compulsory consultation can only increase the likelihood that victims will think of the prosecutor as representing them, while participation . . . will generate greater expectations—and subsequent increased dissatisfaction when they remain largely unfulfilled.[40]

From the standpoint of procedural justice theory, this critique is an especially striking one: a voice opportunity intended to *increase* victim satisfaction and acceptance of outcomes may actually end up doing precisely the opposite.

Edgar's concerns may be alleviated to the extent that prosecutors take particular care to ensure that victims have an accurate understanding of the prosecutorial role and the limits of the consultation requirement—but not without thereby exacerbating the transaction costs problem. Indeed, some might see something of a Catch-22 here: the only way to ensure real improvements in victim satisfaction through consultation may be to insist on such intensive efforts by prosecutors as to defeat the whole efficiency-enhancing point of plea bargaining.

III. PROSECUTORIAL GUIDELINES AND PROCEDURAL JUSTICE

The use of prosecutorial charging and plea bargaining guidelines may function as an effective complement to mandatory consultation, both by addressing the major objections to consultation and by making

40. *Id.* at 507 (citation omitted).

an important, independent contribution to procedural justice. Before explaining these benefits, however, I will offer a more detailed description of how the guidelines might be crafted and fit into the plea bargaining process.

A. Creating and Using Prosecutorial Guidelines

In considering how best to structure prosecutorial guidelines, we may benefit from more than two decades of experience in this country with sentencing guidelines. Like prosecutorial guidelines, sentencing guidelines are intended to identify and assign weights to many of the key variables that properly dominate a traditionally discretionary decision-making process (here, the judge's selection of a sentence). In the sentencing context, different jurisdictions have experimented with a variety of different ways of structuring and using guidelines, some of which have been considerably more successful than others. Salient lessons include the following:

- Guidelines should be simple, focusing the decision maker on a small number of variables that really do and should control the outcome in most cases.[41]

- Guidelines should be designed for ordinary cases, leaving the decision maker with discretion to depart from the guidelines for cases determined to be unusual in some significant respect.[42]

- Guidelines need not be formally "mandatory" or externally enforceable in order to make a difference; while front-line decision makers will pay attention even to purely *advisory* guidelines that show genuine respect for the experience and practical wisdom of those in the trenches, such decision makers can and will circumvent *mandatory* guidelines they perceive to be illegitimate or

41. *See, e.g.*, R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 756 (2001); Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 16–20 (2005).

42. *See, e.g.*, The Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-*Booker *World*, 18 FED. SENT'G REP. 310, 316–17 (2006).

substantively misguided.[43]

These lessons dovetail nicely with the field studies of plea bargaining, underscoring the suitability of plea bargaining for guidelines treatment. Field studies demonstrate the existence of well-established "going rates" for different categories of offense and offender.[44] Thus, experienced lawyers are already accustomed to sorting out cases based on a limited number of variables; this is what permits them to reach agreement on plea terms so swiftly in so many cases.[45] The research also indicates that experienced lawyers already think in terms of ordinary and unusual cases and are well attuned to what differentiates the two.[46]

All of this suggests that prosecutors should not find it especially onerous to produce reasonably straightforward, usable guidelines based on what they already do, guidelines that would simply identify the standard plea deal for commonly recurring case types. For instance, one might imagine a guideline for muggings that looks like this:

Standard Charge	***Offense/Offender Characteristics***
Simple theft	None of the aggravating characteristics associated with the more serious standard charges
Theft from person	Any one of the following: defendant has prior conviction for felony or

43. *See, e.g.*, Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post*-Blakely *Era*, 17 FED. SENT'G REP. 233, 235–39 (2005); *see also* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post*-Mistretta *Period*, 91 NW. U. L. REV. 1284, 1289–90 (1997) (discussing widespread circumvention of federal sentencing guidelines).

44. *See, e.g.*, MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 187–88 (paperback ed. 1992); CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA 131 (1993).

45. *See, e.g.*, FEELEY, *supra* note 44, at 187–88; MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 35 (paperback ed. 1981).

46. *See* MCCOY, *supra* note 44, at 60–61.

	other violent offense; defendant was armed; victim was elderly or otherwise especially vulnerable
Robbery	Any two of the characteristics associated with "theft from person" (including two prior convictions for a felony or other violent offense); or Any one of the following: victim suffered a physical injury as a result of the offense; or defendant brandished or otherwise visibly carried a deadly weapon
Armed robbery	Defendant was armed plus any two characteristics associated with "robbery"

In order for the State to agree to resolve a case without trial, the defendant must normally plead guilty to the applicable standard charge. It is appropriate to depart from the standard charge when the standard charge significantly overstates or understates the severity of the crime, particularly when the applicable offense and offender characteristics do not accurately or fully reflect the harm done, the dangerousness of the offense, or the need to prevent further crimes by the offender.

Of course, the recommended list of offense and offender characteristics does not come close to exhausting the potentially relevant characteristics. Other characteristics, however, may be taken into account at sentencing by the judge, or, in unusual cases, used as the basis for a nonstandard charge ("departure"). In other words, a set of prosecutorial guidelines designed to identify a *standard* offense of

conviction to be sought in *ordinary* cases simply need not deal with the full range of real-world complexity. The guidelines may, however, require a somewhat lengthier set of variables in jurisdictions in which plea agreements routinely cover not only an offense of conviction, but also sentencing recommendations or stipulations. At the same time, it is important even in such jurisdictions not to forget the virtues of simplicity in guidelines drafting.[47]

How might guidelines be incorporated into the plea bargaining process in a manner that also respects the goal of victim voice? I would envision something like the following. Shortly after a decision is made to file charges in a case, the prosecutor contacts the victim. An initial communication provides general background information about the criminal justice system, includes copies of any potentially relevant prosecutorial guidelines, and identifies the prosecutor's initial assessment of what the applicable standard charge would be. The communication further explains the sentencing consequences of a guilty plea to the standard charge. Finally, the communication solicits the victim's views on the appropriateness of the standard charge in his or her case. The victim is invited to supply additional information that might show the prosecutor's initial assessment of the case was incorrect (for instance, where the police report fails to mention it, a mugging victim might inform the prosecutor that the defendant did, in fact, brandish a weapon), as well as information that might justify a nonstandard resolution (for instance, if the defendant, although not carrying a weapon, acted in an extremely threatening manner that produced intense levels of fear comparable to an armed robbery).[48] Victim responses are requested promptly, with multiple options available for submissions: letter, email, Internet form, phone call, or in-person meeting. If the initial communication is by mail, it is followed up with a phone call by the prosecutor or victim coordinator to ensure receipt and answer questions.

At the same time, the defendant is asked for the same sort of input: is the initial assessment of the appropriate plea either incorrect or otherwise unjust? If either the victim or the defendant supplies information that, in the prosecutor's view, justifies movement from the

47. *See generally* Ruback & Wroblewski, *supra* note 41.

48. Prosecutors ought to provide a clear idea in advance of what information they might deem relevant, not only so as to minimize the likelihood that their time and victims' time will be wasted through the submission of much unhelpful material, but also so that any subsequent rejection of victim information as irrelevant will less likely be viewed as unexpected or arbitrary.

initial assessment, then the other side is given an opportunity to respond if such a response might be helpful.[49] The prosecutor may also solicit additional information from police officers to help resolve discrepancies. Once the prosecutor reaches a definitive view on the appropriate plea deal, the defendant has an opportunity to accept or reject it. If there is acceptance, then, with prior notice to the victim, the case is scheduled for a plea hearing. At the hearing, the prosecutor briefly explains, by reference to the guidelines, how he or she determined the appropriate charge. If either the victim or the defendant sought a different resolution, the prosecutor also briefly summarizes that person's position and explains why it was not accepted. If the victim is aggrieved, then he or she will have an opportunity to address the court and argue that the plea deal should be rejected based on the traditional legal standards for guilty plea acceptance.

Should the guidelines be enforceable? For instance, should a victim have any recourse if the prosecutor made an obvious error in determining the standard plea deal (e.g., by ignoring credible, uncontroverted evidence that a robber brandished a gun)? Or if the prosecutor abused his or her discretion in deciding to depart from the standard deal (e.g., by reducing charges for no apparent reason)? In theory, the victim might be given a right to "appeal" the prosecutor's decision either to the judge or internally within the prosecutor's office to supervisors. Without a right of appeal, of course, there is a risk that guidelines will be ignored, leaving us back in Allen Edgar's world of disappointed victim expectations.[50]

On the other hand, the creation of formal enforcement mechanisms may substantially increase transaction costs, actually exacerbate the problem of disappointed expectations, or both. In practice, the judiciary has proven extremely reluctant to second-guess charging and plea bargaining decisions,[51] while formal internal complaint procedures have also often proven ineffective and frustrating to outsiders.[52] Moreover,

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49. This layer of process is perhaps appropriately dispensed with in routine, low-level cases. Indeed, as a matter of fairness to defendants, it may be best to carve out an exception to mandatory consultation for certain categories of cases that are likely to result in a sentence of time served. In such cases, any time spent on fulfilling the consultation requirement might effectively result in a substantial increase in sentence length for defendants who are unable to secure pretrial release.

50. *See* Edgar, *supra* note 9, at 507.

51. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 14–15 (2007) (discussing relevant Supreme Court jurisprudence).

52. *See id.* at 157–60 (discussing complaints about the United States Department of Justice's Office of Professional Responsibility).

the experience with sentencing guidelines suggests that formal enforcement may be unnecessary.[53] If front-line prosecutors have a meaningful voice in the development of guidelines and do not perceive guidelines to be a wholly top-down initiative, then they may take the guidelines seriously even without a threat of formal "reversal" by a judge or supervisor. Additionally, various *informal* enforcement mechanisms may also strengthen compliance. For instance, the victim's opportunity to air grievances at the plea hearing may result in public embarrassment for a prosecutor who abuses his discretion in applying the guidelines. Moreover, the risk of complaints to the press and bad publicity creates incentives for elected head prosecutors to monitor compliance and address problems even in the absence of a formal review mechanism.

B. Making Consultation Work

Guidelines may powerfully complement a consultation requirement, including by diminishing some of the problems associated with a stand-alone requirement. Most importantly, guidelines address the problem of disappointed expectations. If a victim sees that the prosecutor's primary role is to apply general guidelines to specific cases, then the victim should be able to better appreciate that the prosecutor is not his or her lawyer, but rather a custodian of broader public interests. Moreover, the very existence of plea-bargaining guidelines underscores that plea bargaining is the normal method of resolving cases and makes clear that plea bargaining occurs not against a blank slate in each case, but instead in the shadow of a long course of precedent and prior dealings between prosecutors and defense lawyers. Finally, guidelines give the victim a good idea early in the case as to the likely content of the plea deal, as well as to the sorts of considerations that might move the prosecutor away from his or her initial assessment. All of this should help minimize the likelihood that a victim will feel surprised when a plea deal is presented to the court or betrayed when a prosecutor decides to resolve a case in a way that is contrary to the victim's preferences.

Guidelines may also lessen the transaction costs of consultation. To

53. *See* Hunt & Connelly, *supra* note 43, at 237 ("A system perceived as responsive and legitimate by judges, reinforced by good communication from data agencies, might be more immune to these problems [of circumvention] and actually more adaptable to agreed-upon change. Advisory guidelines are at least as likely to satisfy these requirements in the eyes of judges as presumptive guidelines.").

be sure, guidelines do require some additional upfront transaction costs as they are drafted and as prosecutors are trained in their use. Over the long run, however, guidelines may facilitate efficient and timely consultation. The guidelines will indicate a likely resolution and clarify the matters that are of particular concern to the prosecutor, helping the victim to tailor his or her comments in the most productive way. With less need for back and forth communication, consultation may not require the prosecutor and victim to meet in person or to speak live on the telephone. Instead, victims may be able to provide their input quite effectively through a single letter or voicemail message. Alternatively, with less likelihood of a misunderstanding of the prosecutor's role and likely outcome, guidelines may make it easier and more appropriate for consultation to occur through a specialized victim coordinator.

C. Independent Benefits of Guidelines

In addition to shoring up the consultation requirement, guidelines can also make important independent contributions to the sorts of goals identified in Part I.[54] For instance, consider the procedural justice effect: if victims are treated in a way that is perceived to be procedurally just, they are more likely to accept the outcomes in their cases, feel respect for the authorities, and regard the law as something they ought to obey. Although voice (embodied here by consultation) is an important component of procedural justice, the social psychology literature also identifies neutrality as another important characteristic.[55] Neutrality is associated with a decision maker who is unbiased, honest, and principled.[56] In particular, the social psychology research indicates that a decision maker can help to establish his or her neutrality through the use of objective criteria.[57] Thus, prosecutors may further procedural justice ends by employing guidelines that are built around objective offense and offender characteristics, as in my sample robbery guideline. That way, even when a victim feels disappointed with the way his or her case was resolved, the victim may nonetheless have confidence that the outcome was nothing personal—the prosecutor was just adhering to

54. Indeed, it is possible that guidelines alone, without a linked consultation requirement, would strike the optimal balance between the competing goals of maximizing procedural justice and minimizing transaction costs. A transparent, objective decision-making process might ultimately be more valuable from the victim's perspective than an opportunity for voice.

55. Tyler & Thorisdottir, *supra* note 17, at 380.

56. *Id.*

57. Tyler, *supra* note 16, at 298.

predetermined, general norms.

In addition to enhancing the procedural justice effect, guidelines may also help prosecutors to reach better substantive outcomes. The process of first developing guidelines and then considering on a case-by-case basis what warrants departure and how to justify decisions may help prosecutors to be more self-conscious and deliberative about what they do, which may contribute to more thoughtful and better-informed decision making. Moreover, guidelines may also lead to greater uniformity—that is, the consistent treatment of similar cases—which is in itself an important component of substantive justice.[58] Victims and other observers will perceive outcomes to be unfair if they diverge markedly from expectations, and expectations are formed, in part, by the outcomes of prior cases.[59] The disparate treatment of similar cases may thus undermine the criminal justice goals of reaffirming the basic dignity of all victims and rejecting the implicit message of inequality conveyed by criminal offenses. Guidelines may help to address this problem by minimizing the number and extent of disparities.

Guidelines may also work to reaffirm victim dignity in the more procedural sense suggested by Professor Mashaw's work. As noted above, Mashaw emphasizes the importance of notice and explanation as forms of due process that embody respect for the rationality and autonomy of decision recipients.[60] Guidelines would facilitate this sort of due process in the plea bargaining context, providing victims *ex ante* with clear notice as to what factors are of greatest significance, while providing prosecutors *ex post* with a convenient means of explaining their decisions. To be sure, as Mashaw himself warns, an overly rigid reliance on simple, objective guidelines may be as demeaning as a system of broad, open-ended discretion.[61] For that reason, it is

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58. *See* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 485–86 (1988).

59. *See* James H. McGinnis & Kenneth A. Carlson, *Offenders' Perceptions of Their Sentences*, 5 J. OFFENDER COUNSELING SERVS. & REHABILITATION., Mar. 1982, at 27, 35 ("These data [gathered in prison inmate interviews] indicate that offenders' perception of their sentences as lenient or severe is a function of the deviation of the sentences from their expectations."); Michael M. O'Hear, *The End of* Bordenkircher*: Extending the Logic of* Apprendi *to Plea Bargaining*, 84 WASH. U. L. REV. 835, 866, 881 (2007) (discussing importance of expectations in determining fairness).

60. MASHAW, *supra* note 34, at 175–76.

61. *See, e.g.*, Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 30 (2001) ("We are confronted everywhere by rules that do not seem to fit our particular cases. Application of the rules not only disappoints our expectations, it often seems to falsify our experience, and to challenge our conceptions of ourselves as autonomous moral agents.").

important to balance guidance and discretion. I have attempted to do that in my proposal by recognizing the appropriateness of departures from the guidelines in unusual cases. I would also, in the same vein, preserve a significant (though not unlimited) degree of judicial discretion at sentencing to provide an alternative opportunity for victims to seek recognition of the unique dimensions of the harm they have suffered.[62]

Finally, although I emphasize the role of victims in this Article, it should also be noted that (as I have argued elsewhere) guidelines may contribute to helpful procedural justice effects among defendants,[63] as well as enhance the transparency, and hence democratic accountability, of the plea bargaining system to the general public.[64]

IV. RESPONDING TO OBJECTIONS

Even assuming that we are in a jurisdiction that has already committed itself to a role for victims in plea bargaining, as by adopting a consultation requirement, there are still a number of important objections that might be made to my additional proposal for the complementary use of prosecutorial guidelines. This Part briefly considers three such objections: transaction costs will be excessive, recalcitrant prosecutors will undermine the effectiveness of guidelines, and guidelines will ratchet up the severity of an American criminal justice system that is already too harsh by global standards.

A. Transaction Costs

Any attempt to establish a meaningful role for victims in plea bargaining will impose additional transaction costs on the criminal justice system. However, a jurisdiction with mandatory consultation has already decided that, at some level, the trade-off is worthwhile. And if there is a commitment to robust—as opposed to merely symbolic—consultation, then the overlay of guidelines may actually help to make consultation more timely and efficient.[65] To be sure, such benefits must be counterbalanced against the transaction costs of guidelines

62. Thus, the guidelines envisioned here are not intended to function in nearly so rigid and crude a fashion as mandatory minimum sentencing laws. As Professor Beloof has argued, mandatory minimums devalue the participatory rights of victims and offenders alike. Beloof, *supra* note 38, at 302–03.

63. O'Hear, *supra* note 14.

64. *Id.*

65. *Supra* Part III.B.

development, as well as the costs of training prosecutors in their use and perhaps monitoring compliance and responding to problems. Additionally, as I envision it, the guidelines might occasionally give rise to a form of collateral quasi-litigation, as prosecutors try to sort out competing claims from victims and defendants. (Imagine, for instance, a robbery case in which the victim and defendant disagree as to whether a gun was brandished during the crime.) Prosecutors will have to find appropriate ways of balancing the desire for accuracy with the essential nature of plea bargaining as a form of expedited case resolution. On the other hand, with or without my proposal, prosecutors should be striving for consistency and accuracy in their plea bargaining decisions; the guidelines may focus and channel victim-defendant disputes, but they do not fundamentally alter what the conscientious prosecutor should be doing anyway by way of truth-seeking. In the end, while transaction costs are a legitimate concern, they do not necessarily appear either unmanageable or unwarranted.

B. Prosecutorial Cooperation

As envisioned here, guidelines will subject the exercise of prosecutorial discretion to greater transparency and public accountability. Yet, for reasons both good and bad, discretionary decision makers often resist transparency and accountability. This tendency presents a significant challenge for my proposal because recalcitrant prosecutors may effectively undermine the guidelines project at two levels. First, at the general level of guidelines drafting, prosecutors may seek to build so much discretion into the guidelines themselves that they lose much of their usefulness. For instance, a robbery guideline might be drafted so as to require the maximum charge in "unusually serious" cases—a subjective determination that would leave prosecutors with considerable wiggle room in deciding whether to pursue the maximum charge. Second, at the level of case-specific application, individual prosecutors may disregard the guidelines or use them in disingenuous ways, as by accepting poorly justified arguments for departures.

The first problem may be addressed through external regulation of the guidelines. For instance, an independent commission may be charged with ensuring that guidelines are appropriately specific and objective. On the other hand, dealing with the first problem in this way may exacerbate the second problem, as prosecutors may take the guidelines less seriously on a case-by-case basis to the extent they are perceived as something that has been externally imposed.

It would be preferable to secure genuine buy-in from prosecutors. Some may be swayed by the potential for procedural justice in plea bargaining to advance crime-control objectives. Although procedural justice does not fit the standard "get-tough" paradigm of crime control that is often found in law enforcement culture, thoughtful prosecutors recognize the limitations of "get-tough," and many have embraced promising, if softer, alternatives, such as restorative justice and problem-solving courts.[66] Moreover, many prosecutors view themselves as having a special obligation to victims, and there is now a long history of collaboration between prosecutors and the victims' rights movement.[67] To the extent that guidelines are viewed as a victims' rights issue—as they should be—then prosecutors will likely prove more open to their adoption.

C. Harshness

The national experience with sentencing guidelines raises an additional area of concern: the widespread adoption of sentencing guidelines over the past three decades has coincided with an unprecedented lengthening of prison terms and expansion of prison populations.[68] Making the sentencing process more transparent has arguably contributed to its politicization, fueling the steady drumbeat of election-year sentencing bills that ratchet prison terms ever upward. Perhaps it is better to leave plea bargaining in a black box where prosecutors have the freedom to exercise lenience on a case-by-case basis without fear of political repercussions. By contrast, as they reduce plea bargaining practices to publicly available guidelines, politically minded prosecutors will doubtlessly err on the side of harshness and may grow quite reluctant to show lenience on a case-by-case basis against the backdrop of clear norms of severity.[69]

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66. *See, e.g.*, Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls,* 89 MARQ. L. REV. 251, 260–64 (2005) (describing the growing acceptance of restorative justice among criminal justice professionals and specific examples of programs involving prosecution offices).

67. O'Hara, *supra* note 11, at 242–43, 245; *Plea Bargaining from a Criminal Lawyer's Perspective: Plea Bargaining in Wisconsin, supra* note 26, at 377 (remarks of federal prosecutor comparing her relationship with victim to defense lawyer's relationship with client).

68. *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 3 (2003) (noting quintupling of U.S. prison population between 1970s and 2000, giving U.S. highest per capita incarceration rate in the world).

69. Professor Wright has raised such a concern over the adoption of prosecutorial

The risk is admittedly a real one, but there are many caveats and contingencies in this story. For instance, the historical relationship between sentencing guidelines and sentencing severity may be more coincidental than causal. There are certainly many other potential explanations for American harshness than simply the adoption of sentencing guidelines.[70] Moreover, while the guidelines-severity association may be manifest at the federal level, the association is less clear elsewhere, with some states actually achieving *reductions* in prison admissions after adopting guidelines.[71] (Indeed, even at the federal level, the guidelines system may sometimes operate as a brake on severity.[72]) One salient lesson from the state experience has been that guidelines may avoid or minimize the one-way ratchet problem when drafters are specifically instructed to predict the effects of what they do on prison populations (and hence prison budgets).[73] A similar mandate may be given for prosecutorial guidelines, providing prosecutors with political cover when they choose not to maximize severity.

An additional limitation on severity comes from defendants. As plea offers grow harsher, more and more defendants will choose to go to trial. Given the resource demands of trials, prosecutors will, at some point, be forced to choose between more lenient guidelines and a significant reduction in the number of cases that they can take. Of course, prosecutors who turn away too many cases risk political repercussions that are just as severe as those who adopt lenient guidelines.

More speculatively, it is possible that sentence severity is driven, in part, by the common belief that prosecutors give away too much in plea

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guidelines, but hopes that a better-informed public will not necessarily "endorse[] cruel and pointless policies." Wright, *supra* note 14, at 1104–05.

70. *See, e.g.*, WHITMAN, *supra* note 68, at 6 (identifying cultural factors behind American harshness); Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 799–800 (2004) (describing grassroots movement in 1970s and 1980s for tougher response to drug abuse problems, contributing to adoption of harsh mandatory minimums for drug offenses at the federal level).

71. *See, e.g.*, Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENT'G REP. 41, 45 (2002) (discussing North Carolina experience).

72. *See* Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1495–96 (2000) (noting that Congress adopted safety valve feature for mandatory minimum laws in response to concerns that mandatory minimums were disrupting proportionate sentencing scheme contained in guidelines).

73. Wilhelm & Turner, *supra* note 71, at 46.

bargaining.[74] Legislators may be trying to use a predictably tough sentencing system to offset an arbitrarily lenient plea bargaining system. If public confidence in the plea bargaining system were enhanced, as through transparent guidelines, then perhaps some pressure would be taken off the sentencing system.

V. CONCLUSION

As demonstrated by much recent victims' rights legislation, it is becoming increasingly well-accepted, at least at the level of abstract principle, that victims should be given an opportunity to participate in plea bargaining.[75] It is less clear whether this commitment really is more substantive than symbolic[76]—that is, whether victims and the public will insist on, and prosecutors accept, real changes in existing practices. If we are serious about victim participation, then it is time to move beyond mushy consultation requirements and think more rigorously about due process. Prosecutorial guidelines can play an important role in bringing greater procedural justice to plea bargaining. Moreover, they promise broader public benefits than just increased levels of victim satisfaction, including enhanced feelings of respect for the law and legal authorities among victims and defendants alike, better-informed and more consistent plea bargaining outcomes, and improved public accountability.

Guidelines may also give rise to a variety of costs, and that the benefits will outweigh the costs cannot be guaranteed. Indeed, the overall success of prosecutorial guidelines will likely depend on many subtle, and perhaps currently unforeseeable, factors. Interestingly, this was also the situation facing sentencing guidelines thirty years ago: great potential seen at the level of theory was matched with great uncertainty at the level of practice. Reformers proceeded notwithstanding the uncertainties. The result was an uneven string of successes and failures. Although some mistakes and rough spots are unavoidable, the prosecutorial guidelines project may perhaps benefit from lessons learned the hard way by the sentencing reform movement. With due regard for the virtues of simplicity, flexibility, and obtaining buy-in from

74. *See* Herzog, *supra* note 24, at 591 (discussing this criticism of plea bargaining).

75. *See* OVC, *supra* note 7, at 1–2 (summarizing state laws dealing with role of victim in plea bargaining).

76. *See* Michael M. O'Hear, *Punishment, Democracy, and Victims*, 19 FED. SENT'G REP. 1, 1–4 (2006) (noting both symbolic appeal of victims' rights legislation and uncertainty over whether victims' rights movement will effect "real reform of the criminal justice system at an operational level").

front-line users, there is good reason to hope that prosecutorial guidelines may consistently live up to expectations more than sentencing guidelines.

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