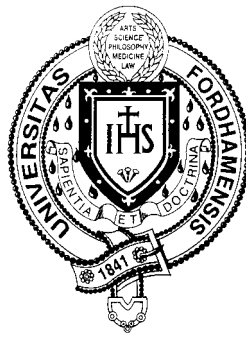


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*Prosecutors and Their Agents —
Agents and Their Prosecutors*

Daniel C. Richman

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Draft

Prosecutors and Their Agents, Agents and Their Prosecutors

By Daniel Richman*

Abstract: This is an effort to describe the dynamics of interaction between federal prosecutors and federal enforcement agents, and to suggest how these dynamics affect the exercise of enforcement discretion. After considering the virtues and pitfalls of hierarchical and coordinate perspective, the article offers a normative model that views prosecutors and agents as members of a “working group,” with each side monitoring the other. It concludes by exploring how this model can be furthered or frustrated with various procedural and structural changes.

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I. Introduction

Although the concern is hardly a new one,¹ recent years have seen intense interest in prosecutorial discretion and motivation.² One reason for this renewed focus may be the advent of the Federal Sentencing Guidelines, which according to most analyses have increased the power of prosecutors vis a vis other actors in the criminal justice system.³ Another may be the growing recognition that the road to criminal justice reform lies not through the battleground of defendant rights – where trench warfare has replaced the swift advances of the Warren years⁴ and even the advances have generally proved to be

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¹See, e.g., Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969); John Kaplan, *The Prosecutorial Discretion – A Comment*, 60 *Nw. U. L. Rev.* 174 (1965); Wayne LaFave, *The Prosecutor’s Discretion in the United States*, 18 *Am. J. Comp. L.* 532 (1970).

²Robert Weisberg, *A New Agenda for Criminal Procedure*, 2 *Buff. Crim. L. Rev.* 367, 367-68 (1999) (detecting “sense that the challenge of a new criminal procedure will be to find ways of evaluating and, if necessary, newly regulating, that vast area of the system that often gets relegated to the default category of executive branch ‘discretion’”).

³See, e.g., Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 *U. Chi. L. Rev.* 901 (1991); Jeffrey Standan, *Plea Bargaining in the Shadow of the Guidelines*, 81 *Cal. L. Rev.* 1471 (1993). But see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 *Wisc. L. Rev.* 679 (1996).

⁴Trench warfare means no swift retreats either. See *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (reaffirming *Miranda v. Arizona*, 384 U.S. 436 (1966)).

just chits to be traded for lower sentences⁵ – but though attention to what Jerry Lynch has called the “indigenous administrative-inquisitorial structures that in fact process most American criminal cases.”⁶

Certainly the renewed focus on prosecutorial discretion and motivation is salutary, as we move beyond simplistic assumptions of “conviction maximization,” in search of richer descriptive models.⁷ But efforts to celebrate or bemoan prosecutorial power go too far when they shift attention too far away from the law enforcement agencies that are primarily responsible for case selection and choice of investigative tactics.⁸ No one, of course, really dismisses the role of the police.⁹ But the model is static: The police or (in the federal system) “agents” decide whom to arrest or investigate, and prosecutors decide whom to charge formally. Each enforcement actor is treated as making an independent discretionary decision, supreme within his realm. If anyone has the upper hand, it is the prosecutor, because she has the last word.

The first goal of this article, pursued in Part II, is to replace this picture with one that captures the negotiation or game that occurs between agents and prosecutors and shows how their iterated interactions will affect investigative and adjudicative¹⁰ decision making, and the allocation of enforcement resources. If the resulting equilibria elude specification, the factors that will affect the allocation of power at least can be identified. Because general discussions about the police-prosecutor dynamic that ignore institutional structures and procedural rule miss some of the most important of these factors, the focus here is on a single system – the federal.

⁵ See Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 *Vand. L. Rev.* 1181, 1237 (1996) (“in a criminal justice system in which plea bargaining is the dominant mode of adjudication, the chief significance of a much-vaunted constitutional right may lie in its value as a bargaining chip”).

⁶ Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Ford. L. Rev.* 2117, 2151 (1998).

⁷ See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 *Va. L. Rev.* 939, 981-89 (1997); see also Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 *J. Legal Stud.* 289, 295-96 (1983) (prosecutor “attempts to obtain the maximum deterrence from his available resources . . . by bringing new prosecutions until the marginal deterrence available from investing extra resources in a given prosecution is the same as the return available from investing in some other prosecution”); William Landes, *An Economic Analysis of the Courts*, 14 *J.L. & Econ.* 61, 63 (1971) (prosecutors seek maximization of convictions weighted by sentence)

⁸ See, e.g., Glaeser, Kessler & Piehl, *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 *Am. Law & Econ. Rev.* 259 (2000) (modeling selection of drug cases for federal prosecution based on the assumption that the decision is made primarily by prosecutors).

⁹ See Frank W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (Frank J. Remington, ed., 1969); Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 *Am. Crim. L. Rev.* 383, 411-12 (1976) (“Because the prosecutor occupies a central position in [system that includes other agencies and officials] which requires cooperation, coordination, and compromise of all its participants, his own need to cooperate, coordinate, and compromise restricts his exercise of discretion.”).

¹⁰ “Adjudicative” here refers not to judicial decisions but to decisions as to how the government will proceed in the adjudicative (post-arrest) phase of a case.

A second goal of this article is methodological. In the late 1960s, Kenneth Davis and others put criminal procedure on the road to an encounter with administrative law.¹¹ But the encounter has proved somewhat sterile. Davis's normative agenda has long become a standard part of the criminal procedure literature, with a long line of distinguished scholars echoing his call for formal guidelines to channel enforcement discretion.¹² By contrast, the positive contributions that an administrative law perspective offer to understanding how the enforcement bureaucracy actually works have been left largely unexplored, an oversight that has become particularly regrettable now that administrative law scholarship has been enriched through the introduction of insights from positive political theory and institutional economics.¹³

The insights of the administrative law literature are not the only ones left untapped, to the detriment of criminal justice analyses. So too has been work, mostly in corporate law literature, relating to the institutional role of lawyers. Just because the relationship between prosecutors and agents is at heart very different from that between lawyers and clients does not mean that some of the same obstacles to coordination that this literature labels "agency problems" do not figure in that bureaucratic interplay, and that the agent-prosecutor dynamic cannot be illuminated from this perspective. Similarly, one could also profitably draw on insights from the behavioral law and economics and cognitive psychology literature, which counsel that we temper rational choice analysis with a recognition of systemic biases that may have behavioral, as well as institutional, origins.¹⁴

Drawing on these analytical perspectives, the methodological project here is to reduce the insularity of the criminal enforcement literature, and engage in the kind of "microanalysis" envisioned by Edward Rubin: "an institutionally grounded analysis of the classic question concerning the role of pluralistic and rational decisionmaking in a

¹¹ See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 *Stan. L. Rev.* 1036 (1972).

¹² See *Id.* at 188-214; Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 *UCLA L. Rev.* 1 (1971); Charles Breitel, *Controls in Criminal Law Enforcement*, 27 *U. Chi. L. Rev.* 427 (1960); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *Harv. L. Rev.* 1521 (1981).

¹³ See, e.g. Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431 (1989); Terry Moe, *The Politics of Structural Choice*, in Oliver E. Williamson ed., *Organization Theory* (1990); Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 *J. L. Econ. & Org.* 306, 308 (1999); Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393, 1413 (1996).

¹⁴ This is not to suggest that the administrative law literature isn't also exploring these insights. See, e.g., Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 *Cornell L. Rev.* 549 (2002); William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 *Cornell L. Rev.* 616 (2002). But see Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 *Cornell L. Rev.* 671 (2002) (noting limitations of literature).

democratic system.”¹⁵ The goal is to “make sense” of interactions at a middle level of theory, particularized enough that actors would recognize the world they live in, but streamlined enough that theoreticians and empiricists who look askance at my uncomfortable straddle might find profitable avenues for more rigorous study. The risk of facing charges that my “model” simply generalizes the experiences of one former prosecutor in an atypical district under superseded conditions¹⁶ is just one I’ll have to take.¹⁷

In Part III, the article moves from the descriptive to the normative and asks what *should* the prosecutor-agent dynamic look like in the federal system, and how can it be improved. Hitching a normative project to an all-too-tentative descriptive endeavor may seem foolhardy, but there is a good necessity defense. The way power is allocated between agents and prosecutors is a function of their organic relationship, political preferences, and exogenous contingencies like September 11, 2001. But it is also a function of conscious or unreflective choices about particular rules of interaction or organizational arrangements -- choices that are not constitutionally or even politically required, and could easily be different. So long as these choices are being made anyway, they might as well be made on the basis of some vision of how prosecutor-agent relationships should be structured.

The vision developed -- that of the working-group -- may seem to some like a fancy way of describing the status quo. Perhaps it does, and we live in the best of all possible worlds. Given the range of agent-prosecutor dynamics across the federal system, however, it is far more likely that there is room for improvement (to put it mildly). And a focus on institutional dynamics reveals opportunities in some surprising places for criminal procedure law to promote healthier relationships among law enforcers

From time to time, I will refer to analogous or divergent practices in other systems, state and foreign, past and present. Thinking about separation of power dynamics within criminal enforcement systems – comparing the benefits of separating functions with those of “checks and balances” involving overlapping functions¹⁸ – obviously could have payoffs outside the federal system. One might even gain insights into how to structure a enforcement system from scratch, as is being done in the European Community,¹⁹ and in the area of international criminal law, where the tensions

¹⁵ Rubin, *supra* note __, at 1426.

¹⁶ I was an Assistant in the Southern District of New York from 1987 to 1992. See James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 108 (1978) (on the exceptional degree of autonomy that the Southern District of New York U.S. Attorney’s office has traditionally enjoyed).

¹⁷ Cf. Lee Epstein & Gary King, The Rules of Inference, 69 U. Chi. L. Rev. 1 (2002) (a devastating critique of “empirical” research in legal scholarship).

¹⁸ See M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127 (2000).

¹⁹ See Johan Goethals, Cyrille Fijnaut & Stephan Parmentier, Preface: The Future of the Public Prosecutor’s Office in the European Union, 8 Eur. J. Crime, Crim. L. & Crim. J. 149, 151 (2000) (“[O]ver the past few

between Hague prosecutors and their NATO enforcers, highlighted during the Kosovo crisis, were (depending on one's perspective) a source of embarrassing inaction or of increased moderation and accountability.²⁰ But the main effort here is not to devise some unified field theory of enforcement discretion, or suggest the need for transplantation (or exportation). Indeed, one of this article's aims is to highlight how attention to institutional and procedural context must dominate any inquiry into such discretion. These references are primarily intended to encourage consideration of alternative possibilities, choices, and historical paths. Yet they also might point the way to a richer comparative literature on how institutional structure can promote the striking of an appropriate balance is struck between criminal enforcement and the rule of law.

II. Coordinate System: What Binds and What Separates

What Mirjan Damaška characterized as the American “embrace” of the “coordinate mode of organization,”²¹ is nowhere more evident than in the federal criminal enforcement system. In state and local systems, the separation of authority that frequently leaves elected executive officials (mayors, sheriffs, and the like) bringing criminal cases to prosecutors or county attorneys with their own electoral source of authority²² are attributable to some combination of historical tradition and popular preference. In the federal system, the comparatively late development of criminal

years there has been a growing body of opinion in ‘Brussels’ to set up a European prosecution service to improve the protection afforded under criminal law of the financial interests of the European Community.”); see also Jacqueline E. Ross, Tradeoffs in Undercover Investigations: A Comparative Perspective, 69 U. Chi. L. Rev. 1501, 1536 (2002) (discussing possibility of “a separate European Prosecutor’s Office for the investigation and prosecution of fraud against the European Community”).

²⁰See Louise Arbour, The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results, 3 Hofstra L. & Policy Symp. 37, 40 (1999) (prosecutor for International Criminal Tribunals for Former Yugoslavia and Rwanda “find[s] it personally appalling to suggest that the participation of SFOR troops in arrests would jeopardize the fundamental operational principal [sic] of evenhandedness and that arrests should, therefore, yield to the higher imperative of the peacekeeping operation.”); Walter Gary Sharp, Sr., International Obligations To Search for and Arrest War Criminals: Government's Failure in the Former Yugoslavia?, 7 Duke J. Comp. & Int'l L. 411, 450-52 (1997); Bartram S. Brown, U.S. Objections to the Statute of the International Criminal Court: A Brief Response, 31 N.Y.U. J. Int'l L. & Pol. 855, 880-85 (1999) (discussing U.S. Government's objections to discretionary power of proposed international criminal court prosecutor).

²¹Mirjan R. Damaška, The Faces of Justice and State Authority 44 (1986); see Mirjan Damaška, Structures of Authority and Comparative Criminal Procedure, 84 Yale L.J. 480 (1975); see also John Hagan, Why Is There So Little Criminal Justice Theory? Neglected Macro- and Micro-Level Links Between Organization and Power, 26 J. Res. Crime & Deliq. 116, 118 (1989) (noting “the loose coupling that is characteristic of American systems of criminal justice”).

²² See Carol J. DeFrances, U.S. Dep't of Justice, Prosecutors in State Courts, 2001, at 2 (2002) (in 2001, all chief prosecutors in state jurisdictions were elected, except in Alaska, Connecticut, and New Jersey, and the District of Columbia); Joan E. Jacoby, The American Prosecutor: A Search for Identity 19-28 (1980); James N. Johnson, The Influence of Politics Upon the Office of the American Prosecutor, 2 Am. J. Crim. L. 187, 190-91 (1973) (discussing public support for popular election of prosecutors).

enforcement agencies²³ and the “unitary” nature of federal executive authority²⁴ make the adherence to coordinate authority, and parallel rejection of hierarchical control, even more remarkable.

Although all federal prosecutors are housed within the Justice Department (in “Main Justice” or in United States Attorneys’ Offices), not all federal investigative agencies are. The Secret Service (which handles financial and computer crimes in addition to its protective duties), the Bureau of Alcohol, Tobacco and Firearms, the Customs Service, and the Internal Revenue Service all report to the Secretary of the Treasury.²⁵ Postal Inspectors – whose jurisdiction over mail fraud sweeps in a broad array of criminal activity, and who gained a new visibility in the anthrax investigation – are part of the U.S. Postal Service. And criminal investigations are also conducted by personnel within various regulatory agencies, including the Securities and Exchange Commission and the Environmental Protection Agency, and such executive departments as Agriculture, Labor, and Interior. Even within the Justice Department, special agents in the FBI, DEA, and INS report, not to prosecutors, but to other agency officials, with only the Attorney General and Deputy Attorney General exercising (or at least possessing) hierarchical authority over them.²⁶ One often hears rookie prosecutors refer to “my agents.” Most soon learn to drop the possessive.

If neither a line prosecutor in a U.S. Attorney’s Office or Main Justice unit nor her chief can summon a special agent from the field or headquarters and dictate how the agency should deploy its resources or run an investigation, and investigative agency officials cannot control the adjudicative process, how does the relationship between agents and prosecutors get set? Part of the answer lies in the macro policymaking, sometimes originating in the White House, that comprises an Administration’s criminal justice agenda. Recent efforts by the Bush and Clinton Administrations to target violent street criminals, Savings & Loan crimes, health care fraud, and the like, have inevitably affected interactions between agencies and prosecutors, since each type of case will have its own particular mix of investigative and adjudicative needs and rewards. Congressional agendas may have similar effects as well.²⁷ “Policy formation” and

²³See Daniel C. Richman, “Federal Criminal Law Enforcement,” in 2 Encyclopedia of Crime and Justice 698 (2d ed. 2002).

²⁴See Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power To Execute the Laws, 104 Yale L.J. 541 (1994); Elana Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001).

²⁵ADD RE DEVELOPMENTS ON HOMELAND SECURITY DEPARTMENT

²⁶See DOJ organizational table. <<<http://www.usdoj.gov/dojorg.htm>>>. For discussions of how control over the FBI by top Justice Department officials has markedly increased since the end of the Clinton Administration, and the arrival of FBI Director Robert Mueller, see Philip Shenon & David Johnson, A Partnership Forged to Thwart Terrorism, N.Y. Times, Nov. 2, 2001, at B1.

²⁷For an example of how Administration and Congressional agendas can affect prosecutor-agency relations, see Daniel C. Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369 (2001). For an exploration of how legislative influence does not necessarily reflect the

decisions about “implementation” (assuming for the moment that the two are analytically distinct)²⁸ will also occur at the sub-Cabinet level, within the Justice Department or at the upper reaches of enforcement agency hierarchies. Even specific cases, because of their importance and national ramifications may also be coordinated and controlled at the highest levels of the Executive Branch.²⁹

As John Hagan has noted, “there is a need to link the study of micro- and macro-level organizational and political forces to account more fully for criminal justice operations and to understand the important kinds of variations that can occur in these operations across contexts.³⁰ At least provisionally, however,³¹ my focus here is on micro policymaking – the interaction between prosecutors and agents in the run-of-the-mill cases that have not been selected out for special attention by Washington. These cases are generally handled by prosecutors in the ninety-four U.S. Attorney’s Offices, and by field agents scattered across the country (but concentrated in the bigger cities). In the absence of a clear bureaucratic command, how are they able to achieve a *modus vivendi*? What are the structures that drive agencies and prosecutors to negotiate the terms of their interaction and that, to a large degree, set those terms?

preferences of a legislative majority, see J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power* (draft 2002).

²⁸ See Keith Hawkins & John M. Thomas, *The Enforcement Process in Regulatory Bureaucracies*, in Keith Hawkins & John M. Thomas, *Enforcing Regulation*, at 10 (1984) (drawing rough but necessary distinction between “policy formation” – “process whereby the agency interprets and translates legislative goals into rules, standards, and plans of action” – and “implementation” – “enforcement of these agency directives,” which “includes the operating routines used by field-level personnel and applied to targets of regulation, decisions about the applicability of regulations, and means for obtaining compliance with rules.”).

²⁹ See John R. Wilke, *Top Prosecutor in Anderson, Enron Cases Plays for Keeps*, *Wall. St. J.* Mar. 15, 2002, at A12 (discussing role of Assistant Attorney General Michael Chertoff in Enron investigation); Beverley Lumpkin, *Tested Under Fire*, *Sept. 21, 2001*, <<available at <http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice.html>>> (noting that FBI Director Robert Mueller “in a very real sense is running” the investigation into the Sept. 11, 2001 attacks); Beverley Lumpkin, *Don’t Let the Door Hit You*, *Nov. 16, 2001* <<available at <http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice.html>>> (discussing Chertoff’s central role in 9/11 investigation).

³⁰ See John Hagan, *Why Is There So Little Criminal Justice Theory? Neglected Macro- and Micro-Level Links Between Organization and Power*, 26 *J. Res. Crime & Deliq.* 116, 122 (1989).

³¹ For an exploration of some the influences that the political branches have on federal criminal enforcement policy, see Daniel C. Richman, *Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757 (1999); Richman, *Project Exile*, *supra* note __; see also Alfred Blumstein, *Coherence, Coordination and Integration in the Administration of Criminal Justice*, 247, 257 in *Criminal Law in Action: An Overview of Current Issues in Western Societies* (Jan van Dijk, et al., eds. 1986) (noting that design of criminal justice system at the “micro level,” with “independent and highly fragmented institutions,” “usually results in great difficulty in coordinating efforts at the macro level in order to maintain an appropriate balance of workload and resources”).

One provisional point before we look at how the game is played: Logic would seem to demand that we start with an adequate description of the motivations that drive individual enforcers and their bureaus. But here is where I can only throw up my hands and beg the reader's indulgence for my failure to figure out precisely what prosecutors or agents maximize.³² Convictions. Sentence-years. Deterrence. Agency prestige. Lifetime earnings. Leisure. My provisional assumption is that every prosecutor or agent is impelled by a broad variety of motives, personal and institutional, and that the salience of each motivation to each actor varies greatly. The effort here, to the extent it focuses on materialist explanations (as opposed to cultural ones),³³ will be to explore how, given specified incentives on the part of the actors involved, institutional structures will influence the exercise of enforcement discretion.

A. Constituent Aspects of Negotiation

At its heart, the relationship between federal prosecutors and federal enforcement agents resembles a bilateral monopoly. Prosecutors are the exclusive gatekeepers over federal court. But they need agents to gather evidence. Agencies control investigative resources, but they are not free to retain separate counsel. If they want criminal charges to be pursued against the target of an investigation, they will have to convince a prosecutor to take the case.³⁴ To focus on these truisms, however, is to miss a complex story of the interaction that often determines how enforcement discretion is exercised on the ground.

1. Prosecutorial Gatekeeping Monopoly

On the prosecutorial side of the equation, let us start with some qualifications. Federal prosecutors would have true monopoly power only if they were able to act through some central "purchasing" agent. And they don't. There is a degree of overlap and potential competition between U.S. Attorneys' offices, with their territorially based jurisdiction, and the litigating units from Main Justice, which have subject-matter based

³² For a recent review of the literature on bureaucratic behavior, see David B. Spence, *A Public Choice Progressivism, Continued*, 87 *Cornell L. Rev.* 397, 404-13 (2002); see also Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 *Cornell L. Rev.* 486, 488-89 (2002).

³³ See Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 *Annu. Rev. Soc.* 479, 481-82 (1997) (dividing literature on legal environments of organizations into "two metatheoretical perspectives": "a rational materialist" perspective that "sees organizations as rational wealth maximizers" and "a normative cultural alternative" that "sees organizations as cultural rule-followers").

³⁴ See 28 U.S.C. § 516; *United States v. Providence Journal*, 485 U.S. 693 (1988) James Eisenstein, *supra* note __, at 156; Philip B. Heymann, *The Politics of Public Management* 96 (1987) ("To see a case carried through to conviction, those investigative agencies that are not within the Department of Justice must win the support of prosecutors who are under the attorney general."). Certain agencies, including independent agencies like the SEC and executive agencies like the INS, can pursue violations administratively. The analysis here assumes a universe of cases in which agencies would like to seek criminal sanctions.

concerns and expertise. Traditions of local independence and advantages of local knowledge³⁵ – and the limited resources they have because of Congress’s affinity for decentralized power³⁶ – can all be barriers to the entry of Main Justice units into a district without cooperation from the U.S. attorney. They remain at least potential entrants, however, offering a limited counterweight to the U.S. Attorney’s Office’s control over its district’s criminal docket.³⁷ Grand jury investigations into alleged Communist infiltration in the late 1940s were, for example, spearheaded by a team of “Special Assistants,” dispatched to the districts from Washington.³⁸ Although the Assistant Attorney General in charge of the Criminal Division explained to a congressional committee that the goal was merely to ensure “uniform[ity,]” and gushed over the “wonderful” spirit of cooperation between his office and the districts,³⁹ such flying squads would have been (and still are) potent reminders of what the department can do when it fears that its priorities will not be shared by the districts.

One U.S. Attorney’s office can also face competition from another. Where a metropolitan area is divided among two or more federal districts (frequently the case when a large city lies near a district’s border), flexible federal venue rules⁴⁰ will allow an aggressive investigative agency to play one U.S. Attorney’s office off against another, essentially steering its “best” cases to the district that has given the agency the best service by taking less alluring cases or offering the “best” (i.e. the most accommodating) legal support for investigations. This dynamic has historically occurred in New York City (where the Southern and Eastern Districts have a long rivalry) and may well occur elsewhere.⁴¹ Indeed, the malleability of venue doctrine – and the broad geographical reach of all too many criminal enterprises -- allows rivalries between non-contiguous districts to develop as well, even as Washington strives to develop means of resolving such differences.⁴²

³⁵ See Eisenstein, at 114-18.

³⁶ See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 806-07 (1999).

³⁷ See Rabin, *supra* note __, at 1063 (“The very existence of the Tax Division, which sends a completely packaged case to the U.S. Attorney and will, on occasion, send a special prosecutor if the U.S. Attorney is reluctant to proceed, creates pressure from within the enforcement branch to proceed.”).

³⁸ John G. Heinberg, *Centralization in Federal Prosecutions*, 15 *Mo. L. Rev.* 244, 255 (1950).

³⁹ *Id.*

⁴⁰ See *United States v. Cabrales*, 524 U.S. 1 (1998); *United States v. Kim*, 246 F.3d 186 (2d Cir. 2001); *United States v. Bowens*, 224 F.3d 302, 309-14 (4th Cir. 2000).

⁴¹ See Selwyn Raab, *Prosecutors’ Feuds Hinder Inquiries*, *N.Y. Times*, Jan. 15, 1991, at B4 (“Federal agents say that jurisdictions are so fuzzy that they sometimes shop between Federal prosecutors in Manhattan and Brooklyn to see which office is more receptive to their cases.”); Howard Kurtz, *Prosecutors Vie in N.Y. Crime Wars; U.S. Attorneys in Brooklyn and Manhattan Keep Eyes on Bad Guys – and Each Other*, *Wash. Post*, Aug. 12, 1988, at A25.

⁴² See Commission on the Advancement of Federal Law Enforcement (“CAFLE”) Hearings, Dec. 2, 1998,

The overlap between state and federal criminal laws also offers agencies some choice, at least in theory.⁴³ Although the federal system is generally thought to offer significant procedural and resource advantages over state criminal processes,⁴⁴ the difference will not always be significant, or, if significant, may still be outweighed by the desire to circumvent federal prosecutorial gatekeeping. This is not to say that a U.S. Attorney's office will mourn whenever federal agencies take cases to the local D.A. For many sorts of cases – counterfeiting, narcotics, bank fraud – the U.S. Attorney may set a threshold level and intend that cases falling below it be taken locally. Yet such arrangements, however consensual, do limit the U.S. Attorney's control, and even knowledge, of agency activity.

Finally, the size and organization of a single U.S. Attorney's office can limit its power vis a vis agencies if agents can play one assistant or unit off against another. If agents can “shop” cases around cases until they find a sympathetic assistant, the risk is that gatekeeping standards will fall victim to a “race to the bottom,” in which those individual prosecutors with the lowest standards (or, from another perspective, the greatest zeal) will be the ones agents most prefer to take cases to.⁴⁵ Offices can, and do,

pt. 1, at 147-48 (statement of Mark Calloway, U.S. Attorney for the Western District of North Carolina) (“many crimes cross many jurisdictions and districts now so if the relationship’s not good with one U.S. Attorney’s office the agencies usually find another place to get a prosecutor”); General Accounting Office, Department of Justice, Information on the Office of Professional Responsibility’s Operations, GAO/GGD-00-187 (Aug. 2000), at 27 (noting that, in September 1996, OPR investigated “three complaints of alleged misconduct arising out of friction between U.S. Attorneys’ offices over the joint use of witnesses” and advised the Attorney General that such problems “could be expected to increase ‘as multi-jurisdictional prosecutions arising out of related schemes become more common’” and that the Department “‘may want to implement procedures to address the resulting frictions between jurisdictions’”).

⁴³But see Michael L. Benson & Francis T. Cullen, *Combating Corporate Crime: Local Prosecutors at Work* 236 (1998) (“taken together, the survey and the field study results suggest that federal agencies are perceived by local prosecutors and investigators as unhelpful and largely uninterested in local problems”).

⁴⁴See John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 *Hastings L.J.* 1095, 1103-25 (1995); see also Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 *S. Cal. L. Rev.* 643, 668-75 (1997).

⁴⁵ See Frank W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* 16 (1969) (describing measures taken in one prosecutor’s office once recognized that police officers, “familiar – at least as they saw it – with the individual characteristics and reaction patterns of various assistants [], ‘shopped around’ for the particular assistant who, they believed, would regard their requests for [arrest] warrants most sympathetically”); Robert Jackall, *Wild Cowboys: Urban Marauders & The Forces of Order* 102 (1997) (telling how one New York City detective “like many [others], was shopping his cases, looking for [a prosecutor] with the stomach to ‘break the fingers’ necessary to get robbers off the streets”); see also Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 *J. L. Econ. & Org.* 53, 72-73 (1986) (noting how wrongdoers can evade interdiction by seeking out multiple gatekeepers); Robert L. Nelson, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *L. & Soc’y Rev.* 457, 470 (2000) (inside counsel reports that if he behaves “too much like a cop,” “[t]he business people will simply go without legal advice, or will engage in an intra-organizational version of ‘forum shopping,’ bringing their problems to the lawyer in the company who is least likely to challenge the business-person’s project”).

counter this problem by establishing some centralized screening mechanism.⁴⁶ But circumvention may still be possible.

These qualifications aside, a U.S. Attorney's office does substantially resemble a monopsonist, when it comes to "purchasing" the fruits of an agency's criminal investigation. Even in these days of interstate and transnational criminal activity, much of what any particular agency field office wants to pursue will, as a practical matter, fall within the bailiwick of only one such office, and the refusal of that office to prosecute will end the matter.

How deeply does gatekeeping by U.S. Attorney's offices cut into the agendas of the various agencies that present them cases for prosecution? The question – like many arising in the context of team production⁴⁷ -- is hard, and certainly not amenable to a quantitative answer. Studies can and have been made of declination rates, and the reasons offered for declination.⁴⁸ But what is one to make of a case declined for insufficient evidence?⁴⁹ Every case file is an artifact. As Nicola Lacey has noted: "Cases do not simply come into the world 'weak' or 'strong'; to a significant extent, they are made so by the commitment or non-commitment of investigatory resources. ... Thus, the whole conduct of police investigations – distribution of resources and operational priorities, proportion and patterns of cases taken up, styles and thoroughness of questioning – is central to how the cases which get further into the system are selected and presented."⁵⁰ Particularly in the federal system, where the offenses targeted usually have a universe of potential witnesses far less circumscribed than one is likely to find in, say, a street corner robbery, the strength of a case presented will thus often will be a function of agency interest and effort.⁵¹ The declination of a weak case under these

⁴⁶ See Miller, *supra* note __, at 16-19 ("shopping around" problem addressed through some system of centralized supervision by more senior assistants and random assignment).

⁴⁷See Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 *Am. Econ. Rev.* 777-795 (1972).

⁴⁸ See, e.g., Richard S. Frase, The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion, 47 *U. Chi. L. Rev.* 246 (1980); U.S. Dept of Justice, Office of Justice Programs, Compendium of Federal Justice Statistics, 1999, at 30, tbl. 2.4 (Apr. 2001).

⁴⁹ *Id.* (citing "weak evidence" as reason for 21.3% of 31,004 declinations by U.S. Attorneys' offices between October 1, 1998, and September 30, 1999).

⁵⁰Nicola Lacey, "Making Sense of Criminal Justice," 1, 13, in *A Reader on Criminal Justice* (Nicola Lacey, ed. 1994); see also Michael McConville et al., *The Case for the Prosecution* 56 (1991) ("The police have, at a most fundamental level, the ability to select facts, to reject facts, to not seek facts, to evaluate facts and to generate facts. Facts, in this sense, are not objective entities which exist independently of the social actors but are *created* by them.").

⁵¹See Eisenstein, at 156 ("The ability to decline prosecution provides assistants with their most potent discretionary power, but many of the cases presented leave little room for the exercise of discretion. Some are so trivial or so weak that prosecution would be ridiculous.").

For a fascinating exploration of the interaction of agency priorities and tactics in a very different context, see Eric A. Johnson, *Nazi Terror: The Gestapo, Jews, and Ordinary Germans* (2000) (analysis of Gestapo investigations finds that targeting was proactive and generally flowed from strategic agenda, not

circumstances may reflect only a slight disjunction between agency and prosecutorial judgment.

Under other circumstances, a prosecutorial declination may not reflect any disjunction at all. In the early 1970s, an FBI survey found that U.S. Attorneys “were tired of having to go through the motions of declining prosecution on cases that the FBI knew could not be prosecuted but that Bureau rules required be presented to the USA.”⁵² The new Director, Clarence Kelly, changed the Bureau’s rules by instituting a “Quality over Quantity” program,⁵³ but so long as agency executives, congressional funders, and others use presentation figures as a measure of agency activity,⁵⁴ agency operatives will view a reasonable number of declinations with equanimity. Indeed, there will be cases presented that an agency would actually like to see declined. Such declinations can “serve a protective function,” allowing an agency to “pass the responsibility” to a U.S. Attorney’s office.⁵⁵ It is a responsibility that U.S. Attorneys, with their blended claims of technical expertise and political independence, their ties to the local community, and their large portfolio of unquestionably worthy cases, are particularly well-suited to bear. One would expect such consensual declinations to occur most frequently in cases where an agency is under some sort of political pressure to proceed, or wants to avoid claims of favoritism. And it is thus not surprising that the highest declination rate in 1999 occurred

denunciations).

⁵²James Q. Wilson, *The Investigators: Managing FBI and Narcotics Agents* 129 (1978); see Rabin, *supra* note __, at 1056 (“an agency’s self-evaluation criteria might make it insensitive to the regular declination of its complaints on de minimus grounds, so long as the agency received credit for an appropriate number of complaints tendered”).

⁵³ *Id.* at 131.

⁵⁴ Exactly what part arrest or presentation statistics play, or are perceived to play, in agency funding decisions is hard to determine. See Letter, Laurie Ekstrand, Director, Justice Issues, U.S. General Accounting Office, to Senator Jeff Sessions, “The Drug Enforcement Administration’s Reporting of Arrests,” Feb. 13, 2002, at 5 (reponding to a Senator’s request for an investigation into whether DEA arrest figures had been inflated in order to obtain more resources, GAO’s “review of DEA budget justifications showed that prior years’ arrest data have been used as output information within performance indicator tables but not as performance goals or outcome measures”); Statement of Eleanor Hill, *The FBI’s Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to Sept. 11, 2001*, Hearing before Joint Intelligence Committees, Sept. 24, 2002, at 5 (FBI field office agent notes that “counterterrorism and counterintelligence have always been considered the ‘bastard stepchild’ of the FBI because these programs do not generate the statistics that other programs, such as Violent Crimes/Major Offenders or drugs.”).

⁵⁵ Eisenstein, *supra* note __ at 152; Jerry Seper, *Senators Question Whether FBI Is Sufficiently Pursuing Terrorism*, Wash. Times, June 17, 2002. (responding to inquiries about the high number of declinations in terrorism cases in the six months after September 11, FBI officials note that the referral of a case to a U.S. attorney is not a recommendation to prosecute); see also Robert A. Kagan, *On Regulatory Inspectorates and Police*, 37, in *Enforcing Regulation*, 42 (“the policeman or inspector who grants ‘curbside probation’ risks being accused of legal impropriety, favoritism, or corruption”).

for civil rights offenses: 92.8%, or 1583 out of 1705 suspects.⁵⁶ Not surprising because, although precise figures are hard to obtain, a large percentage of these suspects are likely to have been law enforcement officers.⁵⁷

Declinations may also reflect an agency's desire not necessarily to shift responsibility but at least to share it. Such calculations (as opposed to, say, insufficient prosecutorial vigilance) may explain the relatively high proportion of declinations in "domestic or international terrorism" cases in the fiscal year ending September 30, 2001.⁵⁸ With heavy pressure from Congress to spend funds allocated for antiterrorism efforts,⁵⁹ the FBI may well have found it helpful to send marginal cases to U.S. Attorney's offices and let the culling happen there. And a similar story of sharing responsibility may (but needn't) explain the 61% declination rate for terrorism cases in the six months *after* September 11.⁶⁰

Conversely, one might expect a low declination rate where there is intense and infeasible political pressure on the federal enforcement bureaucracy (both prosecutors and agents) to take a particular kind of case,⁶¹ and especially where state and local authorities lack or systematically decline to exercise concurrent criminal jurisdiction. In 1994, responding to sustained calls by border states for increased federal immigration enforcement,⁶² the Justice Department launched "Operation Gatekeeper."⁶³ As a result of

⁵⁶U.S. Dept of Justice, Office of Justice Programs, Compendium of Federal Justice Statistics, 1999, at 28, tbl. 2.2 (Apr. 2001); see also Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in *Boundary Changes in Criminal Justice Organizations*, vol. 2 of *Criminal Justice 2000* (National Institute of Justice, 2000), at 104 (noting frequency "since the Rodney King beating trial, with which abuse-of-force allegations against local police officers have been accompanied by calls for Federal intervention"). The next highest declination rates were for obscene material offenses (84.0%), and threats against the president (82.3). Compendium, *supra*. at 28.

⁵⁷See Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States; New Data on Federal Prosecutions and Sentencing* (1998) (noting difficulty in calculating number of criminal civil rights investigations involving law enforcement officers, and reporting that, in 1996, approximately 70% of the FBI's civil rights investigations related to law enforcement officers), available at <http://www.hrw.org/reports98/police/uspo35.htm> (visited June 7, 2002).

⁵⁸TRAC, *Criminal Enforcement Against Terrorists*, (2001), available at <http://trac.syr.edu/tracreports/terrorism/report011203.html> (visited Dec. 3, 2001).

⁵⁹See General Accounting Office, *Combating Terrorism: FBI's Use of Federal Funds for Counterterrorism-Related Activities* (FYs 1995-1998). [GGD-99-7](#) (November 20, 1998).

⁶⁰See Jerry Seper, *Senators Question Whether FBI Is Sufficiently Pursuing Terrorism*, *Wash. Times*, June 17, 2002.

⁶¹See Rabin, *supra* note ___, at 1051 (noting, in context of Selective Service violation prosecutions in 1970: "Sometimes a type of violation is regarded as so serious that selective enforcement will not be tolerated, despite the strain on prosecutorial resources.").

⁶²See Michael Paulson, *States Seek Compensation for Incarcerating Criminal Immigrants*, *Seattle Post-Intelligencer*, Dec. 23, 1994, at A9 (governors of "at least seven states" suing the United States government, "demanding that they be reimbursed for the cost of incarcerating illegal immigrants," argue that "if the federal government had done its job securing the nation's borders, the states would not have as large a problem with criminal immigrants"); Editorial, *Immigration Costs; State Should Not Back Away*

this and other efforts comprising the “Southwest Border Initiative,” immigration prosecutions in five border federal districts increased “more than seven-fold” between 1994 and 2000,⁶⁴ and convictions in INS cases rose from comprising 12.0% of all federal convictions in 1992 to 19.5% in 1998.⁶⁵ And the INS’s declination rate, always comparatively low, was the lowest for 1998-99 (3.4%) for any of the high-volume federal investigative agencies.⁶⁶

Such stories give a taste of the declination dynamic. But only a taste, given how much they rest on speculation. High declination rates for an agency can suggest a serious disjunction between the agency’s agenda and those of the U.S. Attorney’s Offices. But they are equally consistent with a managerial strategy of seeking political insulation, using prosecutors to monitor insufficiently supervised field offices, or impressing funders. Or with an agency strategy of regretfully bowing to prosecutorial gatekeeping authority.⁶⁷ Or some combination of these, with variation over districts or regions. Put differently, the fact that the FBI had a declination rate of 43% in 1998-99, compared to a DEA rate of 18.3% says something.⁶⁸ But from the outside, we can’t be sure about what.⁶⁹

from Lawsuit, Dallas Morning News, August 17, 1994, 24A (supporting Texas’s suit against federal government seeking reimbursement for immigration-related costs now borne by the state, editorial notes that “even when [suspected criminals] are apprehended [at the border], they are let off with a slap on the wrist by U.S. attorneys who are responsible for their prosecution”); Maggie Rivas, Gaps in the Fence; Immigration Reform Seems Far Cry from Reality at Mexican Border, Dallas Morning News, Jan. 3, 1994, 1A (noting complaints by local officials at inadequacy of federal efforts against illegal immigration).

⁶³Reno Initiative Aims to Control Immigration, New York Times, Sept. 19, 1994, sec. 1 at 40; see Alan D. Bersin & Judith S. Feigin, The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California, *Geo. Immigr. L. J.* 285, 299 (1998).

⁶⁴ Fact Sheet, Crisis in the Border Courts, Administrative Office U.S. Courts, available at <<<http://www.uscourts.gov/judnow/crisis.htm>>>, (visited Aug. 31, 2001).

⁶⁵See TRAC, INS at Work; Recent Trends in INS Enforcement, available at <<trac.syr.edu/tracins/findings/aboutINS/insTrends.html>>, (visited Aug. 31, 2001).

⁶⁶ Compendium of Federal Justice Statistics, *supra* note __, at 29, tbl. 2.3. In different terms, the percentage of INS referrals prosecuted went from 84% in 1992 to 93% in 1998. See Immigration and Naturalization Service, 1992 – 1998, <<http://trac.syr.edu/tracins/findings/national/ins9298.html>>.

Why the INS declination rate has been low, even before “Gatekeeper” was best explained by a former S.D. Cal. U.S. Attorney: “Given the local DA’s unwillingness to prosecute border cases, we do not have the traditional federal prosecutor’s tool of declination to state authorities to bring the number of cases into line with the resources.” William Braniff, Local Discretion, Prosecutorial Choice, and the Sentencing Guidelines, 5 *Fed. Sent. R.* 309, __ (1993).

⁶⁷ See Rabin, *supra* note __, at 1055 (discussing “feedback effect” in which an agency “react[ed] to a consistent pattern of declinations [] by shaping its referral policy accordingly”).

⁶⁸Id.

⁶⁹See Landes, *supra* note __, at 227 (noting that “[t]o the extent that prosecutors and investigators collude so that each internalizes the interests of the other,” a system that formally separated prosecution from

Regretfully, one regains one's moorings only by moving from the quantitative to the qualitative or just plain impressionist. By these measures, no one doubts that federal prosecutors exercise a considerable degree of discretionary power in their case selection decisions, and that they regularly diverge from agency preferences in this regard.⁷⁰ At its core, prosecutorial power is primarily negative, and hardly absolute – not the power to make an agency pursue a kind of case that the agency doesn't want to pursue, or even the power to say “no” to every single case of the sort that an agency very much wants to pursue. But the leverage that, at least potentially, flows from prosecutorial gatekeeping authority ought not be underestimated.

2. Agency Control over Investigative Resources, Tactics and Agenda

Now to the investigative side of the equation. Here, too, discretionary choices are made that reflect policy preferences. At the most mundane, this is just a point about the costs of information and the pursuit of some investment strategy. But one needn't look far to find more dramatic instances of the inextricable intersection between tactical choices and enforcement agendas. The decision to arrest and handcuff a Wall Street executive on his trading floor,⁷¹ the decision to “conduct the initial surprise interview of Monica Lewinsky incommunicado for as long as she would allow,”⁷² – each of these raises a question of “proportionality” that cannot be answered without taking a position on the nature and seriousness of the conduct being investigated.⁷³

Investigations, of course, are the province of investigative agencies. To what degree, then, do those agencies make these tactical “investment” decisions on their own, deciding whether and with what intensity any matter or set of matters is pursued? To what extent are they monopolists, when it comes to providing the investigative support that prosecutors need to bring and pursue criminal charges?

investigation would be “operationally equivalent to one that combined the functions).

⁷⁰ See, e.g., Eisenstein, *supra* note __, at 156-68; Wilson, *supra* note __, at 139; CAFLE Hearing, Dec. 1, 1998, pt.1, at 113 (testimony of FBI Director Louis Freeh).

⁷¹ See Miriam Rozen, G.E.'s Sacrificial Lamb, *The American Lawyer*, July/Aug. 1987, at 31 (describing arrest of Richard Wigton on trading floor of Wall Street firm); see also Richard B. Stolley, The Ordeal of Bob Freeman, *Fortune*, May 25, 1987, at 66 (describing arrest of Wall Street arbitrageur in his firm's offices); Connie Bruck, Ten Years of Upheaval: Rudolph Giuliani, *The American Lawyer*, Mar. 1989, at 99 (discussing controversy surrounding the arrests); see also Jonathan D. Glater, Five Questions for Mary Jo White: Those Very Public Arrests of Executives, *N.Y. Times*, July 28, 2002 sec. __ (fin), at 4 (former U.S. Attorney discusses recent public arrest of John J. Rigas, founder of Adelphia Communications).

⁷² Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 *Ford. L. Rev.* 723, 729 (1999).

⁷³ See Little, *supra* note __, at 733 (“The issue [] regarding the investigative decisions made in the Starr investigation, is not whether the tactics were either legal or novel” but whether “they were proportionate to the crime(s) under investigation.”); Anthony Lewis, *Abroad at Home: Sense of Proportion*, *N.Y. Times*, Apr. 20, 1998, at A19 (suggesting that “Mr. Starr” had “lost his sense of proportion”).

Here, again, the received wisdom has a substantial basis in reality. Some federal prosecutors may actually leave the comfort of their offices to pound the pavement investigating cases. But this generally happens only in the movies – which don’t have to worry about such niceties as the rule precluding a lawyer from acting as both a advocate and a sworn or unsworn witness⁷⁴ -- if at all.⁷⁵ Enforcement agencies have the expertise, the manpower, the technical resources, and, perhaps most importantly, the informational networks (of concerned citizens, victims, and informants) that no U.S. Attorney’s office possesses, and without which few cases could be brought. Indeed, save in the exceptional cases – where the news media or a victim brings a case directly to prosecutors’ attention – a U.S. Attorney’s office generally won’t even know that a crime has been committed, let alone be in a position to investigate it with an eye to prosecution.

The investigative resources of some of the largest enforcement agencies (notably the FBI, ATF, and DEA) have been greatly supplemented in recent years by the resources of state and local enforcement agencies, which have found it politically and financially expedient to develop robust alliances with their federal counterparts, pooling information and manpower in exchange for such benefits as technical assistance, overtime pay and “buy money,” and access to favorable federal fora (for criminal cases and forfeiture proceedings).⁷⁶ The balance of power in this area may recently have shifted, as state and local enforcers have moved from being principally supplicants, seeking federal aid in combating violent crime, to being sometimes eager and sometimes grudging providers of the manpower needed for fine-grained nationwide terrorism investigations.⁷⁷ But the primary point of contact between federal and local enforcers has, at least until now, been at the agency level.⁷⁸

⁷⁴See *United States v. Marshall*, 75 F.3d 1097, 1106 (7th Cir. 1996).

⁷⁵ I have dim memories of a short-lived television program a decade ago about a young AUSA in New York. Also see *The Client* (1994) (movie based on John Grisham novel, starring Tommy Lee Jones as a U.S. Attorney jetting about with his staff in his own plane, in pursuit of the bad guys).

⁷⁶See Richman, *Federal Criminal Law*, at 784; Richman, *Changing Boundaries*, at 95; CAFLE Hearings, Aug. 25, 1998, at 18 (Oklahoma Public Safety Commissioner notes that he accepts federal entry into the area of traditionally local crimes “because it gets me money. It gets overtime pay for my people.”).

⁷⁷See Fox Butterfield, *A Police Force Rebuffs F.B.I. On Querying Mideast Men*, N.Y. Times, Nov. 21, 2001, at B7 (calling it a violation of state law, Portland, Oregon, police chief announces that his department would “not cooperate with the Federal Bureau of Investigation in its efforts to interview 5,000 young Middle Eastern men nationwide”); Paul Duggan, *FBI Chief Promises to Give State and Local Police a Role in Probe*, Wash. Post, Oct. 17, 2001, at A15 (president of International Ass’n of Chiefs of Police reports FBI Director Mueller as acknowledging “that the bureau has made insufficient use of its state and local counterparts in the biggest criminal investigation in U.S. history).

⁷⁸See Mary Beth Sheridan, *INS Seeks Law Enforcement Aid in Crackdown: Move Targets 300,000 Foreign Nationals Living in U.S. Despite Deportation Orders*, Wash. Post, Dec. 6, 2001, at A25 (describing INS efforts to enlist local police, as well as other agencies, in apprehension of aliens subject to deportation orders).

Why haven't federal prosecutors reduced their reliance on federal agencies by dealing directly with state and local agencies, trading the advantages of federal jurisdiction for investigative support? This in fact has occurred,⁷⁹ and may occur more, as the federal government tries to negotiate with local officials for their assistance in terrorism investigations.⁸⁰ But there are some obstacles even here. Although agents and police have their rivalries, they have similar professional perspectives. After Attorney General Ashcroft placed U.S. Attorneys in charge of joint terrorism task forces around the country,⁸¹ a former FBI executive expressed his concern that the move would "undermine[] the effectiveness of the FBI's relationship with state and local authorities," and noted that "several police chiefs" had advised that they were "not comfortable in such a relationship led by U.S. Attorneys."⁸²

More fundamentally, the explanation for the relative lack of reaching out to local authorities directly may have much to do with the same sort of specialization of assets that binds firms together in the marketplace.⁸³ Federal agents gain expertise with the

⁷⁹See, e.g., Gail Gibson, Ehrlich Reloads ATF Debate: He Asks Justice Dept. To Overrule Md. On Who Can Screen Gun Cases, *Baltimore Sun*, June 30, 2000, at B1; Richman, *Project Exile*, supra note __, at 406-07 (describing how Maryland U.S. Attorney bypassed ATF and reached out directly to local police for gun cases); see also Roger L. Conner, *The Office of the United States Attorney and Public Safety: A Brief History*, 49 *U.S. Attorneys' Bulletin* 7 (Jan. 2001) (describing efforts of U.S. Attorneys' offices to work directly with local police forces); Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Promising Strategies to Reduce Gun Violence* (1999); Dick Lehr & Gerard O'Neill, *Black Mass: The True Story of an Unholy Alliance Between the FBI and the Irish Mob* 257 (2001) (recounting how federal prosecutors seeking to target mobster who at the time was being protected by the FBI agents he worked with as a sometime informant reached out to state authorities for investigative support).

⁸⁰See Allan Lengel, *Arab Men in Detroit to Be Asked to See U.S. Attorney*, *Wash. Post*, Nov. 27, 2001, at A5 (discussing role of U.S. Attorneys' offices in working with local police forces as part of nationwide effort to "interview" Middle Eastern men); Susan Sachs, *Long Resistant, Police Start Embracing Immigration Duties*, *N.Y. Times*, Mar. 15, 2002, at A11; Steven Brill, *The FBI Gets Religion*, *Newsweek*, Jan. 24, 2002 (same), available at <http://www.msnbc.com/news/690991.asp>, visited 1/24/02. One new player in the relationship between Washington and local enforcers is the new chief of the White House Office of Homeland Security, Gov. Tom Ridge, whose "outreach to state and local officials" has involved enforcement coordination that before 9/11 would likely have been handled within the Justice Department. See Steven Brill, *Ridge Against the Machine*, *Newsweek*, Mar. 18, 2002.

⁸¹See Office of the Attorney General, *Memorandum for all United States Attorneys, all Members of the Anti-Terrorism Task Forces*, Nov. 9, 2001, available at <http://www.usdoj.gov/ag/readingroom/terrorism1.htm> (visited Apr. 3, 2002).

⁸²Statement of Senator Patrick Leahy, *Hearing on Homeland Defense: Sharing Information with Local Law Enforcement*, Dec. 11, 2001, available at <http://www.senate.gov/~judiciary/pj1121101sc.htm> (visited Dec. 12, 2001) (quoting former FBI Associate Deputy Director Oliver B. (Buck) Revell). As part of its effort to cement relations with local enforcers since Sept. 11, the FBI has created a new Office of Law Enforcement Coordination, with a former police chief, at Assistant Director rank. See FBI National Press Office, *Release*, Apr. 11, 2002, available at <http://www.fbi.gov/pressrel/pressrel02/mueller041102.htm>>>.

⁸³See Oliver Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* 52-56 (1985).

federal adjudication process, and, as will be discussed later, personal relationships between federal agents and prosecutors at all levels help cement the bond.⁸⁴ Agencies may also have a degree of bargaining power by virtue of their control over so many of the cases that federal prosecutors most want to bring, and their relative expertise in their areas of specialization.⁸⁵ To the extent that an agency has the option of taking a case to another district or to the state, it can (implicitly, of course) offer an office not a single case but a portfolio of cases, lumping matters that the office might otherwise prefer to decline with politically (and maybe personally) rewarding ones that the office would not want to lose.

Just as agencies sometimes can play one U.S. Attorneys' office against another, prosecutors also have some limited ability to play one federal agency against another. There are a number of areas where agency's jurisdictions overlap, and (perhaps not surprisingly) these are areas in which the political rewards of bringing conspicuous cases can be greatest. The FBI dominates traditional organized crime cases for example (quite the monopolist here), but when a group engages in drug dealing or gun running, the DEA or ATF may have an interest as well. In the white collar area, the postal inspection service's jurisdiction over mail fraud makes that low profile agency⁸⁶ a fit instrument for prosecutors seeking to go where the FBI would prefer not to venture (or to control an investigation to a degree that the FBI would not tolerate). Thus, when Rudolph Giuliani's U.S. Attorney's office pursued Wall Street cases in the late 1980s, it initially would create ad hoc investigative teams from the postal inspection service, the IRS and the SEC.⁸⁷ The FBI's entry into this now-sexy area⁸⁸ came only later.⁸⁹ In another district, a U.S. Attorney recently explained why he liked the overlap between FBI and

⁸⁴ See Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. Econ. & Org. 53, 63 n.24 (1986) ("long-term contractual relationships will involve investments in 'governance structures' that make exit or breach costly for both sides").

⁸⁵ For a discussion of federal agencies' relative freedom to invest strategically in particular kinds of cases or investigative techniques, see Richman, *Boundaries*, supra note __, at 95.

⁸⁶ Stephen Beaven, *Delivering Justice; Postal Inspection Service Fights Crime with a Low Profile*, *Indianapolis Star*, Jan. 8, 2000, at B3; John Waggoner, *Long Arm of Post Office; Inspectors Get Bad Guys, Little Attention*, *USA Today*, Apr 16, 1993, at B1.

⁸⁷ See Rifka Rosenwein, *Giuliani's Securities Unit Struggles with Caseload*, *Manhattan Lawyer*, Aug. 30 – Sept. 12, 1988, at 1.

⁸⁸ The Postal Inspection Service garnered well-deserved publicity for its involvement in these cases. See Jane Applegate, *Postal Inspectors; The Unsung Heroes of U.S. Sleuths*, *L.A. Times*, June 17, 1987; Steve Coll & David Wise, *Foot Soldiers in Trading Crackdown; Postal Agents Aid in Building Insider Case*, *Wash. Post*, July 19, 1987, at H1. But the coverage was but a shadow of that in the Service's glory years in the mid-Nineteenth Century. See Carpenter, supra note __, at 70 ("Hailed as the eyes and ears of the postal system, inspectors rivaled the Pony Express in their capacity for inspiring mythic tales of valor and peril."), *citing* James Holbrook, *Ten Years Among the Mail Bags* (1855), and P.H. Woodward, *Secret Service of the Postal Department* (1886).

⁸⁹ See Rifka Rosenwein & Edward Frost, *FBI Lands First Securities Case*, *Manhattan Lawyer*, July 12 – 18, 1988, at 8.

Secret Service jurisdiction in white collar cases: The U.S. Attorney's office, he noted, "doesn't want to put all their investigative eggs in one basket," because, "at different times [the two agencies] have different resources and different commitments to different types of white collar cases."⁹⁰

Over time, the costs of competition⁹¹ have led agencies, or their political sponsors, to clarify these jurisdictional boundaries.⁹² Yet such clarifications have their own costs, and the current degree of blurriness may reflect some recognition of these advantages, which include the benefits of competition⁹³ and the deterrence of corruption.⁹⁴ Certainly, that blurriness enhances the bargaining power of a U.S. Attorney's office.

Interagency competition is not the only source of prosecutorial bargaining power at this structural level. Where an agency is particularly weak, and poorly organized, prosecutors may be able to gain substantial control over its agenda. This appears to be what happened to the IRS's Criminal Investigative Division, at least until very recently. Housed in an agency under constant political attack for aggressiveness,⁹⁵ reporting to

⁹⁰CAFLE Hearings, Dec. 2, 1998, Pt. I, at 167 (testimony of Mark Calloway, U.S. Attorney for the Western District of North Carolina). Although the Secret Service is best known for its protective activities, it has striven to highlight its "cybercop" role. See, e.g., Robert Vamosi, *How the Secret Service Became Our Nation's Cybercops*, CNET/ZDNet, June 26, 2002.

⁹¹See John A.C. Conybeare, *Bureaucracy, Monopoly, and Competition: A Critical Analysis of the Budget-Maximizing Model of Bureaucracy*, 28 *Am. J. Pol. Sci.* 479, 495 (1984) (noting that competition among bureaus, while leading to efficiencies, "may also bring some negative side effects (e.g., higher monitoring costs for the sponsor, wasteful 'political advertising' by bureaus, loss of economies of scale if decreasing costs are possible)").

⁹² Competition may be more of an issue in the larger districts than in the smaller. One U.S. Attorney recently noted that in smaller districts like his, "a lot of times [] you're lucky to get one agency to look at a problem, let alone have two fighting over it." CAFLE Hearing, Dec. 2, 1998, Pt. I, at 169-70 (testimony of Paul Warner, U.S. Attorney for Utah).

⁹³ See Albert Breton & Ronald Wintrobe, *The Logic of Bureaucratic Conduct* 128 (1982) (noting that because "optimum market structure for maximizing entrepreneurial competition or innovative activity is not perfect competition but some degree of monopoly," assignment of "quasi-property rights within organizations" will stimulate entrepreneurial activity by ensuring that "bureaucrats will obtain the benefits from an increased allocation of resources to their bureau"); Richard S. Higgins, William S. Shughart II & Robert D. Tollison, *Dual Enforcement of the Antitrust Laws*, in Robert J. Mackay, James C. Miller III & Bruce Yandle, *Public Choice and Regulation: A View from Inside the Federal Trade Commission* 154, 177 (1987) (concluding, after studying FTC-Justice Department liaison agreement governing antitrust cases: "Far from resulting in wasteful duplication, bureaucratic competition leads to more efficient resource use."); see also Dorf & Sabel, *supra* note __, at 33 (discussing benefits of mild interagency competition).

⁹⁴See Lehr & O'Neill, *supra* note __, at 245 (describing how control by corrupt FBI agents of information about their drug-dealing informants was threatened when DEA agents launched their own investigation of the informants' trafficking).

⁹⁵ See, e.g., Albert B. Crenshaw, *Senate Panel Told of IRS Abuses; Witnesses Allege Harassment, Mistakes, Fabricated Evidence*, *Wash. Post*, Sept. 25, 1997, at E3; David Cay Johnson, *Senate Committee Is Told of a Vast Range of Abuses by I.R.S. Agents*, *N.Y. Times*, Apr. 29, 1998, at A16.

district managers for whom criminal prosecutions were a secondary concern, and authorized to “pursue a broad range of investigations with little regard to the impact these investigations [had] on overall tax compliance,”⁹⁶ CID agents responded by offering their financial expertise to U.S. Attorneys’ offices, which in turn “determined [the Division’s] investigative agenda.”⁹⁷ It remains to be seen whether the reorganization of the Division will succeed in shifting agents’ attention more specifically to tax compliance goals.⁹⁸

What makes an agency strong or weak, if one measures strength by the extent to which an agency can impose its enforcement priorities downstream on prosecutors (while avoiding upstream interference from the agency’s political masters)? A full answer is beyond the scope of this article.⁹⁹ One school of thought, led by Terry Moe and others, counsels us to look to the politics of institutional design, and recognizes the many ways in which legislators and interest groups can embed their preferences in an agency’s organic structure – its turf, its capacities, and its procedures.¹⁰⁰ In response, Daniel Carpenter, while conceding that “[a]gency structure undoubtedly shares the potential for bureaucratic autonomy,” tells powerful tales of agencies “forging bureaucratic autonomy” in ways unforeseen by their designers and not predetermined by their design.¹⁰¹ Autonomy, for Carpenter, is something an agency can win by “establish[ing] political legitimacy -- a reputation for expertise, efficiency or moral protection and a uniquely diverse complex of ties to organized interests and the media – and induce

⁹⁶ William H. Webster, Review of the Internal Revenue Service’s Criminal Investigation Division (Apr. 1999), at 9.

⁹⁷ Id.; David Burnham, The F.B.I.: A Special Report, The Nation, Aug. 11, 1997, available at <<<http://past.thenation.com/issue/970811/0811burn.htm>>> (visited Nov. 12, 2001) (“a prosecutor in New York” noted that when the FBI refused to pursue “a serious official corruption matter in the district, and my boss – the U.S. attorney – was not prepared to make an issue out of it. To get around the problem, I had to shop around for help, finally recruiting some I.R.S. agents.”).

The Webster Report found no evidence to support allegations that U.S. Attorneys were requiring IRS CID agents “to assist prosecutors on non-tax, financial grand jury investigations as a *quid pro quo* for prosecuting [the Division’s] tax cases.” Webster Report, *supra* note __, at 16 n.27.

⁹⁸ See CID Reorganization stuff; Mark Matthews comments, 3/14/01 68 Crim L. Rptr 513 (3/8/01 speech): “Those of us who have been in this business know the best tax cases are made on the civil side of the house and the audit processing kicked over to CI rather than having CI agents spend their down time with U.S. attorneys and come up with tax cases that way.”). It remains to be seen whether the commitment of CID resources to the effort to block the money flow to terrorist organizations will derail this reorganization. See Judith Miller, A Nation Challenged: The Money Trail; Raids Seek Evidence of Money-Laundering, N.Y. Times, Mar. 21, 2002, at A19; Criminal Investigation’s Role on Terrorism Task Forces (Nov. 1, 2001), available at << <http://www.ustreas.gov/irs/ci/factsheets/docterroristtaskforces.htm>>>

⁹⁹For a tentative exploration of such matters, see Richman, Federal Criminal Law, *supra* note __, at 793-99.

¹⁰⁰See sources cited *supra* note __ (Moe, McNollgast, etc)

¹⁰¹Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928, at 358 (Princeton Univ. Press. 2001).

politicians to defer to the wishes of the agency even when they prefer otherwise.”¹⁰² And among his accounts from the Progressive Era is one of the postal inspectors leveraging their department’s “reputation for moral vigor” -- developed during 1890s through the enforcement of morals legislation] – into a new focus on fraud in the 1910s and 1920s that “made the fraud order one of the most powerful forms of economic regulation in the new, advertising-driven economy.”¹⁰³

There is no reason why we have to choose between these theories. Indeed, we find evidence of both at work in the federal criminal enforcement bureaucracy, and can see how they can reinforce one another. Is the FBI “story” one of the inevitable power that flows from control of the national security “beat,” or of the Bureau’s ability to manage its relationships with Congress, the rest of the Executive branch, and the media? It is surely both. And however beleaguered the Bureau may seem today,¹⁰⁴ no prosecutor will discount its clout.¹⁰⁵ The limited bargaining power of ATF, which exists in large part because opponents of gun control wanted a weak agency responsible for gun enforcement,¹⁰⁶ may be more a matter of institutional design, but one still finds the agency striving to establish “political legitimacy” by touting its violent-crime fighting capabilities and working to forge strategic alliances with local law enforcement

¹⁰² Id. at 4.

¹⁰³ Id. at 148-49.

¹⁰⁴ While the Bureau may have seemed particularly autonomous during the Clinton years, see John F. Harris & David A. Vise, *The Clinton Years: With Freeh, Mistrust Was Mutual*, Wash. Post, Jan. 10, 2001, at A1; David A. Vise & Lorraine Adams, *Rift Between Justice Dept. and FBI Widens*, Wash. Post, Sept. 27, 1999, at A3; *ile under Clinton*, its insulation from oversight appears to have ended, with the arrival of an Administration not targeted by special prosecutors, the disclosures about the agency’s errors in the Oklahoma City bombing case, see Michael Isikoff, *The Culture of “Yes Men”*; Freeh Explains How FBI Let Documents Fall Through Cracks, Newsweek Web, May 16, 2001, available at <www.msnbc.com/news/574363.asp> (visited May 17, 2001); Cheryl W. Thompson & Claudia Deane, *FBI’s Ratings Suffer in Light of Blunders; Handing of McVeigh Case Worries Majority, Poll Finds*, Wash. Post, May 22, 2001, at A3, topped off with the swirling allegations concerning the Bureau’s mishandling of its counterterrorism investigations before September 11. See Romesh Ratnesar & Michael Weisskopf, *How the FBI Blew the Case; the Inside Story of the FBI Whistle-Blower Who Accuses her Bosses of Ignoring Warnings of 9/11*, Time Magazine, June 3, 2002.

¹⁰⁵ See CAFLE Nov. 13, 1998 Hearing, at 44-45 (comment of former U.S. Attorney and FBI Director William Webster) (although “U.S. Attorney is, as many of them like to say, the senior federal law enforcement officer in the area,” “[t]he truth of the matter is that the lines of investigation generally are based on instructions from doctrine, policy and so forth from [FBI] headquarters”); Walter J. Kendall, II, *A Brief Argument for Greater Control of Litigation Discretion – The Public Interest and Public Choice Contexts*, 23 J. Marshall L. Rev. 215, 225 (1990) (“The influence of the FBI on the priorities of the U.S. Attorney’s office was acknowledged to be significant.”); David Burnham, *The F.B.I.: A Special Report*, The Nation, Aug. 11, 1997, available at <<<http://past.thenation.com/issue/970811/0811burn.htm>>> (visited Nov. 12, 2001) (“The theory is that the U.S. attorney [] is the top dog in the area when it comes to federal enforcement,” said one senior investigator. “But in many districts the SACs [special agents in charge] have more experience and political connections in Washington than the U.S. attorney.”).

¹⁰⁶ See Richman, *Federal Criminal Law*, supra note __, at 796; Vizzard, *In the Cross Fire*, supra note __, at 154-88.

authorities.¹⁰⁷ The important point, for purposes of this article, is not to get a fix, or even place a rough estimate, on the absolute or relative power of any agency, but rather to recognize that such power will greatly affect the extent to which prosecutors can impose their priorities on agencies.

To what extent, where there is a disjunction between agency and prosecutorial priorities, can agencies leave prosecutors in the lurch by presenting “investigated” cases that (from a prosecutorial perspective) have not been sufficiently developed? Certainly post-indictment prosecutorial investigative work occurs, and the bright-line that the civil immunity cases draw between investigating a case and preparing one for trial¹⁰⁸ is quite artificial. Part of the problem may be that “cost savings from guilty pleas instead of long trials cannot be transferred” from prosecution to agency budgets,¹⁰⁹ leaving little room for agencies to directly negotiate efficient deals. But even so, prosecutors may not, as a general matter, have a pressing need to address the evidentiary gap created by agents’ inattention to adjudicative needs.¹¹⁰ Under the present system of easily obtained indictments and negotiated dispositions,¹¹¹ prosecutors can let agencies freely arrest, frequently without even giving prior notice, knowing that an indictment will be easy to obtain, even on a quick clock, and that a combination of minimal disclosure obligations and big sentencing differentials will generally induce guilty pleas.¹¹² Giving free rein to agencies allows U.S. Attorneys’ offices to operate at maximum capacity, and keep their

¹⁰⁷ Richman, Project Exile, *supra* note __, at 399.

¹⁰⁸ See, e.g., *Hampton v. Chicago*, 484 F.2d 602, 608 (CA7 1973) (“There is a difference between the advocate’s role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective’s role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.”) (internal quotation marks omitted), cert. denied, 415 U.S. 917 (1974).

¹⁰⁹ Michael Levi, *Covert Policing and the Investigation of ‘Organized Fraud’: The English Experience in International Context*, 195, 210, in Cyrille Fijnaut & Gary Marx, *Police Surveillance in Comparative Perspective* (Kluwer Law Int’l 1995).

¹¹⁰ See Wilson, *The Investigators*, at 160 (“‘Making a case’ is the most common expression agents use to describe what they are doing. . . . Once a case is ‘made’ – which usually means, once it has been accepted for prosecution – the agent thinks of himself as having fulfilled his task. His *work* is by no means done – he must still fill out reports and appear in court – but “work” is simply energy expended and is not at all the same thing as ‘the job’ [.]”); see also Joan E. Jacoby, *The American Prosecutor: A Search for Identity* 112 (1980) (noting how police role changes from one of authority, with discretionary power over investigation and arrest, to one of justifier during the intake stage, to mere coordinator of witnesses and evidence, and maybe witness, at trial).

¹¹¹ See Ann L. Pastore & Kathleen Maguire, eds. *Sourcebook of Criminal Justice Statistics*, 418 (tbl. 5.20), 453 (tbl. 5.51) [Online] <http://www.albany.edu/sourcebook/>.

¹¹² For an insightful normative challenge to this way of doing business, and an exploration of the relationship between the prosecutorial screening and plea bargaining, see Ronald F. Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, __ *Stan. L. Rev.* __ (2003) (forthcoming).

own statistics up (which they need to do to compete with other districts for funding and other resources).¹¹³ And because prosecutors are hard pressed to identify *ex ante* which cases will go to trial, even if they had in-house investigators,¹¹⁴ such personnel would be of limited use in closing the evidentiary gaps.

Besides, prosecutors may, as a whole, do better in a system in which agencies are responsible for gathering evidence for trial. If there were a clear line between investigative-information gathering and adjudicative-information gathering, agencies would have a greater incentive to shift costs to U.S. Attorneys offices by presenting weaker cases for prosecution. In any single case, prosecutors could easily address an agency's failure to allocate sufficient resources to information gathering by declining to bring charges. And if this happened over a category of cases of middling importance, large-scale declination would be the answer.¹¹⁵ But what if the pursuit of cases in a category were politically non-negotiable? Then declination would be less of an option, and the consequences of investigative inaction would be unfavorable dispositions. The U.S. Attorney could try to blame the agency for these, but it would be hard to make the charge stick. To be sure, agencies are not fully accountable under the present system, either, since allocating responsibility for an acquittal or unfavorable plea bargain will always be difficult. Was it because insufficient evidence was collected? The indictment poorly drafted? The case poorly tried?, etc.¹¹⁶ But, at the very least, agencies' distasteful obligation to assist at trials gives them an incentive to gather sufficient evidence to make guilty pleas more likely, and to weed out poor cases early.¹¹⁷

Robert Rabin noted the benefits of the "additional interdependency" that "post-referral agency involvement" "creates between agency and prosecutor":

At a minimum, the involvement sensitizes the U.S. Attorney to the pre-referral resource investment of the agency, and leads most U.S. Attorneys to be open about the reasons for declination when the agency feels aggrieved. In turn, the post-referral work probably sensitizes the agency to some of the concerns of the

¹¹³The collective action problem facing U.S. Attorneys' offices is worth noting. As a group, they might prefer to demand a higher level of case preparation from agencies, but, in the absence of enforceable agreement or some sort of "effort convention," see Harvey Leibenstein, *The Prisoners' Dilemma in the Invisible Hand: An Analysis of Intrafirm Productivity*, 72 *Am. Econ. Rev.* 72 (1982), there is pressure to compete for money from Washington.

¹¹⁴ Cross ref

¹¹⁵ See Rabin, *supra* note __, at 1063 (a "couple" of U.S. Attorneys relate that they have declined "out of hand" cases referred by the Department of Agriculture because of the poor quality of that agency's preparatory work).

¹¹⁶ cross-ref to team-production discussion

¹¹⁷ See Raaj Kumar Sah & Joseph E. Stiglitz, *The Architecture of Economic Systems: Hierarchies and Polyarchies*, 76 *Am. Econ. Rev.* 716, 725 (1986) ("a higher quality screening at the lower bureau improves the portfolio to be evaluated by the higher bureau, but it also costs more because a larger number of projects are evaluated at the lower level").

prosecutor which it otherwise would not share. Specifically, the involvement gives the agency some feel for the trial considerations that exercise a continuing influence on prosecutorial decisions at every stage of the development of a case.¹¹⁸

Contributing to the adjudicative effort reinforces agency interest in obtaining convictions – an interest that, in some general sense, it shares with prosecutors, and that likely has much the same sources: congressional oversight, political accountability within the executive branch, ego satisfaction, internal promotion. . . .¹¹⁹ To be sure, the rewards from a trial flow disproportionately to prosecutors, both institutionally and personally. But given that trials rarely occur, it is hard to say as a general matter that the incentives for agents to seek convictions are very different in kind (to the extent that an agency has a commitment to using the criminal process at all). This is in part because the audience often doesn't draw fine distinctions between prosecutors and agents. The term "feds" is a reputational commodity whose value must be protected. If when agents show up for an interrogation, or prosecutors for plea negotiations, they're greeted with: "Oh, you're the guys who can't put anyone in jail," the conversation is likely to go downhill from there. The commitment of prosecutors and agents may differ from case to case, and case type to case type. And the consequences of such differences are of critical interest here. But without some degree of shared commitment to the whole enforcement project, the system described here would soon break down.

Our first pass at the underlying structure of agency-prosecutor relations thus finds U.S. Attorneys' offices, with substantial control over federal adjudicatory resources but with few investigative resources of their own, receiving cases from a multiplicity of federal enforcement agencies that, to one degree or another, control federal (and to some extent, state and local) investigative resources but cannot achieve their missions without access to the adjudicatory process.¹²⁰ A rich dynamic of interaction could arise out of this mutual dependency, just as one finds in the private sector,¹²¹ with interagency competition ebbing and flowing in the face of "[c]hanging task environments."¹²² The FBI's specialized expertise and jurisdictional domination in the area of "traditional" organized crime, for example, gave it leverage over prosecutors, but may, at least in part, have been responsible for the slowness with which the agency responded to the threat

¹¹⁸ Rabin, *supra* note __, at 1068.

¹¹⁹ For an exploration of prosecutorial motivation, see Richman, *Old Chief*, *supra* note __, at 966-69 (citing other sources).

¹²⁰ See Rabin, *supra* note __, at 1056 ("agency-prosecutor friction is diminished, but not eliminated, by the necessity of living with each other").

¹²¹ See Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal. L. Rev. 2005 (1987).

¹²² Jonathan B. Bendor, *Parallel Systems: Redundancy in Government* 43-44 (1985) ("If one organization's program demonstrates its superiority, other organizations may leave the field, transforming competition into monopoly. . . . But the short-run gain is likely to become a long-run problem. Charging task environments may render old successes ineffective; yet it may be difficult to reintroduce redundancy.").

posed by “non-traditional” organizations (e.g. Russian, Asian, etc.) in the 1980s.¹²³ Other agencies, federal and local, began to enter these emerging “markets,”¹²⁴ leaving the Bureau to play catch-up once the new threats became bright enough on the political radar screen to demand its attention.¹²⁵

Yet the constituting backdrop to the agent-prosecutor relationship goes beyond these structural arrangements to include some basic features of federal criminal procedure.

3. Prosecutorial Controls Over Investigatory Tactics

Even if prosecutors lacked any formal control over the tactical decisions of investigative agencies, their control over the charging process and relative expertise in predicting how the use of particular tactics would play out in the adjudicative process (as a matter of law or of jury response), would give them a significant voice in agency decisionmaking. But, having explored the terms and effects of a relatively simple bilateral monopoly in which agents investigate and prosecutors prosecute, we now should add another element: the control that the law has given or encouraged prosecutors to exercise not just over the decision to charge but over the use of a number of critical investigative tools.

If they are willing to devote resources and abide by constitutional or sub-constitutional restrictions, criminal enforcement agencies can freely resort to a panoply of investigative techniques. They can develop informants, go undercover,¹²⁶ interview

¹²³See Margot Hornblower, *Asian Mafia Seen Spreading; Experts Say Far-East Crime Cartels Are Operating in America*, Wash. Post, Oct. 23, 1984, at A3 (chief of FBI organized crime section notes that Bureau “was deciding whether to target Asian organized crime as one of its nationwide enforcement priorities”); James Rosenthal, *Russia’s New Export: The Mob; How a Bunch of Émigré Gangsters Found a Home in Brooklyn*, Wash. Post, June 24, 1990, at C1 (reporting complaints of state and federal prosecutors that the FBI was giving insufficient attention to Russian mobsters).

¹²⁴ See, e.g., Mark Arax & Jack Jones, *LAPD Blamed for Killing Anti-Gang Unit; Coolness to Plan for Multiagency Force Doomed Proposal, 2 Chiefs Say*, L.A. Times, Jan. 12, 1985, at 29 (Los Angeles police department reported to have scuttled plans for federal-local task force targeting Asian organized crime, because department felt own efforts in area were successful); Barbara Lyne, *The Women of One Hogan Place; Three Who Play Key Roles in Morgenthau’s Inner Circle*, Manhattan Lawyer, Mar. 1990, at 5 (describing how assistant district attorney brought Asian organized crime case to U.S. Attorney’s office that had been developed by police gang squad).

¹²⁵ By 1998, “international organized crime” was an FBI priority, indeed a “threat to U.S. national security.” See Statement of FBI Dir. Louis J. Freeh on Threats to U.S. National Security before the Senate Select Comm. On Intelligence, Jan. 28, 1998, available at <http://www.fbi.gov/congress/congress98/threats.htm>.

¹²⁶In certain sensitive cases (i.e. public corruption) or where undercover tactics are particularly risky, agents may be required, as an administrative matter, to obtain approval from a group that includes Criminal Division prosecutors. See Joshua R. Hochberg, *The FBI Criminal Undercover Operations Review Committee*, U.S. Attorneys’ Bulletin, Mar. 2002, 1-2.

willing witnesses, conduct full-blown searches upon consent or where warrants are not required, make “investigative stops” or engage in sustained physical surveillance.¹²⁷ And, as John Hagan observed of narcotics work, where cases can be made based on these tactics,¹²⁸ agents will have considerable sway.

What agents generally cannot do, however, is invoke coercive processes and require unwilling witnesses to speak with them, under pain of contempt. Strictly speaking, federal prosecutors do not have this power either.¹²⁹ Only the grand jury does. But prosecutors can freely invoke compulsory power in the grand jury’s name.¹³⁰ So long as they can find an agent willing to actually serve the subpoena (and even that is not necessary if a witness has a lawyer willing to accept service), grand jury subpoenas thus give prosecutors the ability to gather information notwithstanding an agency’s lack of commitment (or where the prosecutors seek to cure perceived inadequacies of the investigative agency). Commenting on the District of Columbia U.S. Attorney’s Office’s now-abandoned practice of requiring subpoenaed witnesses to appear for prosecutorial questioning prior to going before the grand jury, one prosecutor recalled that in homicide cases “he would routinely subpoena witnesses to his office in an effort to build a case – which, in the District, is almost always compromised by shoddy police work and uncooperative witnesses.”¹³¹

¹²⁷ Rory K. Little, *Proportionality As an Ethical Precept for Prosecutors in Their Investigative Role*, 68 *Ford. L. Rev.* 723, 737 (1999) (“Not all criminal investigative techniques require, or even involve, prosecutors. Law enforcement agents may and often do, for example, interview witnesses, obtain public records, and conduct covert surveillance, without ever consulting a prosecutor.”).

Compare Ethan A. Nadelmann, *The DEA in Europe*, 269, 285 in Fijnaut & Marx, *supra* (“Since the mid-1980s, [] prosecutors in almost every European country have begun to play at least some role in authorizing, supervising or informally shielding controlled deliveries [in which the police allow drugs to proceed to their destination so as to see who will pick them up]. This has involved first circumventing, then bending and ultimately redefining the legality principle to accommodate controlled deliveries. Initially prosecutors agreed to ignore or wink at the legal charades engaged in for their benefit by the police. It has since progressed to the point where prosecutors can legally authorize a controlled delivery, impose certain constraints on its conduct, and demand certain assurances from the police.”).

¹²⁸ Hagan, *supra* note __, at 123 (“prosecutors must often rely on narcotics officers for information they need in developing cases, and they therefore are often willing to give these officers extra consideration”).

¹²⁹ By contrast, prosecutors in the United Kingdom’s Serious Frauds Office can require “attendance of persons to answer questions” and seek criminal sanctions if they fail to answer questions “without a reasonable excuse.” Janet Dine, *Criminal Law in the Company Context* 176 (1995).

¹³⁰ See Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 *Am. Crim. L. Rev.* 339, 344 (1999); see also *United States v. Williams*, 504 U.S. 36, 48 (1992) (noting that “the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appear to the court when such compulsion is required”).

¹³¹ Tom Schoenberg, “Prosecutors Nix Witness Strategy,” *Legal Times*, Dec. 11, 2000, at 1, 6; see also Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *Iowa L. Rev.* 393, 427 (2001) (discussing “office visit” practice of D.C. U.S. Attorney’s Office).

Even in less extreme cases – where an agency appears to be zealously pursuing an investigation -- control over coercive processes allows prosecutors what may end up being a controlling voice as to what directions the inquiry will take. This dynamic is particularly likely to occur in the white-collar context.¹³² There, sophisticated parties (represented by sophisticated lawyers) having non-incriminating competitive or privacy justifications that they can freely assert when an agency asks for voluntary cooperation, will often do just that. And these obstacles to agency inquiry so blithely imposed can productively be removed by coercive processes. For these parties are more likely than others to provide truthful information and documents in response to a grand jury subpoena.¹³³ The need for grand jury activity is not the only reason why prosecutors often find themselves controlling white collar investigations. To some extent, such control would naturally flow from the combination of targets with the resources to assert rights, and rights to assert,¹³⁴ and prosecutors' responsibility for defending agency tactics. But prosecutors' effective domination of grand jury processes certainly provides an additional degree of control.

Even where information cannot be obtained by grand jury subpoena, prosecutors control other coercive tools that agencies lack: the ability to threaten prosecution, to enter into arrangements that promise leniency or better in exchange for information, and to seek compulsion orders requiring witnesses to testify under grant of immunity. Of these powers, only the last has formally been granted to prosecutors (and not law enforcement agencies) by statute.¹³⁵ The others have been treated as arising out of prosecutorial charging discretion. Even where an agent actually promises a suspect that he will not be prosecuted if, say, he aids in an investigation, the promise will not be binding in the absence of specific (and generally unavailable¹³⁶) evidence that the agent had authority to bind the U.S. Attorney's office.¹³⁷

¹³² See also Benson & Cullen, *supra* note ___, at 69 (noting that “pattern of early and active involvement in the investigation of corporate cases also is found among local prosecutors”).

¹³³ See Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 *Am. Crim. L. Rev.* 339, 345 (1999) (in white collar area, “potential witnesses frequently operate within an institutional context that both requires the threat of legal sanction as a means of obtaining testimony, and takes that threat seriously”).

¹³⁴ See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1, 28 (1997); see also Robert A. Kagan, *On Regulatory Inspectorates and Police*, 37, in *Enforcing Regulation*, at 47 (comparing police with regulatory inspectors); Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (1985).

¹³⁵ See 18 U.S.C. § 6002 (governing applications for compulsion orders for court and grand jury proceedings). Note that § 6004 provides for compulsion orders in proceedings before agencies. (See *infra* for discussion of administrative subpoenas).

¹³⁶ Recent Justice Department regulations reaffirm the absence of agent authority in this regard: A [Justice Department law enforcement] agent does not have any authority to make any promise or commitment that would prevent the government from prosecuting an individual for criminal activity that is not authorized pursuant [specific guidelines], or that would limit the use of any evidence by the government, without the prior written approval of the [Federal Prosecuting Office] that has primary jurisdiction to prosecute the [informant] for such criminal activity. A[n] agent must take the utmost care to

The effect that this legal regime has on agent-prosecution relations can best be appreciated by comparing that regime to that prevailing in England and Wales. There, where the Crown Prosecution Service has had gatekeeping authority over almost all prosecutions since 1986, a 1993 High Court decision held that it would be an “abuse of process” for prosecution to proceed where police had represented to the defendant that no such prosecution would be brought.¹³⁸ Although the Crown Prosecution Service protested that it had the exclusive right to decide whether to proceed, the High Court, giving little thought to “how a Crown Prosecutor, without any powers to supervise the investigation stage, could prevent the police making such undertakings,”¹³⁹ responded: “If the CPS find that its powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage.”¹⁴⁰ By maintaining prosecutors’ charging monopoly, the American federal rule is a far more effective spur to coordination within the government, and ensures that prosecutors will have a critical, indeed dispositive voice, about whether and on what terms informants and/or cooperators can obtain enforceable grants of immunity or leniency.

By statute, prosecutors have a gatekeeper role over the use of certain other investigative techniques, such as electronic surveillance under Title III.¹⁴¹ And as a

avoid giving any person the erroneous impression that he or she has any such authority. Department of Justice Guidelines Regarding the Use of Confidential Informants, Jan. 8, 2001, at 4; available at <http://www.usdoj.gov/ag/readingroom/ciguuidelines.htm>

¹³⁷See *United States v. Flemmi*, 225 F.3d 78, 84-90 (1st Cir. 2000); *Cordova-Perez*, 65 F.3d 1552, 1554 (9th Cir. 1995) (INS agent who made a “no prosecution” promise could not bind the United States); *United States v. Fuzer*, 18 F.3d 517, 520-21 (7th Cir. 1994) (ATF agents lacked authority to promise that defendant would not be prosecuted); *Streebing*, 987 F.2d 368, 373 (6th Cir. 1993) (finding that FBI agent “lacked any actual or apparent authority to make the alleged promise not to prosecute”); *United States v. Kettering*, 861 F.2d 675, 676 (11th Cir. 1988) (holding that a DEA agent lacked authority to guarantee immunity); *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 888 (D.C. Cir. 1981) (“no authority for ruling that oral promises of immunity by an investigator [FBI agent], not in accord with statutory requirements, bind all federal . . . prosecutors”); *United States v. Hudson*, 609 F.2d 1326, 1329 (9th Cir. 1979) (holding that Secret Service agent’s promise to drop charges did not bind the United States).

A defendant who made incriminating statements in reliance on unauthorized agent promises may be able to suppress them as improperly obtained. Compare *Welsh S. White, Confessions Induced by Broken Promises*, 43 *Duke L.J.* 947 (1994) (arguing for doctrine to that effect) with *United States v. Flemmi*, 225 F.3d at 91-92 (rejecting one such claim).

¹³⁸*R. v. Croydon Justice, ex parte Dean*, [1993] 3 All ER 129.

¹³⁹Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* 35 (1995).

¹⁴⁰*R. v. Croydon Justice, ex parte Dean*, [1993] 3 All ER 129 (Staughton, L.J.); see also Julia Fionda, *The Crown Prosecution Service and the Police: A Loveless Marriage?*, 119 *Law Quart. Rev.* 376-79 (1994).

¹⁴¹Application by “an attorney for the Government” is also needed for pen registers and “trap and trace” devices, see 18 USC 3122. For a trenchant depiction of the FBI’s autonomy in the wiretap area before passage of Title III, see Athan Theoharis, *FBI Wiretapping: A Case Study of Bureaucratic Autonomy*, 107 *Pol. Sci. Q.* 101 (1992).

general matter, agents need their sponsorship for search warrant applications as well. Although the Federal Rules appear to allow agents to apply for warrants on their own,¹⁴² familiarity with legal standards and with drafting make prosecutors sought-after partners in this process. This might not just be a matter of technical expertise, for prosecutors play a bonding role here as well vis a vis the judicial officers to whom search warrant applications must be presented. A judicial officer aware that “good faith” doctrine makes her decision to issue a warrant effectively unreviewable (at least in criminal case),¹⁴³ may be more likely to sign off if the application has been written, or at least sponsored, by an AUSA known to the court personally,¹⁴⁴ or whose status as a legal professional makes him more apt to get judicial deference.¹⁴⁵

The more technically demanding a warrant process is, the more a prosecutor can use her statutory role to scrutinize an agency’s investigation. As one prosecutor counseled in a departmental publication:

All prosecutors should be from Missouri [the “Show Me” state]. With electronic surveillance, and all other aspects of our work for that matter, we should personally verify all facts in a wiretap affidavit that can be verified. An investigative agent will not be offended when we ask to see copies of the pen register or trap and trace data, or toll records which constitute part of the probable cause for an application. This personal review not only affords the prosecutor an opportunity to verify the accuracy of such information in the affidavit, it also gives him or her an opportunity to identify other information that might be pertinent immediately or at some future point in an investigation. Likewise, the prosecutor should review any and all surveillance and interview reports that are connected to events described in an affidavit.¹⁴⁶

¹⁴²See Fed. R. Crim. P. 41(a) (“Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued”).

¹⁴³See *United States v. Leon*, 468 U.S. 897 (1984).

¹⁴⁴See Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 Neb. L. Rev. 251, 269 (2000) (discussing how personal relationships between judges and prosecutors are fostered); see also Miller, *Prosecution*, supra, at 53 n. 18 (survey of arrest warrant practices of Michigan state judges in late 1960s notes: “One judge responsible for the signing of warrants stated that he, being a former prosecutor himself, placed much faith in the ability of the present prosecutor to screen cases. Consequently, he did little more than scan the information contained in the warrant before signing it.”).

¹⁴⁵ Cf. John C. Coffee, Jr., *The Acquiescent Gatekeeper: Reputational Intermediaries, Auditor Independence and the Governance of Accounting*, Working Paper No. 191, May 21, 2001 draft, available at <<<http://papers.ssrn.com/paper.taf?abstract id=270944>>> (discussing how reputational penalties can bond gatekeeper performance).

¹⁴⁶Jeffrey W. Johnson, *Defending Wiretaps: “Think in the Beginning What the End Will Bring,”* U.S. Attorneys’ Bulletin, Sept. 1997, 27, 28; see also “Wiretaps: A DEA Agent’s Perspective: Interview with Special Agent Mark Styron,” U.S. Attorneys’ Bulletin, Sept. 1997, at 29, 31 (supervisory DEA agent who instructs other agents on use of wiretaps observes: “When a case merits a wiretap, the agent usually spends a great deal of time advising the AUSA of the investigative history.”).

Noting prosecutors' value as intermediaries between agencies and judges in the search warrant application process leads to a more general point about prosecutors' role. Even when an agency does not need formal *ex ante* judicial or prosecutorial authorization to proceed with some investigative tactic, consultation with prosecutors will often be salutary because of the extent to which agency actions will later be subject to judicial scrutiny.¹⁴⁷ Prosecutors' legal expertise and professional ties to judges can provide agencies with the promise of greater success or some insulation (should their work be condemned on review). And agencies may also want to give prosecutors some foreknowledge of (and complicity in) tactics (including warrantless searches and interrogations) that will later be the subject of suppression hearings. Even when agencies have in-house legal personnel, these considerations (and perhaps perceptions of relative competence in such matters) can lead agents to seek legal counsel from prosecutors.¹⁴⁸

Agents surely see themselves as paying a price for this insulation and insurance. Dramatic evidence of this can be found in account of the now-famous counsel at the FBI's Minneapolis field office, Coleen Rowley, about her office's vain efforts to gain access in August 2001 to the computer of Zacarias Moussaoui, now charged with conspiring with the September 11 hijackers. Explaining why she had sought a warrant under the Foreign Intelligence Surveillance Act, rather than going to the U.S. Attorney's office for a criminal search warrant, Rowley noted:

“[A]lthough I thought probable cause existed (“probable cause” meaning that the proposition has to be more likely than not, or if quantified, a 51% likelihood), I thought our United States Attorney’s Office, (for a lot of reasons, including just to play it safe) in regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75%-80% probability and sometimes even higher), and depending on the actual AUSA who would be assigned, might turn us down.”¹⁴⁹

¹⁴⁷ See Scott Turow, *Policing the Police: The D.A.’s Job*, in *Postmortem: The O.J. Simpson Case* (Jeffrey Abramson, ed. 1996), at 189, 191 (blaming Los Angeles D.A.’s office for sponsoring perjurious testimony by police officers in O.J. Simpson case and recalling that when he was an AUSA, AUSAs “were available to answer federal investigators’ legal questions twenty-four hours a day,” and “agents were forbidden to make an arrest or enter a residence without our approval”).

¹⁴⁸ See Webster IRS report at 103 (“Field interviews established that CI Special Agents generally have little confidence in the legal advice of their IRS Counsel due to the Counsels’ lack of criminal litigation expertise. Consequently Special Agents rely heavily on Assistant United States Attorneys for advice during investigations.”). Cf. Rosen, *Inside Counsel*, *supra* note __ at 503-04 (noting that historically corporations didn’t vertically integrate for legal services because “elite firms . . . were the only source for quality legal services”).

¹⁴⁹“Coleen Rowley’s Memo to FBI Director Robert Mueller,” *Time Magazine*, June 3, 2002 (edited version of Rowley’s letter to Director Mueller, dated May 21, 2002); see Romesh Ratnesar & Michael Weisskopf, *How the FBI Blew the Case; the Inside Story of the FBI Whistle-Blower Who Accuses her Bosses of Ignoring Warnings of 9/11*, *Time Magazine*, June 3, 2002.

Indeed, the insulation that prosecutors provide may be based not simply on professional courtesy but on a judicial recognition of prosecutors' risk aversion. The dynamic in this regard may be much like that in the corporate arena, where lawyers also are frequently perceived as "naysayers."¹⁵⁰ Although prosecutors lack their private counterparts' need to justify billable hours, their overstatement of legal risk – i.e. going beyond simple prudence in face of legal uncertainty¹⁵¹ -- still has its own rewards in the control it gives them over agency decision making.¹⁵² Where professionals seek "to increase their power and prestige within organizations []by constructing the legal environment as a major threat and then claiming the unique expertise to craft an effective response," the advice they give "may be substantially more constraining than the law itself."¹⁵³

The nature of the procedural and substantive rules that prosecutors must interpret is itself a source of their professional power. Enforcement agents would undoubtedly require some legal assistance in a world of well-developed codes of police conduct and of criminal liability. But the world in which federal agents now operate seems almost to have been intentionally constructed to render them dependent on lawyers. Common law constitutional constraints dominate on the conduct side, and, though "the Supreme Court has studiously denied that federal common-law crimes exist,"¹⁵⁴ the lack of legislative specificity on the substantive side is remarkable.¹⁵⁵ Whether prosecutors actively embrace this legal uncertainty is a matter of speculation.¹⁵⁶ But they certainly profit from it in their relations with agents.

¹⁵⁰Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Result: The Role of Lawyers in Transmitting Legal Rules*, 5 S. Cal. Interdisc. J. 375, 399 (1997).

¹⁵¹ *Id.* 379-80.

¹⁵²*Id.* at 439 ("[A] lawyer's status in a client interaction is elevated by the assumption of dominance and control in that relationship, and the leverage a lawyer has to achieve that status is the threat of legal risk. By using it, the lawyer can take charge and displace the client's apparent autonomy."); see also *id.* at 416 ("the overstatement of legal messages within an organization approaches the blurry line between those intended in good faith to prompt action by the client and those strategically designed to maximize the status and resources of legal players within the enterprise."); Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L & Soc'y Rev. 47, 77 (1992) ("[T]he professional power perspective suggests that personnel professionals and practicing lawyers have a shared interest in constructing the threat of wrongful discharge in such a way that employers perceive the law as a threat and rely upon those professions to curb the threat").

¹⁵³Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 *Annu. Rev. Soc.* 479, 500 (1997).

¹⁵⁴ Richman, *Federal Criminal Law*, *supra* note __, at 761 (citing cases).

¹⁵⁵ See *id.*; Kahan, *supra* note __, at 472-79.

¹⁵⁶See Kahan, *supra* note __, at 479-81 (suggesting that prosecutors use power of initiation to guide development of federal criminal law). Cf. Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 *Harv. L. Rev.* 2009, 2058 (1990) ("The differing social prominence of the bar in the civil and common law worlds is due to contrasting views within these systems over the degree of precision

Imperialism is not the only reason why prosecutors are likely to overstate legal risk. Their institutional aversion to adjudicative loss – whether in a pre-trial suppression hearing or a post-trial reversal – can also lead them to underestimate the investigative or enforcement value of a proposed investigative tactic. To be sure, the tactic’s success could bring in valuable evidence that would increase the likelihood of an adjudicative victory (by plea or trial). But the prosecutor, having the ability to decline cases she deems “weak” (and probably having less invested in an investigation¹⁵⁷) can usually be more cavalier about the risk that a particular investigation will come up dry.

These are all reasons why the rational prosecutor may be quicker to veto an agency’s investigative plans than a close reading of the relevant case law might require. But, as Langevoort and Rasmussen have noted in the corporate context, the lawyer’s bias against risk may have a cognitive basis as well. It is true that, unlike their corporate cousins, prosecutors will often be consulting a body of case law skewed toward the approval of a proposed action.¹⁵⁸ That is a natural consequence of a system in which criminal defendants are free to bring, and lose, meritless legal claims of improper agency action.¹⁵⁹ But, as in the corporate context, the prosecutor will still encounter “asymmetric accountability,”¹⁶⁰ and be more likely to face review and condemnation for authorizing action than for vetoing it.¹⁶¹ And with the costs of foregone action so often elusive, the temptations to err on the side of caution are great.

There are limits to the costs to agencies of involving prosecutors in investigative decision making. For the prosecutor who has helped (or at least thinks he has helped) call investigative shots is more likely to be aligned with the agency’s interests when it comes to making charging decisions.¹⁶² But it would not be surprising if many agents

and certainly necessary to the exercise of professional authority.”).

¹⁵⁷ To the extent that a prosecutor does have a considerable investment in the success of a particular investigation, because, say, she has devoted most of her time to it, or because she perceives a need to pursue this particular case, her decision-making bias may be quite different. [cross ref to infra]

¹⁵⁸ See Langevoort & Rasmussen, *supra* note __, at 433 (noting that in civil context, there is selection bias toward the “hard” cases, “leading some to predict a roughly 50/50 split between dispositions for plaintiffs and defendants on the merits, regardless of the prevailing standard of law”); see also George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984).

¹⁵⁹ See Kate Stith, *The Rise of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 *U. Chi. L. Rev.* 1 (1990).

¹⁶⁰ Langevoort & Rasmussen, at 427.

¹⁶¹ There are, of course, exceptions to this rule. See Beverly Lumpkin, *Anti-Terrorism Proposals*, ABCNews.com, Sept. 28, 2001, available at <<<http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice.html>>> (visited Oct. 2, 2001) (reporting dispute between unnamed FBI and Justice Department officials, in wake of Sept. 11, 2001 Pentagon and World Trade Center attacks, as to whether Department officials had prevented the Bureau from obtaining FISA warrants prior to attacks). ADD AFTER FUTHER CONG HEARINGS

¹⁶² See Busch & Funk, *supra* note __, at 66 (noting how in “many large cities” in Germany, “the organized-

saw prosecutors more as a necessary evil or ambassadors to a foreign realm than as devoted champions.¹⁶³ And the “costs” to agencies (measured as power lost to prosecutors) are presumably greatest in those areas in which judicial intervention is most likely, or in which the information acquisition tools controlled by prosecutors (like grand jury subpoenas for complex white collar investigations) are most needed.

4. Culture Clash and Merger

The next element to add is cultural. And at first blush, it would seem that, whatever their legal and institutional obligations to work together, prosecutors and agents would be pushed in different directions by their membership in distinct, even antagonistic, professional cultures. Yet here too, particularly in the federal system, there is a degree of convergence that often goes unrecognized.

The basics are well known. Although the FBI has a long tradition of lawyer-agents, most agencies do not.¹⁶⁴ And even the FBI has changed a lot since the Hoover years.¹⁶⁵ As a general rule, then, most agents have not been exposed to the acculturation process at law school, which not only tends to be process oriented when it addresses

crime units of the police [] set up special offices for maintaining liaison with the state attorney’s office,” and observing that “[t]he danger of such a liaison is that the state attorney’s office may find itself being gradually drawn away from judicial criteria, becoming increasingly committed to the criteria of police efficiency.”).

¹⁶³ Although in the federal system, agents cannot directly seek electoral revenge on prosecutors for overly aggressive gatekeeping, police have that option elsewhere. See Roy B. Flemming, Peter F. Nardulli & James Eisenstein, *The Craft of Justice: Politics and Work in Criminal Court Communities* 46 (1992) (recounting how DA who had “turned down an awful lot of warrants” and had thereby “pissed off the cops” dropped out of race for reelection when he found “he had no support from the Fraternal Order of the Police”).

¹⁶⁴ See CAFLE Oct. 5, 1998 Hearing, at 87-88 (testimony of Richard Cañas, Director of the National Drug Intelligence Center) (“where the DEA took great pride in [the fact] that 70-80 percent of its people had prior [state and local] law enforcement experience, the FBI took great pride that 80-90 percent of their people did not”); see also Department of Labor, *Occupational Outlook Handbook* (2002), available at <<<http://www.bls.gov/oco/ocos160.htm>>> (to be considered, FBI applicant “either must be a graduate of an accredited law school or a college graduate with a major in accounting, fluency in a foreign language, or 3 years of related full-time work experience”; DEA applicant “must have a college degree and either 1 year of experience conducting criminal investigations, 1 year of graduate school, or have achieved at least a 2.95 grade point average while in college”; Secret Service and ATF applicant “must have a bachelor’s degree or a minimum of 3 years’ related work experience”); Thie et al., *supra* note __, at 323 (“Most new [ATF] agents come directly from colleges and universities, often from one of the many schools with a strong program in criminal justice.”); *id.* at 328 (Most candidate agents join the Secret Service with some prior law enforcement experience, often in a police department or the military. Others come directly from college, often schools with programs in criminal justice.”).

¹⁶⁵ Actually, it was in the 1960s, when Hoover still very much in power, that “the Bureau began to look to nonlawyers as agents.” Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* 362 (1987). But see Harry Thie et al., *Future Career Management Systems for U.S. Military Officers* 317 (1994), available at <<<http://rand.org/publications/MR/MR470/>>> (“While candidates [for the FBI] have a wide range of backgrounds, requirements demand many lawyers and accountants”).

criminal enforcement issues, but exalts a norm of moral neutrality¹⁶⁶ that can (but need not) lead prosecutors to distance themselves from the enforcement projects of the agents they deal with, who may see the world in more Manichean terms.

Law school is only the beginning of the story, though. Far more influential is the difference in the career paths of agents and prosecutors. There are many career, or at least long-serving, prosecutors.¹⁶⁷ But a great many view the job as a way station, a means of acquiring human capital (litigation experience, familiarity with local legal practices and personalities) that will facilitate their representation of private clients thereafter.¹⁶⁸ Even those prosecutors who plan to stay with the government will often orient themselves toward their professional counterparts through participation in local bar activities, and the like.¹⁶⁹ In contrast, agents stay for a long time. A 1994 RAND report found that “[o]verall attrition in the [FBI] is low,” and that, while some agents resign in their first five years, “[m]ost agents either retire at the earliest opportunity [age 50] or remain in the bureau until mandatory retirement [age 57].”¹⁷⁰

¹⁶⁶ See Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 *Minn. L. Rev.* 193 (1991). But see Langevoort & Rasmussen, at 414 (“the image of lawyers more beholden to the law than to their clients is of questionable descriptive accuracy”).

¹⁶⁷ See Hearing of the Civil Service Subcommittee of the House Government Reform Comm., *Retirement for Federal Law Enforcers* H.R. 583, Sept. 9, 1999, statement of Rep. Ed Bryant (“Data from the Department of Justice reveals that length of service for AUSAs was seven years for 1990 through 1992, and eight years for 1993 through 1996. . . . By comparison, the length of service for other Justice employees was 19 years in 1996.”); statement of Rep. Tom Davis (“Right now, the current average length of service for an AUSA is ten years.”).

¹⁶⁸ See Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 *Am. L. & Econ. Rev.* 259 (2000); Richard T. Boylan & Cheryl X. Long, *The Sources of Agency: An Empirical Examination of United States Attorneys* (July 1999 draft, as of 12/15/99) (suggesting that prosecutors are prone to take cases to trial to acquire human capital unless they are closely monitored); see also Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Regulation Between Regulators and Regulatory Lawyers*, 65 *Ford. L. Rev.* 149, 168 (1996) (“[A]gency lawyers, like other lawyers, invest substantial human capital in building a reputation for thoroughness, integrity, and zealous representation of their clients. This reputational paradigm is reinforced by the values of the legal professional that accord the most respect to the toughest government lawyers, and not to the weakest or most accommodating.”).

Familiarity with informal discretionary policies, particularly as to charging, may also be valuable. That at least appears to be the feeling of the many defense lawyers who start plea negotiations with prosecutors by telling them how the case would have been treated “when I was in the Office.” See Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* 78 (1985) (defense lawyers tell of rapport with AUSAs because they too were once prosecutors).

¹⁶⁹ Cf. James Q. Wilson, *Inside Bureaucracy: What Government Agencies Do and Why They Do It* 60 (1989) (“In a bureaucracy, professionals are those employees who receive some significant portion of their incentives from organized groups of fellow-practitioners located outside the agency.”).

¹⁷⁰ Harry Thie et al., *Future Career Management Systems for U.S. Military Officers* 321 (1994), available at <<[<http://rand.org/publications/MR/MR470/>>](http://rand.org/publications/MR/MR470/)>>.

Related to the different career paths of agents and prosecutors are their different geographical orientations. AUSAs may choose to move to another city, and may therefore decide to move to another U.S. Attorney's office. Assistants may even be asked by Washington to take on jobs in another city, perhaps even as U.S. Attorney.¹⁷¹ But the typical AUSA stays in one city, and builds her professional reputation there. Life is very different for agents. According to the RAND report, upon graduation from the FBI Academy, FBI agents "begin a three to five year assignment in one of the field offices. (Current policy precludes this assignment from being near the agent's home of record.)"¹⁷² "The second assignment for most agents is typically to another field office (often one of the "top 12" offices that are larger, have broader operational requirements, and are sometimes difficult to staff) or to the headquarters in Washington D.C."¹⁷³ "Since FBI agents sign mobility agreements when hired, reassignment is based on the needs of the FBI and whether agents choose to compete for management positions in other locations."¹⁷⁴ "All agents are reassigned or relocated at regular intervals."¹⁷⁵ Similar policies -- including mobility agreements, regular reassignment, and control of the entire process from headquarters -- can be found at other agencies as well.¹⁷⁶

The effects of the cultural disjunction between agents and prosecutors that these (and other, related) differences foster are varied, but they can drive a powerful wedge between the two groups.¹⁷⁷ Agents or even agencies seeking to justify their refusal to share information about sources and methods with prosecutors will assert a fear that such data will be misused once the prosecutors enter private practice.¹⁷⁸ This tendency toward non-disclosure is bolstered by concerns that prosecutors have far less "on the line" when it comes to investigative security. An agent's promise to an informant, for example, is

¹⁷¹ See, e.g., Seth Rosenfeld, Big Job Ahead for New U.S. Attorney; "Straight Shooter" Takes Over Office in Apparent Disarray, S.F. Examiner, Aug. 23, 1998, at D1 (appointment of Robert Mueller, then an AUSA in D.C., as interim U.S. Attorney in San Francisco); Benjamin Weiser, Bush Picks Virginia Prosecutor for U.S. Attorney, N.Y. Times, Dec. 1, 2001, at D3 (appointment of James Comey, then AUSA in Virginia, to be U.S. Attorney in Southern New York).

¹⁷² Thie et al., supra note __, at 317.

¹⁷³ Id.

¹⁷⁴ Id. at 319.

¹⁷⁵ Id.

¹⁷⁶ See Thie et al., supra note __, at 323-24 (ATF); 329-31 (Secret Service).

¹⁷⁷ See W.E. Douglas Creed & Raymond Mills, "Trust in Organizations: A Conceptual Framework Linking Organizational Forms, Managerial Philosophies, and the Opportunity Costs of Controls, in Roderick M. Kramer & Tom R. Tyler, Trust in Organizations: Frontiers of Theory and Research, 16, 18-19 (1996) (discussing trust as in part a function of "characteristic similarity").

¹⁷⁸ Cf. Stewart A. Baker, Should Spies Be Cops, 97 Foreign Policy 36, 46 (Winter 1994-95) (former general counsel of National Security Agency notes: "It is bad security to describe highly sensitive sources and methods to a steady stream of prosecutors -- many of them young lawyers who will soon be making a career out of representing criminal defendants.").

bonded by his and his agency's professional reputation. The prosecutor who will soon move into another world has few such fears. Agents may also worry that prosecutors looking for lucrative private practices berths will be too quick to compromise cases with, or extend professional courtesies to, prospective professional allies (or partners), or, alternatively, too quick to tax agency resources by taking cases to trial unnecessarily, in order to gain marketable litigation experience.¹⁷⁹ Agents may also see prosecutors as all too ready to credit defense allegations of agent misconduct.¹⁸⁰ Part of the problem may be sheer resentment on the part of agents at the rewards that private practice will bring prosecutors, and perhaps some disdain for the unworldliness of young prosecutors' law school experience.

Prosecutors, for their part, may tend to identify with professional adversaries,¹⁸¹ and see their job as reining in "cowboy" line agents who pay little heed to the niceties of due process.

Yet there are also forces that tend to reduce the culture gap. A small part of the story (but an interesting one) may be the growing high-end private market for federal investigative expertise. When some of the best retirement jobs an agent could seek were in the security area, they had good reason to pursue bank robbery cases¹⁸² but no particular cause to get close with prosecutors. But particularly since the advent of the Federal Sentencing Guidelines, which put a high premium on internal corporate investigations, ex-federal agents have begun to find a new array of lucrative employment

¹⁷⁹See Boylan & Long, *supra* note __.

¹⁸⁰See Kurt Eichenwald, *The Informant* 361-62 (2000) (recounting how defense allegations of informant and FBI misconduct drove a wedge (at least temporarily) between agents and prosecutors).

¹⁸¹See James Eisenstein, Roy B. Flemming & Peter F. Nardulli, *The Contours of Justice: Communities and Their Courts* 34 (1988) (study of county courts notes: "The higher-status members of the criminal court community share more than a common workplace and linked occupations. All are lawyers, sharing the relatively high status that this profession accords its members and the common experience of attending law school and practicing law.").

¹⁸²See David Burnham, *The F.B.I.: A Special Report*, *The Nation*, Aug. 11, 1997, available at <<<http://past.thenation.com/issue/970811/0811burn.htm>>> (visited Nov. 12, 2001) (retired F.B.I. executive notes that "at the local level, bank robberies are pretty nice for the agent. Sometimes they're exciting, and rarely do they require serious work. And don't forget what may be the most important factor: A lot of agents want to please the bankers because one of their favorite retirement jobs is being the chief of security for a bank.").

opportunities in the private sector.¹⁸³ And the hiring will likely be done by, or presided over, by lawyers, often ex-prosecutors who once worked with or around them.¹⁸⁴

Another factor is training – although who is training whom can vary from place to place and from time to time. The young prosecutors charged with supervising a wiretap, dealing with a cooperator, or putting a corporate subordinate into the grand jury will frequently find that the street-wise agents on the case are far more perspicacious instructors on human nature and criminal machinations than her law school professors, her ex-law-firm colleagues, or even the prosecutors down the hall.¹⁸⁵ For their part, an increasing number of agents, many quite inexperienced,¹⁸⁶ find themselves looking to

¹⁸³See Hilary Rosenberg, *The Deal Detectives*, Institutional Investor, May 1996, at 74; Joseph B. Treaster, *Gumshoes with White Collars*; Deal Spotlights New Shrewdness in Detective Business, N.Y. Times, Aug. 29, 1997, at D1; Kim Clark & Eileen P. Gunn, *The Detectives*; The Business of Uncovering Corporate Crime Is Booming, Fortune, Apr. 14, 1997, at 122; Susan Antilla, *When Things Go Wrong On Wall Street*, N.Y. Times, May 15, 1995, sec. 3, at 15. For a sense of the agency backgrounds of the investigative consultants allied with one white-collar law firm, see http://www.hkconsulting.com/consultants_results.asp?searchArea=c3 (visited Mar. 29, 2002).

¹⁸⁴See Anthony Lin, *Lawyers Play Detective in Corporate Scandals*, N.Y.L.J., July 26, 2002, at 1, 3 (“Corporations typically hire law firms to spearhead investigations. . . .Law firms then decide whether or not to hire an investigative agency and what role that agency will play.”); id. (“[M]ost of the lawyers now leading major corporate investigations possess significant law enforcement backgrounds, whether from stints at U.S.attorney’s offices, the Securities and Exchange Commission, the U.S. Department of Justice or elsewhere.”); David M. Halbfinger, *Corporate Cops; They’re Private, They’re Crime Busters and They’re Proliferating*, Newsday, Mar. 26, 1995, Money & Careers sec. at 1 (discussing role of ex-prosecutors in investigative industry); Kim Clark & Eileen P. Gunn, *supra* note __ (“It turns out [], that many [investigative] agencies claiming to have operatives around the world are really just a couple of ex-prosecutors in an office with the directory of retired FBI agents.”).

For an unscientific sense of the range of employment options for ex-FBI agents, see websites linked to homepage of Society of Former FBI agents, http://www.socxfbi.org/socxfbi_html/membersHPlist.html.

¹⁸⁵ Of course, a prosecutor’s failure to recognize a training opportunity can increase the cultural gap. See W. Boyd Littrell, *Bureaucratic Justice* 42 (1979) (study of justice system in a New Jersey county notes how “delicate interpersonal problems” can arise when veteran police officers, much older and with more criminal law knowledge than young prosecutors have to defer to prosecutorial authority).

¹⁸⁶Even before September 11, 2001, turnover and aggressive agency expansion were producing a relatively less experienced workforce. See Statement of FBI Director Louis J. Freeh on FY 2002 Budget Request Before the Senate Committee on Appropriations Subcommittee for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, May 17, 2001; available at <<<http://www.fbi.gov/congress/congress01/freeh051701.htm>>> (“Agents hired since September 1993 represent about 41 percent of the agents on board today.”); Chitra Ragavan, *FBI Inc., How the World’s Premier Police Corporation Totally Hit the Skids*, U.S. News & World Report, June 18, 2001, at __ (noting that Freeh’s “ramping up of staff was combined with a rapid retirement of senior agents in charge and deputies (lured in part by lucrative pensions and large private sector paychecks), leading to a young workforce”). The trend will become even more pronounced in the wake of September 11. See Jerry Seper, *FBI Sets “Aggressive Hiring” Goal at 900; Languages, Cyber-skills Are Priorities*, Wash. Times, Jan. 30, 2002, at A4; see also Stephen Barr, *New Drill in Law Enforcement: Ready, Aim, Hire!*, Wash. Post, Feb. 13, 2002, at B2 (“Recruitment programs at Customs, the FBI and other law enforcement agencies are being driven by the war on terrorism and by efforts to improve homeland defense.”).

prosecutors for guidance and on-the-job training.¹⁸⁷ This is particularly true in the white-collar area, where, as has been seen, prosecutors have a significant investigative role and can develop investigative expertise. One U.S. Attorney recently noted that the need for Assistants to teach agents about white collar crime had increased “as many young agents have been diverted into violent crime investigations.”¹⁸⁸ It would be an overstatement to say that the training of prosecutors by agents, or of agents by prosecutors creates a common culture,¹⁸⁹ but these processes certainly tend to bridge cultural and professional gaps and promote closer coordination in investigative decisionmaking.

Yet another factor, in many districts, is the presence in the U.S. Attorney’s office of one or more representatives of one or more agencies, in the capacity of “task force representative” – the product of an increasing use of these interagency groups in a number of areas including organized crime and narcotics. Over and above the coordinating function they play in the cases they are assigned to work on, these agents can serve as general mediators between people from their agency and Assistants, able to vouch for Assistants to agents, and visa versa.¹⁹⁰

Finally, one ought not underestimate the unifying influence of a shared commitment to “getting the bad guys,” hardened by the adversarial process,¹⁹¹ nurtured

¹⁸⁷ CAFLE Dec. 2, 1998 Hearing, pt. I, at 166-67 (testimony of U.S. Attorney Calloway) (“It used to be that the agents trained the prosecutor,” but a hiring freeze followed by a burst of hiring created “a level of inexperience,” requiring “the more senior AUSAs” to train agents).

¹⁸⁸ CAFLE Dec. 2, 1998 Hearing, pt. I, at 162-63 (testimony of U.S. Attorney Warner). In mid-1997, “about 25 percent” of the more than 1100 FBI agents in the New York field office, which has a large white-collar caseload, had “under one year of experience.” Hearing on the Activities of the Federal Bureau of Investigation, Pt. II, Subcomm. On Crime, House Judiciary Comm., June 5, 1997 (testimony of FBI Director Louis J. Freeh).

¹⁸⁹Cf. Dato W. Steenhuis (Coherence and Coordination in the Administration of Criminal Justice, 229, in *Criminal Law in Action* (Jan van Dijk, et al. eds, 1986), at 243-45 (Advocate-General at the Court of Justice, Leeuwarden, Netherlands, notes that, in absence of structural changes, “an important instrument to achieve the coordination of production in the criminal justice system would be the adoption of a common organisational culture,” which could be accomplished through a common training program and job rotation for police, prosecutions, judges).

¹⁹⁰State prosecutors have recognized the value of this mediation. See Michael L. Benson & Francis T. Cullen, *Combating Corporate Crime: Local Prosecutors at Work* 224 (1998) (“One factor that is helpful to networking success [between federal and state agencies] is the presence of someone in the local prosecutor’s office who has credibility with federal agencies. In Duval County [Florida], for example, the local prosecutor had on staff two retired FBI accountants as fraud investigators. These individuals knew the local federal agents and were, as the prosecutor put it, ‘a real benefit in terms of keeping the door open and getting and giving assistance.’”).

¹⁹¹See Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *Ford. L. Rev.* 917, 949-50 (1999) (noting emergence of “‘us and them’ mentality” among Assistants).

by mutual respect and need, and on occasion lubricated by alcohol.¹⁹² “[E]ffective coordination always depends, at least in part, on the development of informal norms and conventions through group interaction, socialization, and experimentation.”¹⁹³ And, as in any other organizational setting, the social relationships that can arise out of constant and routine contacts will provide a solid foundation for trust.¹⁹⁴

B. Conclusion

Where does this leave us? The equilibria between prosecutorial and agency power vary from office to office, and, even within the same office, from agency to agency. Sometimes, it is just a matter of local “culture.” That culture, however, may reflect the exigencies or luxuries of a particular mix of cases (which may in turn be a function of enforcement needs and/or politically set priorities).

Julie O’Sullivan recently related how, as a former Southern District of New York AUSA working on the Whitewater investigation in the Little Rock, Arkansas, office of the Independent Counsel, she was struck how the regular Little Rock Assistants had

a completely different way of doing cases. The agents came to them with completed cases ready to be indicted. They took the old model very seriously. The agents investigated, the prosecutors prosecuted. There were some exceptions, but overall that was definitely the model.

As a result, between local agents and a lot of Southern District-trained Assistants [] there was some tension in the beginning, because we not only wanted to attend witness interviews, we actually wanted to conduct them, which seemed very foreign to the agents.¹⁹⁵

¹⁹²See Nina Burleigh, *White Power: Against Arab Terrorists or Wall Street Criminals* U.S. Attorney Mary Jo White Always Plays to Win. But Is Investigating the President Who Appointed You Really Such a Good Career Move?, *New York Magazine*, July 2, 2001 (“The U.S. attorney’s office has always required a high comfort level with the boys in law enforcement, but White has stood out as a prosecutor’s prosecutor, happiest socializing with FBI agents and cops.”); Gary J. Miller, *Managerial Dilemmas: The Political Economy of Hierarchy* 193 (1992) (noting how, in one study, “gambling, games, and social interaction constituted a vital part of the means by which the men reinforced one another’s expectations of cooperative play in their team production dilemma.”).

¹⁹³ Donald Chisholm, *Coordination Without Hierarchy: Informal Structures in Multiorganizational Systems* 85 (1989) (using Bay Area public transit agencies as case study); see Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* 65 (U Chi Press 1988) (“Boundaries between professional jurisdictions [] tend to disappear in worksites, particularly in overworked worksites. There results a form of knowledge transfer that can be called workplace assimilation.”).

¹⁹⁴Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 *J. Corp. L.* 869, 907-08 (1999); see also Roy J. Lewicki & Barbara Benedict Bunker, *Developing and Maintaining Trust in Work Relationships*, in Kramer & Tyler, *supra* note __, 114, 121-22 (discussing “knowledge-based trust”).

¹⁹⁵Panel Discussion: *The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator*, 26 *Ford. Urban L. J.* 679, 701-02 (1999) (comments of Julie R. O’Sullivan). For another description of a similar difference in the way prosecutors from two different offices conceived of their

The “traditional” model of investigators presenting neatly wrapped cases to passive prosecutors may have a lot to do with the “traditional” criminal docket.¹⁹⁶ As John Hagan has noted, “[p]roactive police work,” by its very nature, “involves a tightening of the coupling among the police, prosecutorial, and judicial subsystems.”¹⁹⁷ The mainstays of federal enforcement in the good old days (bank robberies, interstate transportation of stolen property, even buy-bust narcotics cases) were not all reactive, strictly speaking, but they could easily be pursued by agents with minimal prosecutorial assistance.¹⁹⁸ To the extent that a U.S. Attorney’s office still has that sort of focus, its AUSAs will be used to leaving investigating to the agents. Conversely, prosecutors in an office – like the Southern District of New York -- that has more of a substantial white-collar crime focus will likely expect to play a significant investigative role, not just in white collar cases but in all cases.¹⁹⁹

There may be places where agents simply propose and prosecutors simply dispose. There may even be places where, in doing so, each actor is largely indifferent to how the other will exercise his discretion. The goal of this Part, however, has been to show how institutional structures, legal rules, and professional interaction combine to bind the bureaucratic elements of the federal enforcement system far closer together than has been generally understood (at least in the academic literature). And the allocation of power that results from this dynamic will largely determine how enforcement discretion is exercised – against which targets and with what force.

investigative role see Kurt Eichenwald, *The Informant* 276 (2000) (for Springfield prosecutors, “Investigation was for the agents; prosecution was for lawyers.”); they therefore balked with lawyers from the Antitrust Division sought to participate in “drop-in interviews with potential defendants” in the Archer Daniels Midland case).

When a supervisory FBI agent wrote in the FBI’s “Law Enforcement Bulletin” about how investigators could use “the enterprise theory of investigation” to “help dismantle criminal enterprises,” the role he envisioned for prosecutors was simply to advise investigators as to the elements of the offenses involved and whether they had been satisfied, and then to prosecute the completed case. Richard A. McFeely, *Enterprise Theory of Investigation*, FBI Law Enforcement Bulletin, May 2001, at 17.

¹⁹⁶See Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 *Fordham Urban L.J.* 573, 577 (1999).

¹⁹⁷Hagan, *supra* note ___, at 123.

¹⁹⁸ See Louis B. Schwartz, *Federal Criminal Justice and Prosecutors’ Discretion*, 13 *Law & Contemp. Probs.* 64, 84 (1984) (role of federal prosecutor is to decision “whether and in what manner to prosecute,” while agencies “investigate and refer cases”); see also Little, 68 *Ford. L. Rev.* at 734; Gerard E. Lynch, *The Crime of Being a Criminal*, Pts. III & IV, 87 *Colum. L. Rev.* 920, 964 (1987) (contrasting “proactive” and “reactive” models of investigation).

¹⁹⁹See http://trac.syr.edu/whatsnew/crime_trends/whitecollar.html (statistics comparing white collar cases in 1998 (roughly 5000 per 100 million pop in ED Ark vs. 8000 per 100 million in SDNY) Note that statistics don’t reflect case sophistication (and extent of grand jury action)

III. Normative Models

The dynamics of prosecutor-agent interaction may vary greatly across the country and certain constituting elements of that interaction may be either deeply imbedded in the way the federal criminal enforcement system has been structured or a function of politically contingent decisions made with no thought to such dynamics. It nonetheless is appropriate, as a normative matter, to consider what the relationship between federal prosecutors and agents ought to look like and how existing dynamics might be altered. For one thing, the answers we get can inform our understanding of the prevailing “prosecutorial administrative system” that Jerry Lynch highlighted.²⁰⁰ But the project can be prescriptive as well. Not every determinant of how authority is allocated between prosecutors and agencies is set in stone. Indeed, much can be done to change the allocation, should we wish to do so. And legislative and judicial decisions are regularly being made that have this effect. But policy-making in such respects has been largely by default – principally driven by analyses about what judicially enforceable rights criminal defendants ought to, or ought not to, have, not considerations about organizational structure and interaction. The irony is that if we paid more attention to how power is allocated between agents and prosecutors, we might better protect criminal defendants’ interests – and perhaps even their rights.

A. Toward A Prosecutorial Hierarchy?

Before modeling the optimal relationship between prosecutors and agencies, one first needs at least a rough sense of what one wants the federal enforcement system to do. One, hopefully rather uncontroversial, goal, is that of prosecuting only guilty people and convicting them whenever possible, and doing so in accordance with law (defined vaguely and broadly to include constitutional and sub-constitutional constraints). A second, hopefully only slightly less controversial, goal is that enforcement proceed with a degree of moderation. American criminal law is famous (or infamous) for its breadth and for the degree of discretion it allows to enforcers.²⁰¹ And, though relative breadth is hard to measure, the federal criminal “code” may well be even broader than that of the states in the range of conduct it ostensibly covers.²⁰² Reasonable minds can differ “over what business practices should be deemed fraud, even over whether perjury in a civil case should be pursued criminally,”²⁰³ but they are unlikely to differ over the need for institutionalized restraint in this area.

Why can’t we start by reducing the need for executive restraint by demanding that Congress take more pains to specify what should really be a federal crime? We can, but I

²⁰⁰ Lynch, *Our Administrative System*, supra note __, at 2145.

²⁰¹ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 512 (2001).

²⁰² See Lynch, *Our Administrative System*, supra note __, at 2137; Richman, *Federal Criminal Law*, supra note __, at 760-61.

²⁰³ Richman, *Project Exile*, supra note __, at 397.

won't spend too much time on the point for three reasons: (1) It's too obviously right as a theoretical matter, the corollary of our allegiance to the rule of law and democratic accountability²⁰⁴; (2) many, from the Chief Justice of the United States on down have already made the argument forcefully and well²⁰⁵; and (3) it would be easier to get blood from a stone.²⁰⁶

Restricting the focus to the executive branch, one can easily – although, as will be seen, not necessarily – push toward a normative model of prosecutorial-agency interaction that strives, within the limits of a fragmented organizational chart, to subordinate agents to prosecutorial judgment, at least when it comes to saying no.²⁰⁷ In this model, prosecutors, just like their corporate cousins (though perhaps for different reasons) are to be exalted in their gatekeeping role,²⁰⁸ celebrated for their ability to prevent agency misconduct or excessive zeal, and given every tool possible to enhance their capabilities to this end.

An effort to bolster prosecutorial authority need not rest on any claim of superior judgment. In their gatekeeping capacity, prosecutors merely supplement agency judgments about appropriate targets and tactics, they do not replace them. Even if they were somewhat less skilled or interested than agents in making such judgments, prosecutors could still promote legal and moderate enforcement by offering an additional level of review – as long as prosecutors were not so unskilled that agents relaxed their own efforts out of frustration. As has been noted in the separation of powers context,²⁰⁹

²⁰⁴ See Kahan, *supra* note __, at 484.

²⁰⁵ See William H. Rehnquist, Address to the American Law Institute, Remarks and Addresses at the 75th Annual ALI Meeting, May 1998, at 15-19 (1998); William H. Rehnquist, 1991 Year-End Report of the Federal Judiciary, The Third Branch, (January 1992), at 1, 3; Judicial Conference of the United States, Committee on Long Range Planning, Long Range Plan for the Federal Courts, 21-28 (1995); Task Force on the Federalization of Criminal Law, American Bar Association, Criminal Justice Section, The Federalization of Criminal Law (1998); John C. Coffee, Jr., Hush!: The Criminal Status of Confidential Information After *McNally* and *Carpenter* and the Enduring Problem of Overcriminalization, *Am. Crim. L. Rev.* 121 (1988); Kahan, *supra* note __; Jeffrey Standen, An Economic Perspective on Federal Criminal Law Reform, 2 *Buff. Crim. L. Rev.* 249, 284-95 (1998) (calling for federal criminal code reform).

²⁰⁶The extent to which the lack of legislative specificity reflects an unrestricted congressional grant of power is open to dispute. Compare Kahan, *supra* note __ (focusing on breadth of substantive federal criminal law), with Richman, *Federal Criminal Law*, *supra* note __ (exploring mechanisms other than substantive law through which Congress guides the exercise of enforcement discretion).

²⁰⁷ See Kent Greenawalt, *Conflicts of Law and Morality* 357 (1987) (“The police []should not take upon themselves the responsibility of resolving debatable and troublesome moral questions that might affect prosecution; those should be left to prosecutors.”).

²⁰⁸ See Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 *J. L. Econ. & Org.* 53, 53 (1986); Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 *Yale L. J.* 857 (1984); Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 *Md. L. Rev.* 869 (1990).

²⁰⁹ See John O. McGinnis & Michael Rappaport, Our Supermajoritarian Constitution, 80 *Tex. L. Rev.* 703 (2002).

what matters in this extremely thin analysis is the number of components and their serial arrangement.²¹⁰ And anything done to ensure that prosecuting offices have access to information about targets and tactics, and the ability to act on that information, will promote (but obviously not ensure) the reduction of type I errors (of commission).

Claims of superior judgment can also be made. If the goal is to ensure that agents' investigative efforts do not violate constitutional or statutory strictures, or the admonitions a court has made in its supervisory capacity,²¹¹ then who better to advise agencies prospectively and monitor agency compliance retrospectively than prosecutors, whose current and future jobs place a premium on the knowledge (or prediction) and transmission of legal norms. And the more junctures at which prosecutorial advice is sought, and the information needed to give it properly provided, the better. Similarly, prosecutors' familiarity with de jure and de facto standards of evidentiary sufficiency – what counts as “beyond a reasonable doubt” in court, and what will actually persuade a jury in the district – make them valuable resources for the agents putting cases together, so long as the prosecutors know the true quality of the evidence.

Another, perhaps more tenuous, argument for maximal prosecutorial involvement in agency decisionmaking rests not on prosecutors' technical abilities, but on the sense of perspective and unique commitment to procedural justice that they are thought to bring to the enforcement bureaucracy. The idea of prosecutors as “magisterial” figures, bound by a special duty to “seek justice”²¹² probably would sound rather self-aggrandizing to the dedicated federal agent. After all, he too thinks of himself as pursuing justice, and if he's doing his job right, he too will keep a professional distance from his cases, tempering zeal with judgment and moderation.²¹³ And underneath all the aspirational talk, in law

²¹⁰ See C.F. Larry Heimann, *Understanding the Challenger Disaster: Organizational Structure and the Design of Reliable Systems*, 87 *Am. Pol. Sci. Rev.* 421, 427 (1993) (contrasting serial systems, which by requiring the approval of several components before agency action can be taken are less prone to type I errors, with parallel systems, which are more prone to such errors “because it is only necessary for the incorrect action to pass through one channel in order to be implemented by the system”).

²¹¹ See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 *Colum. L. Rev.* 1433 (1984); *United States v. Williams*, 504 U.S. 36 (1992) (noting limitations on supervisory judicial power).

²¹² See, e.g., Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 *Am. J. Crim. L.* 197, 198 (1988); Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *Ford. Urb. L.J.* 607 (1999); Bennett L. Gershman, *The Prosecutor's Duty To Truth*, 14 *Geo. Legal Ethics* 309 (2001); ABA Model Rules of Professional Conduct, Rule 3.8 (comment) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 *Ariz. L. Rev.* 1305, 1308-10 (1998).

²¹³ See Robert Jackall, *Investigating Criminal Violence*, 97 *Social Research* 849, 866 (2000) (noting of homicide investigators in New York: “Even as they assess the stories of those who provide them with information, criminal investigators are continually constructing and revising their own narratives about what actually happened in any given crime.”); Stephen J. Vicchio, *Ethics and Police Integrity*, in *Federal Bureau of Investigation, Law Enforcement Bulletin* (July 1997), available at <<<http://www.fbi.gov/publications/leb/1997/july972.htm>>>

reviews, judicial opinions, and professional literature about prosecutors as “ministers of justice,” lurk contestable assumptions about prosecutors’ special fitness for that role, and the unsuitability of agents or police officers for it.²¹⁴

Having noted the occasionally grating triumphalism of the legal literature,²¹⁵ however, one can still find some truth in assumptions about prosecutorial tendencies to appropriately moderate agency judgments and tactics. In part, it is a matter of professional allegiances and associations. As Brian Grosman found in his valuable study of a Canadian Crown Attorney’s Office: While some prosecutors identify with the police and associate defense lawyers with their clients, others “identify with the values of the defense lawyers” and see themselves as part of “the general legal community” – a community that does not include cops and agents.²¹⁶ Given that their *raison d’être* and future livelihoods in large part turn on the exaltation of procedural due process values, prosecutors might be expected, at least at the margin, to be more sensitive to such niceties than agents, whose success is more likely to be measured in terms of crime control.²¹⁷ That prosecutors are also subject to disciplinary rules formulated and enforced by their professional peers may increase their sensitivity yet further (even assuming the underenforcement of those rules).²¹⁸

Going even further out on a limb, one might also see federal prosecutors as better reflectors of community values than agents, and as better intermediaries between parochial agency interests and local needs. All enforcers work in the shadow of their jurisdiction’s juries, and neither agents nor prosecutors will gain much if they regularly pursue cases that jurors don’t think should be pursued, or tactics that repulse local jurors

²¹⁴ See Candace McCoy, *Police, Prosecutors, and Discretion in Investigation*, in John Kleinig, *Handled with Discretion: Ethical Issues in Police Decisionmaking*, 159, 174 (1996) (“The best approach to the improvement of discretionary decisions is to be sure that the organization itself provides the conditions under which particular choices are encouraged. It seems that prosecutors are more likely to mitigate their adversarialness than police, because they do not have to cope with the daily suspiciousness and elements of danger, nor necessarily with the ‘us versus them’ mentality, as do police. Although they are practiced in the adversarialness of trial, their organizational role and subculture are more likely to be amenable to nonadversarialness investigation than police.”).

²¹⁵ See Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* 72 (U Chi Press 1988) (discussing strategies whereby one profession tries to “subordinate” another).

²¹⁶ Brian A. Grosman, *The Prosecutor: An Inquiry into the Exercise of Discretion* 68 (1969); see also Suzanne Weaver, *Decision to Prosecute: Organization and Public Policy in the Antitrust Division* 160-61 (1977) (“close connections” that Antitrust Division lawyers “maintain with their colleagues in the private antitrust bar” are regarded by division lawyers as “a powerful constraint on their actions”).

²¹⁷ The source of the “crime control”/“due process” dichotomy is of course Herbert Packer. See Herbert Packer, *The Courts, The Police, and the Rest of Us*, 57 *J. Crim. L., Criminology & Pol. Sci.* 238, 239 (1966).

²¹⁸ See Horowitz, *supra* note __, at 1377 (“The fact that a police prosecutor is not bound by an attorney’s code of ethics or answerable to the disciplinary process for attorneys is perhaps the most disturbing aspect of the practice of police prosecution.”); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 *St. Thom. L. Rev.* 69 (1995).

and judges. Conviction-maximizing may not be their only goal, but it is a necessary one.²¹⁹ As the actors responsible for pitching cases to juries, and for negotiating dispositions with an eye to jury responses, however, prosecutors are more attuned to these matters and, indeed, as has been seen,²²⁰ are valued by agents for this very expertise. The U.S. Attorney system, which places local lawyers in an office led by an official appointed (usually) with considerable input from local political figures, accentuates this comparative advantage, particularly with respect to strongly centralized agencies in which hierarchical controls are reinforced by geographical transfers.²²¹ And, at least in recent years, the natural tendency of U.S. Attorneys to respond to local political forces has been reinforced by the readiness of Main Justice to devolve power in this direction.²²²

As one former U.S. attorney put it:

The U.S. Attorney, as a representative of the President, has the unique responsibility of establishing prosecutorial policy. He or she is the single person in the criminal justice system who must look to the totality of criminal threats within the district, as well as the available resources to meet those threats, and fashion a prosecution response that maximizes the positive impact that can be obtained from the resources. No other person has this broad responsibility.²²³

All these premises, empirically supported and otherwise, support a model of prosecutor-agent interaction that strives to enhance the authority prosecutors have by virtue of their charging power. Such enhancements could take the form of measures that increase the likelihood that the prosecutors can and will exercise independent judgment in their charging decisions. With their negotiating power thus increased, prosecutors would inevitably gain a greater say in investigative agency decisions about resource allocations and tactics. And measures could also be taken that more explicitly involve prosecutors in investigative decisionmaking, or at least confirm their existing control over particular investigative tactics.

²¹⁹ See Richman, *Old Chief*, supra note __, at 967-68.

²²⁰ See supra at __.

²²¹ Compare David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 *L. & Soc'y Rev.* 247, 273-74 (1998) (noting how uniformity of prosecutorial decisionmaking in Japan is promoted by frequent transfers, much to dismay of some agency personnel).

²²² See Richman, *Federal Criminal Law*, supra note __, at 808-09; Kendall, supra note __, at 226 (U.S. Attorney tells of efforts to speak to community groups about their concerns). Note that the "community prosecution" movement, see Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 *Notre Dame L. Rev.* 321 (2002), has gained some federal adherents, even outside the District of Columbia (which more resembles the state jurisdiction where the movement has its roots). Roger L. Conner, *The Office of the United States Attorney and Public Safety*, 49 *U.S. Attorneys' Bulletin*, No. 1, at 7 (Jan. 2001); U.S. Attorney Wilma A. Lewis, *Community Prosecution in the Office of the United States Attorney for the District of Columbia*, 49 *U.S. Attorneys' Bulletin*, No. 1, at 38 (Jan. 2001).

²²³ Braniff, supra note __, at __.

B. Questioning Hierarchy?

Yet is it so clear that we want to move in the direction of a prosecutor-dominated hierarchy that strives (against all odds) to make law enforcement agents into prosecutorial agents?

To begin, one may not accept the assumption that prosecutors have superior judgment when it comes to targeting and tactics. There are three different, but related, elements to this challenge. The first, without denying prosecutors' technical legal expertise, questions whether they really are the forces of moderation portrayed above. If one believes, like Dan Kahan, that ambitious U.S. Attorneys "consistently overreach in the hope of pleasing local interests who are in a position to confer future political rewards,"²²⁴ any move to increase prosecutorial control over agency decisionmaking is a step in the wrong direction. Kahan's cure for this pathology is to shift more control over prosecutorial legal theories to Main Justice. But his diagnosis could also be addressed by measures that shored up, or at least retained, the present extent of agency control over investigations. It does not matter, in this analysis, whether agencies are seen as politically responsive to the President and the Administration, or as semi-autonomous and relatively apolitical. And indeed one's view on this score will vary with agency and with Administration (and probably with one's frame of reference). The important point is that, either way, so long as their agendas differ, relatively centralized enforcement agencies can be counterweights to prosecutorial overreaching of the type Kahan fears.²²⁵

The second element of this challenge to prosecutorial incursions into agency decisionmaking rests on a weaker form of Kahan's diagnosis. U.S. Attorneys' offices do not necessarily "overreach," this argument goes, but they are prone to reflect local enforcement preferences at the cost of national priorities.²²⁶ The point is only relative, since agency field offices also to some degree respond to local groups and authorities.²²⁷

²²⁴Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 Harv. L. Rev. 469, 496 (1996).

²²⁵ See Moulton & Richman, at 90 (noting how FBI acts as a "relatively apolitical watchdog over line prosecutors"); see also Heymann, *supra* note __, at 100 (noting that "involvement of professional, career agents makes less credible charges of political bias in Justice [Department]").

²²⁶ Cf. Richman, *Project Exile*, at 405 ("Against sometimes parochial local needs, a U.S. Attorney must consider broader national priorities, usually conveyed by Main Justice or expressed by the referrals of highly centralized enforcement agencies [].").

²²⁷ See Wilson, *supra* note __, at 202 ("[F]ield administrators are likely to have strong ties to local authorities including, possibly, governors, congressmen, and police chiefs, and these alliances are disrupted only at the [central agency] executive's peril."); see also John T. Scholz, Jim Twombly & Barbara Headrick, *Street-Level Political Controls Over Federal Bureaucracy*, 85 Am. Pol. Sci. Rev. 829 (1991) (studying effects of local politics on enforcement activities of Occupational Safety and Health Administration field offices). See, e.g., Press Release, Office of Senator Dianne Feinstein, Senator Feinstein Asks Attorney General Ashcroft to Officially Approve DEA Office in Redding, July 6, 2001, visited July 7, 2001, <<<http://www.senate.gov/~feinstein/releases01/r-redding.html>>> (California Senator asks Attorney General for DEA office "[t]o combat the serious methamphetamine problem in Northern California). See also Statement of Eleanor Hill, Sept. 24, 2002, *supra* note __, at 13 (former FBI headquarters official notes that the Bureau's "culture often prevented headquarters from forcing field

But U.S. Attorneys – frequently members of the local elite, selected by local politicians -- and their assistants -- local lawyers whose chosen livelihood requires them to think constantly about local jury responses and local legal culture – are unlikely have the same continuing interest in adhering to a national bureaucratic agenda that their agency counterparts have.²²⁸ Recognizing that all agendas are political (although one hopes not partisan), the question becomes *whose* politics. To the extent that one wants national priorities to dominate (or at least not be given short shrift), one needs to avoid giving prosecutors, who already control the charging process, too many tools to impose their agendas on agents.²²⁹

The third element has less to do with the politics of agenda setting and more to do with comparable knowledge and capacity. Decisions to pursue a particular defendant or set of defendants, and the force with which he should be pursued are not just legal judgments or even moral judgments, but will inevitably involve some vision of how common the conduct, how socially harmful, and how one offender stacks up against another. Even were prosecutors able to gain full access to the information an agency has on a case it wants to pursue, they would still lack a systematic sense of all the other possible cases. Of course, federal agency knowledge may be spotty as well, outside of particular “beats,”²³⁰ but it is supplemented by local enforcers (who thereby gain some hold over agencies that can undercut their centralization) and, at worst will still be better than prosecutors’. Prosecutors regularly have to make the grossest “apples” vs. “oranges” sort of comparisons -- one complicated tax case vs. three easy gun cases -- and because of their gatekeeping position, and relative neutrality, are better placed than agencies for such judgments. And, as Elizabeth Glazer has both written and demonstrated,²³¹ prosecutors may be well placed to alert one agency to the synergies of

offices to take investigative action that they were unwilling to take.”).

²²⁸See CAFLE Hearings, Nov. 13, 1998, at 34-37 (testimony of Chuck Wexler, Exec. Dir., Police Executive Research Forum) (noting how U.S. Attorney must play a critical role in focusing attention of federal agencies on local problems); Rory K. Little, Good Enough for Government Work? The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty, 14 Fed. Sent. Rptr. 7, 9 (2001) (finding it unsurprising “that U.S. Attorneys within states that do not permit the death penalty do not prosecute capital cases as often, or recommend them, as do U.S. Attorneys in states that vigorously pursue the death penalty”); Rabin, *supra* note __, at 1043 (“On the whole, the agencies keep much tighter rein on field personnel than does the Justice Department on U.S. Attorneys.”). This is not to say that prosecutors have no interest in national priorities. See Andrew B. Whitford, Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys, 12 J. Pub. Admin. Res. & Theory 3 (2002) (exploring how U.S. Attorneys respond to national political control).

²²⁹ See Thomas H. Hammond, Agenda Control, Organizational Structure, and Bureaucratic Politics, 30 Am. J. Pol. Sci. 379 (1986) (discussing effects of organizational structure on organizational agenda). For an empirical study showing the extent of local variation even within the highly centralized corps of *procureurs* in France, see Jacqueline Hodgson, Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations, 29 J. L. & Soc’y 227 (2002).

²³⁰ cross ref

²³¹ See Elizabeth Glazer, Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime, 24 Ford. Urb. L. J. 573 (1999); Elizabeth Glazer, Harnessing Information in a Prosecutor’s Office, Nat’l Inst.

sharing information with another agency.²³² But when it comes to discriminating among the matters within their respective jurisdictions, the agencies reign supreme (or at least they should). Moreover, prosecutors asserted competence to rise above agency turf concerns and look at “the totality of threats” within their districts is a claim that rests more on the blinders with which agencies see the world, not on the keenness of prosecutorial vision.

A second challenge to the normative model does not dispute any of its assumptions about the value of prosecutorial decisionmaking but rather argues that prosecutorial contributions can best be made from a perspective somewhat removed from the investigative context, and would even be threatened if injected into that context.²³³ The problem finds many parallels in the debate over the advantages of inside, as opposed to outside, counsel when it comes to promoting legal compliance by private firms. Inside counsel, according to their champions, “can use the information, organizational power, and trust they obtain from being part of the client organization to participate in corporate planning, anticipating legal problems and maintaining legal compliance.”²³⁴ There is a “real risk,” however, that “inside counsel may not share outside counsel’s preference for acting as a gatekeeper” and will turn to “members of corporate management rather than other lawyers” as a “reference group.”²³⁵ And the risk will be more pronounced if inside lawyers are scattered within an organization, working alongside the people they counsel. As Chayes & Chayes noted,

The more decentralized the lawyers are, [] the more likely it is that the preventive program will be fully integrated with general corporate operations.

of Justice Journal, October 2000, at 1-7.

²³²See also CAFLE Hearing, Dec. 2, 1998, Pt. I, at 148 (testimony of Mark Calloway, U.S. Attorney, W.D.N.C.) (noting that U.S. Attorney’s office is “unique” in being able to see cases of every agency and being able to tell where there is an “overlap or where there’s a need for cooperation”).

²³³See, e.g., Craig Whitlock & April Witt, Pr. George’s Prosecutor, Police Spar; Offices Blame Each Other for Investigative Blunders, Wash. Post, Sept. 21, 2001, B1: (explaining his refusal to assign prosecutors to work in teams with police officers, state’s attorney cites “rules against prosecutors becoming directly involved in a police investigation.”); Law Commission (New Zealand), Report 66: Criminal Prosecution (October 2000)(NZLC R66), available at www.lawcom.govt.nz/documents/publications/R66cpr.pdf (visited Oct. 1, 2001) (“Prosecution should be separated from investigation. Separation of these two key functions ensures that there are checks and balances incorporated into the system to protect the individual. It also promotes impartiality and ultimately respect for the criminal justice system and the rule of law.”); William Landes, Comments, in *The Economics of Crime and Punishment*, 227 (ed. Simon Rottenberg (1973) (“when investigation and prosecution are combined we might expect a greater use of settlements [] that avoid the acknowledgement of error when it appears that the evidence is insufficient to convict the defendant in a trial”).

²³⁴Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 *Ind. L.J.* 479, 487 (1989).

²³⁵Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 *Md. L. Rev.* 869, 915 (1990).

Lawyers who have daily contact with product, manufacturing, marketing, and sales personnel know the routines and practices and can correct them. Decentralization, however, means less expertise, and a risk of less professional objectivity.²³⁶

The analogy between prosecutors and corporate counsel has its limits,²³⁷ but the tension between engagement and informational access, on the one hand, and professional judgment on the other is equally present in the range of relationships that prosecutors can have with criminal investigations. At some level, knowledge itself can influence perspective. The prosecutor who, while taking no part in the conduct of investigations, regularly learns from agents about their ambiguities, false starts, and sometimes overly aggressive tactics may find himself more sympathetic to agency travails than would a more removed official accustomed to hearing seamless narratives. This is not necessarily so, but the readiness of criminal justice officials to become enured to the inadequacies of police officers is a sad, but familiar phenomenon, and helps explain the allure for defendants of the more naïve decisionmaking that juries offer.²³⁸

The risks to prosecutorial judgment are even greater when prosecutors become extensively involved in investigative decision making. Just as corporate lawyers “cease to objectively evaluate transactions that are often their own creations,”²³⁹ prosecutors who have helped call the shots in an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter.²⁴⁰ This response is in part quite rational and appropriate, since they will have already passed judgment on the nature and extent of the resource commitments. But the response can go beyond what is merely rational. A prosecutor may be loathe to pull the plug on an investigation she has invested time and

²³⁶Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 *Stan. L. Rev.* 277, 289 (1985).

²³⁷Even the broadest notions of corporate counsel’s ethical responsibility and independence, for example, see, e.g., William H. Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (1998), pale beside the rhetoric and reality of prosecutorial discretion.

²³⁸See David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 *Am. J. Crim. L.* 455 (1999); see also *United States v. Lawes*, __ F.3d __, __ (2d Cir. 2002) (7/1/02) (rejecting claim that prospective jurors should have been asked at voir dire about attitudes toward police, court notes that “juries in New York City show a healthy skepticism of prosecution cases built entirely on the credibility of police officers”).

²³⁹Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 *S. Cal. L. Rev.* 507, 545 (1994).

²⁴⁰See Robert W. Gordon, *Imprudence and Partisanship: Starr’s OIC and the Clinton Lewinsky Affair*, 68 *Ford. L. Rev.* 639, 645 (1999) (“Procedures for checking over-zealousness should include assigning someone in the office, preferably the lead prosecutor himself, the role of skeptic – the lawyer who picks apart the case, puts the case for the defendant demands to be told why it is worth prosecuting.”).

professional prestige in.²⁴¹ She may be cognitively limited as well, too quick to find that any new information merely confirms her original impressions of a case or a target.²⁴² And, unfortunately, these challenges to objectivity will be greatest in the “big case,” where the prosecutor’s professional commitment is the largest; her immersion in the investigation is the longest, and where her close-knit relationships with the case agents can come at the expense of her ties to the rest of her office.²⁴³ These factors may be offset by the higher level of supervisory oversight (which the line assistants are likely to see as “meddling”²⁴⁴) these cases are likely to receive. But supervision of fact-intensive judgment calls is bound to be difficult.

While one risk of too much prosecutorial involvement in investigative decision making is that prosecutors’ ability to monitor agent conduct is reduced, with prosecutors effectively made into agency captives, another risk is that such involvement will actually threaten the esprit and effectiveness of investigative agencies. Even as we celebrate the giant strides made in the professionalism of police agencies over the past century, and recognize the particular triumphs of federal units in this regard, we ought not forget that professionalism cannot be fostered without autonomy. And professional “autonomy” “involves the feeling that the practitioner ought to be able to make his own decisions without external pressures from clients, those who are not members of his profession, or from his employing organization.”²⁴⁵ Of course, concern for agency esprit can occur even within the framework of a hierarchical relationship. “[A] boss frequently finds herself choosing not to overturn a subordinate’s bad decision because doing so would reduce the subordinate’s effort and enthusiasm in the future.”²⁴⁶ But, given their likely career paths, many Assistants might not take this long-term view.

²⁴¹Painter, *supra* note __, at 545 (one reason for loss of objectivity is that “lawyers invest their time and professional prestige in transactions they want to see completed”).

²⁴² See Langevoort, *supra* note __, at 101 (Because “[t]he processing of new information and the search of memory to aid in inference are biased, sometimes heavily, toward the confirmation of existing schema,” “even absent any motivational factors, a lawyer is likely to dismiss as unimportant or aberrational the first few negative bits of information that she receives regarding a client or situation.”).

²⁴³A striking aspect of the recent El Rukn debacle in Chicago and the revelations about the FBI’s relationship with “Whitey” Bulger, was the degree of closeness between the prosecutor and the agents in each case, and the degree of separation between these teams and the rest of the U.S. Attorney’s office. See *United States v. Griffin*, 856 F. Supp. 1293 (N.D.Ill. 1994); *United States v. Boyd*, 833 F. Supp. 1277 (N.D.Ill. 1993), *aff’d*, 55 F.3d 239 (7th Cir. 1995); Jeffrey Toobin, *Capone’s Revenge*, *New Yorker*, May 23, 1994 (discussing alleged misconduct by prosecutor and agents in El Rukn cases); Lehr & O’Neill, *supra* note __. “War rooms” – where agents and prosecutors cluster -- are, of course, relatively common in really big cases, and they bring important benefits in efficiency and esprit. But they have their risks as well.

²⁴⁴See Langevoort, *supra* note __, at 114 (“Each of these bureaucratic interventions [by a law firm to protect its reputation against cognitive pitfalls on part of its partners] comes at considerable cost [] in terms of time and effort as well as the more subtle interference with individual partner autonomy that otherwise characterizes many highly successful firms.”)

²⁴⁵Richard H. Hall, *Professionalization and Bureaucratization*, 33 *Am. Soc. Rev.* 92, 93 (1968).

²⁴⁶George Baker, Robert Gibbons & Kevin Murphy, *Informal Authority in Organizations*, 15 *J. L. & Econ. Org.* 56, 57 (1999); see Paul A. Sabatier, John Loomis & Catherine McCarthy, *Hierarchical Controls*,

Finally, even with the experience gained through regular investigative involvement, prosecutors just may not be very good at making investigative calls that require the “street smarts” or industry knowledge that agents pride themselves on developing. To be sure, an agent’s claims of “street smarts” can conceal a sub-optimal attitude toward the legal niceties that (one hopes) loom larger in a prosecutor’s calculus. But for tactical decisions that turn on predictions of human behavior, informed by previous tactical experiences – How will a target respond? What is the appropriate level of pressure to place on a recalcitrant witness? – second-guessing by prosecutors may be counterproductive.

The normative model that emerges from these concerns does not necessarily exalt agents over prosecutors, but it counsels against exalting prosecutors over agents. And it would promote measures defining and distinguishing between the separate ambits of each group. As Fama and Jensen have explained, organizations “in which important decision agents do not bear a substantial share of the wealth effects of their decisions” can survive in part because the organizations have structures that “separate the ratification and monitoring of decisions from initiation and implementation of the decisions”²⁴⁷ It does not take a large leap in terminology to apply this model to law enforcement bureaucracies, and to see as supporting a system that keeps agents and prosecutors at arm’s length.

C. Toward a Theory of Working Groups and Mutual Monitoring

The contrast in the proceedings of a recent Council of Europe conference was stark: While noting the similarities between his nation’s criminal justice system and that of Sweden, the Prosecutor General of Finland noted that “Finland did not wish to make the prosecutor head of the pre-trial investigation as is the case in Sweden. In Finland, every effort was made to emphasize in particular a prosecutor’s objective neutrality.”²⁴⁸ The Prosecutor General of Sweden explained: “It has sometimes been argued that early assumption of responsibility dilutes the prosecutor’s functions of supervision and control. To that I would reply that it must be an advantage if the supervisory and controlling functions come into play at an early stage of the investigation, above all where serious

Professional Norms, Local Constitutencies, and Budget Maximization: An Analysis of U.S Forest Service Planning Decisions, 39 Am. J. Pol. Sci. 204, 207 (1995) (noting that “top officials have less control over ‘street-level bureaucrats’ than the Progressives envisioned [], particularly when field officials are professionals whose job commitment is contingent upon their ability to exercise substantial discretion”).

²⁴⁷Eugene F. Fama & Michael Jensen, Separation of Ownership and Control, 26 J. L. & Econ. 301, 301-02 (1983).

²⁴⁸Matti Kuusimäki, Independence of Prosecutors In Relation to the Executive Power, the Courts and the Police, in Council of Europe, What Public Prosecution in Europe in the 21st Century (2000) (proceedings of Pan-European Conference), 103, 106.

crimes are concerned. And there are guarantees of legal security built into the system which offset the risks associated with early participation by the prosecutor.”²⁴⁹

Another overseas perspective: When a proposal was made in Australia to give the Director of Public Prosecutions the power to intervene in investigations, one legislator condemned the “dangerous” idea as “absolutely opposed to common law principles.” He scathingly referred to the proposal as “the Hawaii Five-O amendment,” calling it an “attempt to turn (the DPP) into a Los Angeles type district attorney’s office.”²⁵⁰

But do we really need to choose between integrated hierarchy and coordinate separation?

The short answer is that we couldn’t even if we wanted to. In thinking about how the federal enforcement bureaucracy should be organized, one can no more choose between hierarchy and integration than one can choose between “crime control” or “due process” in structuring a criminal justice system.²⁵¹ As was true with Herbert Packer’s models, each of these is not a goal that one strives for to the exclusion of the other. They are simply poles between which we must navigate. The question remains, though: In which direction should we be steering?

If one uses a broad enough brush, one can draw outlines of a normatively appealing system (operating in a second-best world in which Congress has left the enforcement bureaucracy as a whole with extraordinary discretion): We want investigative agencies to use their expertise and information sources in service of some legitimate agenda that structures decision making about the selection of targets and the intensity with which such targets are pursued. How and where that agenda gets set will vary, and should vary, from agency to agency and from locality to locality. Perhaps there is some appropriate balance between headquarters, field office, group, and individual agent decision making; some optimal balance between national priorities, local needs, and personal initiative. But though I can easily think of some inappropriate agendas, I know of no way to capture what the range of appropriate agendas ought to be.

Setting an enforcement strategy is peculiarly challenging for federal agencies since it requires not only the identification of an optimal strategy for every locality, but also the identification of the (or an) optimal allocation of responsibility between federal, state and local authorities.²⁵² No unified theory provides the answer(s), and even if it did,

²⁴⁹Klas Bergenstrand, Role and Status of the Public Prosecution Crime Policy, in *What Public Prosecution*, supra note __, 89, 92.

²⁵⁰ Detective Chief Superintendent Rod Harvey (New South Wales Police Service), *The Independence of the Prosecutor: A Police Perspective*, Paper given at Australian Institute of Criminology, Apr. 18, 1996; available at <<<http://www.aic.gov.au/conferences/prosecuting/harvey.pdf>>>.

²⁵¹Herbert Packer, *The Courts, The Police, and the Rest of Us*, 57 *J. Crim. L., Criminology & Pol. Sci.* 238, 239 (1966).

²⁵² See Richard Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 *U. Chi. L. Rev.* 246, 280-90 (1980) (noting challenges of coming up with an optimal federal prosecution strategy).

any solution would be just for the moment in time when the question was posed. National needs, whether actual or perceived, change. And every new priority has institutional consequences that in turn shape the setting of priorities. It is noteworthy that the debate about the FBI's role in combating terrorism is now being played out in primarily in terms of the locus of decision making, with champions of centralization pointing to the nature of the mission -- which requires a high degree of coordination with other agencies, both foreign and domestic, and puts a premium on centralized intelligence collection and dissemination²⁵³ -- and its sensitivity,²⁵⁴ and champions of field office authority complaining of a "lack of investigative zeal at headquarters."²⁵⁵

From prosecutors as well, we want independent judgments, based on similarly diverse and mutable professional and political calculations about what charges are worth pursuing and with what intensity. The important point -- here, at least -- is not how agencies and prosecutors develop their respective priorities, but how, assuming some organic basis for their priorities, these bureaucrats and their bureaucracies will interact.²⁵⁶ The problem ought not be seen as one of subordinating one group's agendas to those of the other, but rather of productively embracing the political tensions between the two. And "political" is indeed the operative word. As Graham Allison observed in his classic study of bureaucratic politics, "[T]he context of shared power but separate judgments about important choices means that politics is the mechanism of choice. Each player pulls and hauls with the power at his discretion for outcomes that will advance his conception of national, organizational, group, and personal interests."²⁵⁷

²⁵³See Dan Eggen, FBI Director to Propose "Super Squad" for Terror, Wash. Post, May 15, 2002, at A1 (move to create "'super squad,' headquartered in Washington," to "lead all major terrorism investigations worldwide" "underscores the extent to which Mueller intends to remake the FBI and consolidate power in the Washington headquarters, whose administrators have traditionally allowed field agents and their bosses to maintain control over their own investigations."); see also Richard A. Best, Congressional Research Service, Report for Congress: Intelligence and Law Enforcement: Countering Transnational Threats to the U.S. (Dec. 3, 2001).

²⁵⁴ See Walter Pincus, Congress to Postpone Revamping of FBI, CIA, Wash. Post, July 2, 2002, at A1 ("One longtime FBI agent [] recently questioned the new rules that have been established for agents in field offices to initiate counterterrorism investigations without first obtaining approval from headquarters. 'I'm worried about six or seven years from now when there are five or six Arab-American members of Congress and they call me before some committee to grill me on my actions against their people,' the agent said.").

²⁵⁵ David Johnson & Don Van Natta, Jr., Wary of Risk, Slow to Adapt, F.B.I. Stumbles in Terror War, N.Y. Times, June 2, 2002, at A1, 31.

²⁵⁶See John P. Heinz & Peter M. Manikas, Networks Among Elites in a Local Criminal Justice System, 26 L. & Soc'y Rev. 831, 832 (1992) ("A lack of system integration may, of course, produce coordination problems, unpredictable outcomes, inconsistent decisions, rule violations, or other pathologies. ... But loose coupling may also be functional. The relative separation of the elements or subsystems permits each to maintain a measure of independence, which may make the system more flexible and less resistant to innovation.").

²⁵⁷Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* 171 (1971).

Properly framed, the institutional and cultural forces that both bind and separate agents and prosecutors will, at a minimum, produce the negotiated trade-offs envisioned by the separation of powers literature, as well as a degree of mutual or reciprocal monitoring. At best, it will produce the productive collaboration of working groups with diverse professional membership envisioned by the group dynamics literature.²⁵⁸ If the risk of “polarization” that pushes a group to choose an extreme option is increased when the group has “a degree of solidarity,”²⁵⁹ the structured interaction of enforcers drawn from two relatively distinct cultures can promote depolarization and more thoughtful decision-making, even in the absence of judicial oversight.²⁶⁰ As Mark Seidenfeld has noted, “polarization is likely to occur when groups are ‘attitudinally homogeneous,’” which, in turn, is more likely to be the case when members share similar professional and work backgrounds than when they pursue different disciplines and come from different offices within the agency.²⁶¹

Considerable attention has been given to working groups and team production in the corporate and organizational theory literature.²⁶² “Teams” have been defined as

set of individuals (1) whose agencies’ contributions are thought to be mutually complementary in their productive capacities and (2) whose individual characteristics – including such matters as their knowledge and skills, their access to resources and to status within their home agencies, their aspirations and beliefs, their personal strengths and weaknesses – are taken into account by those, including the team members themselves, who organize their respective activities.²⁶³

²⁵⁸See Juliet Kaarbo & Deborah Gruenfeld, *The Social Psychology of Inter- and Intragroup Conflict in Governmental Politics*, 42 *Mershon Int’l Studies Rev.* 226, 232 (1998) (discussing how boundary spanning can lead to more thoughtful processing of information); see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 354 (1998) (“Experimentalist regulatory agencies recall the design and problem-solving teams of learning-by-monitoring institutions in the way they pool various kinds of expertise in the evaluation of different situations.”).

²⁵⁹Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *Yale L.J.* 71, 92 (2000).

²⁶⁰See Sir Iain Glidewell, *The Review of the Crown Prosecution Service (Presented to Parliament by the Attorney General)* Cm. 3960, at 94 (June 1998) (“The professional independence of lawyers in the [Crown Prosecution] Service is the light which should illuminate all their work, but independence of mind does not require total separation from others.”). Cf. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458, 462-63 (2001) (offering regulatory approach in which “normative elaboration occurs through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas,” not just courts).

²⁶¹Seidenfeld, *Cognitive Loafing*, *supra* note __, at 544.

²⁶²See, e.g., See Eric Talley, *Taking the "I" out of "Team": Intra-Firm Monitoring and the Content of Fiduciary Duties*, 24 *Iowa J. Corp. L.* 1001, 1002 (1999); Bengt Holmstrom, *Moral Hazard in Teams*, 13 *Bell J. Econ.* 324 (1982); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *Va. L. Rev.* 247 (1999); Irene Valsecchi, *Policing Team Production Through Job Design*, 12 *J. L. Econ. & Org.* 361, 371 (1996).

²⁶³Eugene Bardach, *Getting Agencies to Work Together: The Practice and Theory of Managerial*

At the heart of the interest in such groups is an appreciation of the extent to which a properly structured team production process “can transcend the built-in limitations of hierarchical control by developing norms of reciprocated cooperation and effort.”²⁶⁴ And the absence of any clear output metric or robust hierarchical control in the federal enforcement area makes the idea of working groups quite alluring, even if only as a second-best way of promoting enforcer moderation and effort.

Moreover, this model of professional interaction works better (at least potentially) here, than it does in the corporate setting, where institutional and market pressures can lead the inside (or even the outside) counsel placed within a working group to subordinate his professional instincts or values to more entrepreneurial goals. At least in the federal context, the distinctive institutional homes for prosecutors and agents, and the distinctive aftermarkets provide the best guarantee that the blurring of the line between investigatory and adjudicatory decision-making will not break down the diversity of their perspectives.²⁶⁵ The value of experience and specialized knowledge may limit the extent to which prosecutors and agents can be rotated from unit to unit, or from investigation to investigation. But so long as care is taken that an agent’s primary orientation is to his agency, and an assistant’s primary orientation is to his office, and for both cultural and materialist reasons, his profession,²⁶⁶ the benefits of deliberation²⁶⁷ can best be captured in the context of teams, not arm’s-length interagency negotiations.²⁶⁸

Having adopted the mutual monitoring/working group model not as the solution to all issues of enforcement discretion but as a vision of beneficial interaction, we next should determine whether we need to do anything to promote it. Maybe the model just captures current realities, and we live in the best of all possible worlds. I suspect not.

Craftsmanship 117 (1998).

²⁶⁴Gary J. Miller, *Managerial Dilemmas: The Political Economy of Hierarchy* 216-17 (1992).

²⁶⁵ See Seidenfeld, *Cognitive Loafing*, *supra* note __, at 541 (“groupthink” especially likely to occur when group’s members “are homogeneous in terms of social background and ideology, when the group leader and decisionmaking norms and processes tend to direct the group toward a preselected outcome, and when the group believes that it faces a crisis situation in which there is high stress and little opportunity for a decision that will improve the status quo”).

²⁶⁶ See Francis E. Rourke, *Bureaucracy, Politics, and Public Policy*, 18 (3d ed. 1984) (discussing how professional units can be “dominated by individuals whose primary commitment is to the skill they practice rather the institution by which they are employed”). Situating prosecutors in the continuum that ranges from the classic Weberian bureaucrat to the collegial professional, see Clifford I Nass, *Bureaucracy, Technical Expertise, and Professionals: A Weberian Approach*, 4 *Sociological Theory* 61 (1986); Malcolm Waters, *Collegiality, Bureaucratization, and Professionalism: A Weberian Analysis*, 94 *Am. J. Sociology* 945 (1989); is a conundrum that sociological theorist might profitably pursue.

²⁶⁷ See Sunstein, *supra* note __.

²⁶⁸ See Glidewell, *supra* note __ at 128 (suggesting use of integrated “criminal justice units” composed of police and Crown Prosecution Service personnel).

But can one prove that all is not right? It is tempting to bracket difficult empirical questions and to resort to a broad argument of horizontal equity. It is undisputable that prosecutors play a larger role in the development of white collar cases than they do in all but the bigger drug cases. This is in part a function of the extent to which prosecutors control the grand jury process, but, as already discussed,²⁶⁹ it also reflects agency readiness to rely on counsel when investigative moves are most likely to be contested by deep-pocketed targets. At first blush, one might see prosecutors as a moderating influence on agency zeal and be troubled by fact that white collar defendants are getting a special insulation from aggressive enforcement that other sorts of targets are not getting. Horizontal equity would thus argue for measures that increased the moderating influence of prosecutors on drug investigations. There are some problems with this critique though. To begin, it's not clear that it is the agents who need moderation in white collar cases.²⁷⁰ Agencies may articulate white collar enforcement agendas, but on the personnel side, it is the prosecutors, not the agents who are most likely to be gung-ho in white collar cases, where aggressive investigative and trial tactics are most likely to be rewarded by the aftermarket. Moreover, even were one to conclude that the nature of the prosecutor-agent interaction in white collar cases somehow led to more "moderation," one might still be untroubled by the comparison to narcotics cases. Perhaps white collar enforcement, by its very nature and because of the extraordinary breadth of statutes directed at white collar offenses, threatens to chill valuable economic and political activity in way that narcotics enforcement does not. Perhaps white-collar criminal statutes are more "incomplete" (to use the term of Pistor & Xu), being particularly open-ended and ambiguous as to what legislators really consider harmful.²⁷¹ Certainly the *Wall Street Journal's* editorial page would so argue.

In the absence of clear (or even semi-clear) empirical evidence that we live in a suboptimal world when it comes to the degree of coordination between prosecutors and agents, we come an expository crossroad. We can sit tight and await better evidence. Or we can plunge ahead.

There are a number of arguments for plunging ahead. First, we can easily shift the burden of proof and find just as little clear evidence that teamwork between prosecutors and agents has flourished in precisely those kinds of cases (and by extension in those localities) where it is most needed. Second, even were one to believe that the invisible hand was working overtime to ensure the appropriate equilibria across cases, agencies, and districts, one would still regularly have to confront decisional junctures, whether of legal rule or institutional design, when one's choice will inevitably affect the

²⁶⁹Cross ref

²⁷⁰See Burnham, *The F.B.I.*, supra note __ (noting "bureau's apparent lack of zeal in pursuing corporate and white-collar crime"); Webster report, supra note __, (describing efforts of U.S. Attorneys offices to bring CID agents in to handle complex financial cases).

²⁷¹ See Katharina Pistor & Chenggang Xu, *Incomplete Law – A Conceptual and Analytical Framework – and Its Application to the Evolution of Financial Market Regulation*, (Apr. 2002 draft), available <<http://ssrn.com/abstract/id=310588>>.

prosecutor-agent dynamic. Where a choice makes coordination harder (for reasons having nothing to do with coordination), it would be helpful to know how to compensate. Finally, one can plunge ahead without being polemical, offering not a platform for wholesale reform, but simply a toolkit of measures that could promote the teamwork model.

IV. Promoting Team Work and Mutual Monitoring

What are some of these measures? Given that nearly every legal or institutional move one makes (or forgoes) can affect agent-prosecutor relations, the possibilities are endless. However, in part to show the breadth and variety and potential measures, and in part because they have particular salience to the agent-prosecutor dynamic, the focus here will be on three different areas: (A) information flow to prosecutors; (B) rules or institutions deterring agent-prosecutor interactions and/or facilitating the circumvention of these interactions by one side or the other, and (C) unilateral institutional measures.

A. Information Flow

Prosecutors are ill-equipped to second-guess agency choices about tactics and targets when they lack sufficient information about the cases agencies decide to pursue and the universe of potential cases. What measures would increase the flow of such information?

1. Administrative Notifications

If one's goal were simply to ensure that prosecutors had more of a role in investigative decisionmaking, one could expand (administratively or statutorily) the range of situations in which a prosecutor's (or a court's) approval were required. If however one wanted to promote collaborative decisionmaking without shifting the balance of power too far in prosecutors' direction, a softer alternative would be to impose notification requirements on agencies. This, at the very least, would give prosecutors an opportunity to start a conversation, even though the power they could deploy in such a conversation would derive from other sources.

The Attorney General's recently released investigative guidelines for the FBI offer a good example of how such administrative notification requirements can be used.²⁷² When FBI supervisor opens a preliminary inquiry in a "sensitive criminal matter" – defined as one involving political corruption, "the activities of a foreign government, the activities of a religious organization or a primarily political organization or the activities of any individual prominent in such an organization, or the activities of the news media" – he must notify the relevant U.S. Attorney "or an appropriate Department of Justice official" "as soon as practicable, "and the fact of notification shall

²⁷²Attorney General John Ashcroft, The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (May 30, 2002), available at << <http://www.usdoj.gov/olp/generalcrimes2.pdf>>>

be recorded in writing.”²⁷³ The FBI must also “notify the appropriate federal prosecutor of the termination of a [sensitive] investigation within 30 days of such termination.”²⁷⁴

Views on whether these are right cases for prosecutorial notification or the efficacy of such notification for anything other than bureaucratic self-defense will vary. The relevant point here is simply that this sort of administrative measure will, at least on the margin, increase the degree of collaborative decisionmaking in the cases it covers.

2. Brady & Other Disclosure Rules

Notification measures provide an opening, but do little to elevate the quality of the conversations a prosecutor has with agents. To do this, one would need to promote, even require, investigative agencies to transmit more raw investigative data to prosecutors – information about tactics used, both successfully and unsuccessfully, and forgone. Prosecutors’ distance from primary evidence collection will inevitably limit their ability to know, let alone bring their influence to bear on, the full range of resource allocation and tactical decisions that agencies make. Indeed they labor under this disadvantage even in those systems where they formally have hierarchical power over police forces.²⁷⁵ But recent debacles like the Whitey Bulger case in Boston (where FBI agents kept prosecutors in the dark about the nature of their relationship with top-echelon

²⁷³ Id. at 8-9.

²⁷⁴ Id. at 11.

²⁷⁵ See Marc Robert, *The Role and Status of Public Prosecution Services in Europe: Major Problems and the Council of Europe Draft Recommendation*, 21, in *European Conference*), at 35-36 (“As regards those systems – the majority – which already acknowledge the right of public prosecution services to supervise police forces or their activity, the committee agreed that there was often a wide gap between the legal powers attributed to these services and the real-life, day-to-day exercise of these powers, a discrepancy which discussion and consultation did seem to be capable of overcoming. It would appear that the crucial issue, to which a solution remains to be found, is that public prosecution services and also, in fact, judges are heavily dependent on police priorities in bringing offenders before the criminal justice system.”).

In the Netherlands, where the police function “under the command of the public prosecution service,” Hans de Doelder, *The Public Prosecution Service in the Netherlands*, 8 *Eur. J. Crime. Crim. L. & Crim. Just.* 187, 187 (2000), “a prosecutor finds himself in a highly police-dependent position because he has to rely heavily on information gathered by the police. Just as a judge is under negative control of the prosecutor service, a prosecutor is under negative control of the police. If the police do not start an investigation or do not share certain information, a prosecutor is left empty-handed.” Id. at 191. See also Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* 66, 81 (1995) (noting that in Scotland, where “police remain in law subordinate to the prosecutor [procurator fiscals] in the investigation of crime,” insiders say “reports are known to be stereotyped and often short of useful information, which tends to hinder well-informed decision-making at the prosecution stage.”); Heiner Busch & Albrecht Funk, *Undercover Tactics as an Element of Preventive Crime Fighting in the Federal Republic of Germany*, 55-69, in Cyrille Fijnaut & Gary Marx, *Police Surveillance in Comparative Perspective* 55, 66 (1995) (“even in targeted crime investigations for which public prosecutors are definitely responsible, they often remain at a disadvantage. Information is pre-shifted [sic] or simply not provided. By accepting the police argument that they have to protect their information sources and undercover operations, public prosecutors allow themselves to be transformed into the ‘dancing bears’ of the police.”).

informants),²⁷⁶ and the Timothy McVeigh case (where the Oklahoma City bombing prosecutors were blindsided by the belated appearance of FBI field office files they had previously promised to disclose to defense counsel, and that the FBI Director had himself ordered be given to prosecutors),²⁷⁷ though each unique and distinguishable in its own right – still point to an all too impermeable barrier between agency and prosecutorial files.

This impermeability can be targeted administratively.²⁷⁸ And after each debacle, measures are often taken to ensure that the particular problem will not recur.²⁷⁹ Administrative efforts to enhance informational flow to prosecutors have their limits, though. One important obstacle is the cultural gap between agencies and prosecutors that has already been discussed.²⁸⁰ Agents may think prosecutors have no need for raw investigative data, and cannot always be trusted to handle it properly.

One need not stop at administrative measures however. The problem can also be addressed -- and to some extent has already been addressed -- by constitutional or statutory rules that require prosecutors to disclose to defense counsel certain raw investigative data – e.g. initial witness interview reports, documentary and physical evidence that points in directions other than that pursued by investigators, etc. These rules may not seem particularly helpful to prosecutors after they have obtained a conviction, or who find themselves the subject of stinging judicial criticism.²⁸¹ Indeed, we regularly see prosecutors joining with investigative agencies to oppose reversal where evidence has emerged post-conviction that, according to the defendant, casts doubt on the validity of the government's theory at trial. Even *ex ante*, the rabid or lazy prosecutor

²⁷⁶ See *United States v. Flemmi*, 195 F. Supp. 2d 243 (D. Mass. 2001); Lehr & O'Neill, *supra* note __. See also *Orena v. United States*, 956 F. Supp. 1071 (E.D.N.Y. 1997) (relationship between FBI agent and mobster in New York). The problem is certainly not confined to the FBI. See, e.g., Cheryl W. Thompson, *DEA Shielded Tainted Informant; Agency Paid Source for 16 Years Despite Arrests, Perjury*, *Wash. Post*, July 19, 2001, at A1.

²⁷⁷ See Inspector General, Dep't of Justice, *An Investigation of the Belated Production of Documents in the Oklahoma City Bombing Case 37-42* (March 19, 2002); available at <<http://www.usdoj.gov/oig/igspeccr1.htm>> (visited Mar. 26, 2002); see also Lois Romano & Dan Eggen, *FBI Kept Files from McVeigh's Lawyers*, *Wash. Post*, May 11, 2001, at A1.

²⁷⁸ See Stanley Z. Fisher, *supra* note __, at 1414 (comparing U.S. with England, which has a "comprehensive regulatory framework for police record-keeping and revelation of case information to the prosecutor").

²⁷⁹ See Dep't of Justice Guidelines Regarding the Use of Confidential Informants (January 8, 2001), available at << <http://www.usdoj.gov/ag/readingroom/ciguide.htm>>>.

²⁸⁰ See *supra* at __

²⁸¹ See *United States v. Diabate*, 90 F.Supp.2d 140 (D.Mass. 2000) (dismissal of indictment based on United States Attorney's office's violation of local rule requiring it to instruct agencies (in this case U.S. Secret Service and Fall River police) to preserve notes that could have been used to impeach law enforcement witnesses). For a discussion of this local rule, found at <<http://www.bostonbar.org/dd/crimrules/report.htm>>, see Fisher, *supra* note __, at 1437.

who just wants to convict the nearest available suspect won't have a brief for a broad discovery regime.²⁸² Yet institutionally, prosecutors can profit from such rules in their dealings with agencies, particularly when the rules impose an infeasible duty on prosecutors to disclose information from agency files, regardless of their own personal knowledge.²⁸³ As a result of these rules, prosecutors are able to tell agents not just "Please give me all the reports detailing your agency's relationship with the informant so that I can assess how good a witness he'll be," but also "If you don't turn everything over to me, defense counsel and the judge will really stick it to us, and particularly me, if anything turns up post-conviction." On the margin, such disclosure rules thus harness an adversarial right to foster closer coordination between prosecutors and agents, and to enhance prosecutors' ability to do truly independent screening (and to better monitor agency investigative tactics). By ostensibly ignoring the gulf between prosecutorial and agency knowledge²⁸⁴ and putting what at first blush seems an "unrealistic"²⁸⁵ burden on prosecutors, the rules may actually reduce that gulf.²⁸⁶

The lesson here is we needn't always choose between promoting legality and moderation through institutional mechanisms and promoting them through the creation of judicially enforceable rights. By giving defendants a right of access to, say, exculpatory or impeachment information in the hands of investigative agencies, doctrines like that articulated in *Brady* and its progeny also help ensure that prosecutors have the tools to

²⁸² Prosecutorial discomfort with broad disclosure regimes may also reflect distrust of a jury's ability to appropriately assess the information. See Daniel C. Richman, *Expanding the Evidentiary Frame for Cooperating Witnesses*, 23 *Cardozo L. Rev.* 893, 897 (2002).

²⁸³ See *Kyles v. Whitley*, 514 U.S. 419 (1995); *US v. Bryan*, 868 F.2d 1032 (9th Cir. 1989); *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir. 1985); *US v. Lacy*, CR 94-0384 (N.Cal. 8/18/95) (Patel) (AUSA cannot rely on agency to search personnel files for Brady material). See also Kevin McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 *Hastings L.J.* 957, 1002 (1989); See Lis Wiehl, *Keeping Files on the File Keepers: When Prosecutors Are Forced to Turn Over the Personnel Files of Federal Agents to Defense Lawyers*, 72 *Wash. L. Rev.* 73 (1997).

²⁸⁴ Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 *Fordham L. Rev.* 1379, 1382 (2000) ("The *Kyles* court failed to acknowledge the distinction between holding prosecutors strictly responsible for the conduct of other prosecutors (in the same office), and for the conduct of the police, who are not normally employed by or directly accountable to the prosecutor.").

²⁸⁵ Fisher, *supra* note __, at 1383 .

²⁸⁶ For limits, and a sense of the policymaking involved in the articulation of the Brady right, see *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998): "[K]nowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt 'a monolithic view of government' that would 'condemn the prosecution of criminal cases to a state of paralysis.'" (quoting *United States v. Gambino*, 835 F. Supp. 74, 95 (E.D.N.Y. 1993), *aff'd* 59 F.3d 353 (2d Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996)); *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994). For an exploration of the special problems raised by the involvement of intelligence agencies in a criminal investigation, see Jonathan M. Friedman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 *Yale L. & Pol'y Rev.* 331 (1998).

effectively scrutinize agency decision making.²⁸⁷ An expansion of the Brady and non-constitutional pre-trial disclosure regime (both in terms of the information covered, the timing of disclosure,²⁸⁸ and enforcement) would serve both purposes.²⁸⁹ And, if we want to promote our working group model, any effort by prosecutors or enforcers to limit those regimes should be resisted.²⁹⁰

3. Hearsay in the Grand Jury

In any event, if the goal is to ensure that prosecutorial gatekeeping consider the true quality of investigative data and not look only to the burnished reports that merely reflect agency screening decisions, we might want to go beyond simply requiring that prosecutors take steps to acquire such data. We might force them to actually sift through it: Interview first-hand witnesses; handle physical evidence; speak with the relevant government experts. By the time a prosecutor comes onto the scene, the universe of potential evidence will inevitably reflect agency selection decisions and may also be

²⁸⁷As one organized crime prosecutor explained in a panel discussion on criminal discovery:

Federal agents love to bring the bow tie case to an Assistant United States Attorney. When I say bow tie, I mean they are presenting to you an accordion file and they are saying this is everything that you need to know to go forward with this case. And the Assistant United States Attorney that goes forward on that basis is not doing their job. They're not doing it from the constitutional standpoint. Because everything that's been said here about our responsibilities to thoroughly investigate what are in police files, FBI files, and those dozens of file cabinets tucked away in some dark corner someplace is absolutely correct.

Panel Discussion: Criminal Discovery in Practice, 15 Georgia St. L. Rev. 781, 805-06 (1999) (comments of Art Leach, chief of organized crime strike force in the Northern District of Georgia).

He later noted:

[The] FBI loves to tell Assistant U.S. Attorneys, you can't see it. Well, I can dismiss this case. And it takes a tough individual to tell the agents that. And any AUSA who tells a lawyer that the agent won't let me do what is just and right in the case ought to be fired.

Id. at 808.

²⁸⁸ See *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (under Brady and progeny, “disclosure prior to trial is not mandated.”).

²⁸⁹ See *United States v. Ruiz*, __ U.S. __ (6/24/02) (government under no constitutional obligation to provide impeachment information prior to defendant's entry of guilty plea); see also John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 Ford. L. Rev. 2097, 2133-50 (2000) (critiquing limited nature of discovery regime for federal criminal cases).

²⁹⁰ One caveat here: The more agent see prosecutors as acting on behalf of defendants, the deeper the cultural gulf between prosecutors and agents becomes. “Legalistic mechanisms” like expanded Brady rights can thus “backfire” by increasing the “sense of distance and differentness” between organizational groups. See Sim B. Sitkin & Darryl Stickel, *The Road to Hell: The Dynamics of Distrust in an Era of Quality*, in Kramer & Tyler, *supra* note __, 196, 198. To the extent that investigators respond by withholding information from *both* prosecutors and defense counsel (either by leaving facts out of reports or not turning over certain reports), the gains from an expanded Brady regime would be limited.

tainted by agency handling. But the more contact the prosecutor has the evidence at an early stage, the more informed her screening decisions will be.²⁹¹

If every case went to trial, prosecutors would indeed be under pressure to do just such things, because of the hearsay rule and as part of good trial preparation. The combination of professional self-interest and easy monitoring (because poor trial preparation shows) would be potent. But diminishingly few cases go to trial. Moreover, even for cases going to trial, prosecutors won't have a strong incentive to scrutinize first-hand witness accounts until the eve of trial, after plea negotiations have broken down. To do otherwise would be inefficient in a plea-driven system.²⁹² This means that scrutiny will often not occur until after indictment, when the prosecutor is subject to the bias flowing from such a public commitment.²⁹³ While institutionally, prosecutors might benefit from a more careful scrutiny of witnesses an early stage, they thus are under pressure to rely on agency reports.

One way to counteract these pressures would be to reconsider the well-established rule²⁹⁴ that allows federal prosecutors to rely (exclusively if they choose) on hearsay presentations in the grand jury. Federal prosecutors retain the ability to sift through evidence for themselves before seeking an indictment, and may even (for a variety of tactical reasons) decide to call first-hand witnesses. But they frequently don't, lacking any incentive to do so.²⁹⁵ And it will only be in those (mostly white collar) cases that a prosecutor developed herself in the grand jury (or which she was involved in for some other reason) that she will therefore be in a good position to second-guess agency judgments about credibility and other such matters.

²⁹¹Ron Wright and Marc Miller make a similar point, in the course of arguing for more rigorous prosecutorial screening as a way to minimize plea bargaining. Wright & Miller, *supra* note __, at TAN 291.

²⁹² See *supra* __.

²⁹³See Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud, 46 Vand. L. Rev. 75, 103 (1993) (“[O]nce commitment has occurred, and especiall

if it is publicly expressed and repeated, what might an obvious red flag to a disinterested observer may not appear such to the actor.”); see also Donald C. Langevoort, Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms), in Cass R. Sunstein, ed., Behavioral Law & Economics 144, 151 (2000).

²⁹⁴See *Costello v. United States*, 350 U.S. 359 (1956).

²⁹⁵ I rely primarily on my personal experiences for this. “[P]erhaps the greatest cost of grand jury secrecy rules is the lost opportunity for systematic study of the body.” Richman, Grand Jury Secrecy, *supra* note __, at 342. But see Blanche Davis Blank, *The Not So Grand Jury* (1993) (account of one-time grand juror); Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 Cornell L. Rev. 260, 267 (1995) (discussing absence of hearsay rule in grand jury).

The standard critique of the prosecutorial license to introduce hearsay in the grand jury is that the practice diminishes the grand jury's ability to perform its screening role.²⁹⁶ Yet, in a world where (for better or worse) prosecutors are de facto judges and jurors, the primary significance of the license and its use may be on the care with which prosecutors perform their gatekeeping function. It may be that things are just right, and that federal investigators do not require the monitoring that many of their state counterparts get. Perhaps state systems, like New York's, that do bar hearsay presentations in the grand jury,²⁹⁷ need a rule forcing prosecutors to deal with all significant fact witnesses at an early stage because their police forces are less careful, or because a great many state cases involve eyewitness or accomplice claims about single-transaction crimes. In the absence of such features, the argument might go, it makes sense for the federal system to leave agencies responsible for dealing with witnesses pre-indictment.

But there is no such neat dichotomy. Federal cases often are just not that different from state cases. Given the well-known pitfalls of eyewitness²⁹⁸ and accomplice²⁹⁹ testimony, the increasing involvement of the federal government in the single-transaction street-crimes that used to fall in the exclusive bailiwick of state authorities, and the increasing (and consequent) reliance of federal agencies on work of state and local police officers,³⁰⁰ the effects of federal grand jury doctrine may not be so benign. And its reversal could be a significant component of any program aimed at giving federal prosecutors the raw investigative material that, together with their charging powers,

²⁹⁶See *United States v. Acuri*, 282 F. Supp. 347, 349 (E.D.N.Y.) (Weinstein, J.), *aff'd*, 405 F.2d 691 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463, 541 (1980).

²⁹⁷ See Sara Sun Beale, et al., *Grand Jury Law and Practice* § 4:20 at 4-109 to 4-116 (2d ed. 1997); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?* 82 B.U. L. Rev. 1, 22-23 (2002).

²⁹⁸ See U.S. Dep't of Justice, Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 24 (1996) (noting critical role played by eyewitness testimony in wrongful convictions studied); Elizabeth F. Loftus, *Eyewitness Testimony* (rev. ed. 1996).

²⁹⁹ See Yaroshefsky, *supra* note __, at 962 (conclusions drawn from "preliminary examination of the extent to which the role of cooperators and the cooperation process under the Sentencing Guidelines have created or exacerbated problems regarding the reliability of cooperator testimony").

³⁰⁰ See Richman, *Boundaries*. A magistrate judge in Atlanta recently noted:

It used to be in the old days, when I first started as an Assistant U.S. Attorney, that virtually all of the law enforcement agents who were making the cases and presenting them [] were federal agents. Now that seems to be the exception rather than the rule. And most of the drug cases, the violent crime cases that we see in federal court are actually made, at least in the Northern District of Georgia, [] by state and local agents or state and local agents who are participating in task forces with federal agents.

Criminal Discovery in Practice, *supra* note __, at 794 (comments of Magistrate Judge Gerrilyn G. Brill).

would promote greater dialogue with investigative agencies about tactics as well as targets.³⁰¹

B. Mechanisms that Directly Promote or Deter Mutual Gatekeeping

If the goal is to promote collaborative dialogue, we should also carefully scrutinize any measure or structural arrangement that deters agency-prosecutor interaction or facilitates the ability of one side to circumvent the involvement of the other.

1. Application of the No-Contact Rule

One area where recent legislation has already threatened to undermine prosecutorial involvement in investigative decision-making involves pre-indictment contacts with represented targets. In the absence of any general constitutional or statutory bar on such contacts, those seeking to restrain enforcers turned to the legal ethics rules, which, in one form or another, prohibit an attorney from communicating “with a party he knows to be represented by a lawyer in that matter,” absent that lawyer’s permission.³⁰² Their victory came in the McDade Amendment,³⁰³ which mandated that federal prosecutors face the same ethical restrictions as do their private counterparts. Justice Department regulations have since made clear that prosecutors “shall not direct an investigative agent acting under the attorney’s supervision to engage in conduct under circumstances that would violate the attorney’s obligations” under the provision.³⁰⁴ But a significant regulatory gap has now been created between prosecutors and agents, as agents, not bound by the ethics rules, remain free to contact represented targets overtly

³⁰¹ Cf. April Witt & Paul Schwartzman, Pr. George’s Prosecutor Targets Questioning: Police Must Provide Interrogation Notes, *Wash. Post.*, June 7, 2001, at B1 (in wake of newspaper articles about false murder confessions, State’s Attorney announces that “he no longer will prosecute confession-based homicide cases unless county detectives provide him with detailed written accounts of the time suspects spend under interrogation”).

³⁰² Model Code of Professional Responsibility DR 7-104(A)(1)(1983). The Model Rules of Professional Conduct contain a similar provision. Model Rules of Professional Conduct Rule 4.2 (1994). The literature on this resort to ethical regulation is considerable. See, e.g., Bruce A. Green, A Prosecutor’s Communications with Defendants: What Are the Limits?, 24 *Crim. L. Bull.* 283 (1988); Pamela S. Karlan, Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel, 105 *Harv. L. Rev.* 670, 700-03 (1992); Alafair S.R. Burke, Note, Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate, 46 *Stan. L. Rev.* 1635 (1994); Note, Federal Prosecutors, State Ethics Regulations, and the McDade Amendment, 113 *Harv. L. Rev.* 2080 (2000); Daniel C. Richman, Cooperating Clients, 56 *Ohio St. L.J.* 69, 146-48 (1995); Richard Uviller, Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 *Colum. L. Rev.* 1137, 1179 (1987).

³⁰³ Omnibus Consolidated and Emergency Supplemental Appropriations, Ethical Standards for Federal Prosecutors Act, § 801, P.L. 105-277, 112 Stat. 2681 (1998) (codified at 28 U.S.C. § 530B); see Ryan E. Mick, Note, The Federal Prosecutors Ethics Act: Solution or Revolution?, 86 *Iowa L. Rev.* 1251 (2001).

³⁰⁴ 28 C.F.R. 77.4(f) (1999).

and covertly, so long as they do not involve prosecutors in such endeavors.³⁰⁵ The gap may even get bigger, now that at least one state court has held that prosecutors are also precluded from engaging in deceit or dishonesty of the sort necessary in undercover and “sting” operations.³⁰⁶ To the extent one’s goal is to ensure prosecutorial involvement in investigative decision making,³⁰⁷ the McDade Amendment, and the unreflective application of ethical rules governing investigations to prosecutors generally, is thus a large step in the wrong direction (and unlikely to prove effective in restraining investigative contacts with represented parties).

2. FISA and the USA PATRIOT Act

The recent Wen Ho Lee case³⁰⁸ provides another example (albeit a limited and provocative one) of a legislative provision that, at least in effect, deterred agents from collaborating with prosecutors at an early stage. Prior to its amendment by a provision of the USA PATRIOT act, the Foreign Intelligence Surveillance Act (“FISA”) was understood to establish a regime under which the government could conduct electronic surveillance and physical searches under terms more permissive than those governing criminal investigations only so long as “the primary purpose” of those searches was to

³⁰⁵ See Caroline Heck Miller, *Knowing the Danger from the Dance: When the Prosecutor is Punished for the Government’s Conduct*, 29 *Stetson L. Rev.* 69, 83-84 (1999) (agents free to use investigative tactics barred under legal ethics rules, but not by constitution “until the moment they consulted a government attorney for legal counsel; having done so, they may be directed to desist.”); see also Senate Hearings 106-255 at 63, 94.

³⁰⁶ See DOJ Sues Oregon Bar Over Dishonesty Rule, Asserts Need for “Prosecutorial Exception,” 69 (BNA) *Crim. L. Rptr.* 438 (July 4, 2001); *In re Gatti*, 8 P.3d 966 (Or. 2000). But see Utah State Bar Ethics Adv. Op. Comm., No. 02-05 (Mar. 18, 2002) (concluding that government lawyers do not act unethically merely by taking part in or supervising lawful covert operations that involve use of deceit), reported in 71 (BNA) *Crim. L. Rptr.* 135 (May 1, 2002).

³⁰⁷ Increasing prosecutorial control was one of the rationales the Department of Justice cited when it tried, unsuccessfully [SO FAR] to make repeal of the McDade Amendment part of its anti-terrorism program. See Beverley Lumpkin, *You Know What They Say About Sausage; Halls of Justice: A Weekly Look Inside the Justice Department*, ABCNews.com., Oct. 5, 2001 (measure hailed by Criminal Division official who “said for the bureau to fight bin Laden and his like effectively, it needs confidential informants to infiltrate, and prosecutors need to oversee their use and to counsel the agents.”). The measure passed the Senate, but did not make it into the final USA PATRIOT Act. *Broad Anti-Terrorism Package Passed by Congress, Signed by President*, 70 *Crim. L. Rptr.* (BNA) 93, 96 (Oct. 31, 2001).

One answer, of course, to the prosecutorial control argument for repeal would be to amend the disciplinary rule to make prosecutors responsible for agency behavior, whether or not they authorized it. See Sebrina A. Mason, *Policing the Police: How Far Must a Prosecutor Go to Keep Officers Quiet?*, 26 *S. Ill. U. L. J.* 317 (2002) (discussing recent Illinois disciplinary rule requiring prosecutors to “exercise reasonable case” in preventing police officers from making extrajudicial statements that, as prosecutors, they could not make themselves).

³⁰⁸ For background on the case, see generally <<http://www.wenholee.org>>.

obtain foreign intelligence information.³⁰⁹ As Eleanor Hill recently explained in the Joint Intelligence Committee hearings on September 11: “In order to avoid courts ruling that FISA surveillances were illegal because foreign intelligence was not their ‘primary purpose,’ DOJ lawyers began to limit contacts between FBI personnel involved in these activities and FBI and DOJ personnel involved in criminal investigations.”³¹⁰

According to the Justice Department’s inquiry into the government’s handling of the Wen Ho Lee investigation, FBI fears that contacts with prosecutors would jeopardize the agency’s ability to proceed under FISA “not only jeopardized the potential for a *successful* prosecution; it jeopardized the potential for *any* prosecution.”³¹¹ Precisely what the prosecutors could have done had they not been excluded is not entirely clear from the report because important parts of it remain classified. But the report found that, had the Criminal Division been consulted earlier, it could have given agents critical advice on access to Lee’s computer, on how to conduct Lee’s interviews, and on the importance of establishing motive. Noting that, at the time, the FBI’s Director and general counsel were both former prosecutors, the report went on to observe: “The issue is not one of expertise. ... The issue is that it is the Criminal Division that is charged with the primary responsibility for asserting the Department’s prosecutive equities. While it should not be the *only* party at the table, when such equities are at stake, it should certainly be at least one of them.”³¹²

Whether, had it been better coordinated, the Wen Ho Lee investigation would have ended differently is hard to determine. The government’s decision to let Mr. Lee plea guilty to a single count of mishandling classified information is certainly consistent with Mr. Lee’s claims that he was a victim of an unjustified witchhunt. Yet it could also reflect the government’s recognition that it had bungled the case beyond repair. The important point for our purposes is the way the investigation’s miscues highlight the sometimes perverse relationship between institutional dynamics and legal doctrine. Although some many complain that the USA PATRIOT Act’s relaxation of the FISA barriers between intelligence activity and criminal investigations – requiring only that intelligence gathering be “a significant purpose” and not necessarily the only or even chief purpose of FISA searches and interceptions³¹³ -- threatens civil liberties, there may be countervailing benefits from relaxation of strictures (self-imposed or otherwise)

³⁰⁹See 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B); Attorney General’s Review Team on the Handling of the Los Alamos National Laboratory Investigation, Final Report 709 (May 2000) (“Bellows Report”) (declassified version) <<http://www.usdoj.gov/ag/readingroom/bellows.htm>> (citing cases).

³¹⁰ Statement of Eleanor Hill, Joint Intelligence Committee Hearings, Oct. 8, 2002, at 24, available at <<<http://intelligence.senate.gov/0210hr/021008/hill.pdf>>>

³¹¹Bellows Report, supra note __, at 704. (Note that report’s primary author was an AUSA, Randy L. Bellows).

³¹²Id. at 744.

³¹³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. Pub. L. No. 107-56, sec. 218 115 Stat. 272 (2001).

against early prosecutorial involvement.³¹⁴ And a large part of the Wen Ho Lee investigation story is about the costs of institutional separation.

Obviously, a lot more could be said about each of the legal regimes discussed here. Each can fairly be said to have merits or demerits that have nothing to do with its effects on the balance of power between prosecutors and agent. Disclosure rules serve the goal of adversarial fairness and may even promote more accurate factfinding. Eliminating the use of hearsay in grand jury presentations might lead to more rigorous screening by grand jurors who would have a better sense of the witnesses on which the government was really relying. Reliance on ethical rules to regulate prosecutorial contacts with represented targets may be necessary because suppression is a poor deterrent,³¹⁵ and administrative controls insufficient to deter prosecutors who can escape administrative sanctions by resigning, and who upon resigning might find their aggressiveness rewarded by the private market.³¹⁶ The risk of government abuses in the intelligence-gathering area may exceed the gains from increased prosecutorial involvement. And so on. The point here is not to fully assess the costs and benefits of any of these measures, but rather to show how, even within the essentially coordinate structure of the federal enforcement bureaucracy, one could productively tinker with the system if one's goal were to increase the quality of the interaction between prosecutors and enforcement agencies.³¹⁷

3. U.S. Attorney's Office Investigative Units

Removing actual or perceived barriers to agent-prosecutor collaboration may not be enough, of course, if one or both sides are not committed to productive interaction. Should we be concerned about that commitment, and its consequences for our model of mutual monitoring, however, we might also target procedural or institutional mechanisms that allow one side to circumvent or mitigate the influence of the other.

³¹⁴ For a history of coordination difficulties between 1995 and the passage of the USA PATRIOT Act, see General Accounting Office, Report to the Ranking Minority Member, Senate Gov't Affairs Comm., FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters Is Limited, GAO-01-780 (July 2001).

³¹⁵ See Richman, Cooperating Clients, *supra* note __, at 144-48.

³¹⁶ But see Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. Rev. 721 (2001) (noting how rarely prosecutors face sanctions in disciplinary process).

³¹⁷ See also Richard S. Frase, Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care, 78 Cal. L. Rev. 539, 558-59 (1990) (changes along French lines that might promote "a more integrated, efficient and responsible police function might include the following: requiring the police to notify the prosecutor at an early stage of the investigation and, whenever possible, prior to arrest; giving the prosecutors (or designated prosecutors) explicit authority to direct or order specific police investigatory acts; and placing in the hands of the chief prosecutor or attorney general some police administrative or disciplinary powers similar to the French Attorney General's control over the OJP [Officers of the Judicial Police] designation.")

One such target might be investigative units within U.S. Attorneys' offices. There are only a few such units³¹⁸ but they still raise important questions about whether we want to give prosecutors the capability to pursue cases on their own.³¹⁹ The proliferation of federal agencies, and their overlapping jurisdictions, may limit the degree to which any single agency can, say, check the "overreaching" of a U.S. attorney's office. But either alone or in combination, these agencies do provide an additional level of review for prosecutorial targeting decisions.

To be sure, there will be situations where, at least from a prosecutor's perspective, control of an investigative unit would be a godsend.³²⁰ In cases involving corruption or possible criminal conduct within an enforcement agency,³²¹ an office might want to be particularly careful about agency conflicts of interest. It might also want the capability to quickly address shortfalls between the evidence a prosecutor wants for trial and the evidence an agency is willing to provide. If we are interested both in checking prosecutors and in ensuring that they maintain a distinct perspective on investigative decision making, however, we might see the loss of these capabilities as a price worth paying, and look askance at the idea of a U.S. Attorney's office handing some of its most sensitive cases on its own.

By comparison the price seems unacceptably high outside the federal enforcement bureaucracy – in local systems – or within that bureaucracy, in a context analogous to local systems.³²² An interesting case study in this regard can be found in the request in 2000 by the Justice Department for funding for 43 investigators within the D.C. U.S. Attorney's office. Explaining the request, a departmental spokesperson noted:

The concept of assigning investigators to a prosecutor's office is not unique. According to the National Association of Investigators and Adjusters

³¹⁸ See CAFLE Hearing, Apr. 13, 1999, at 8-9 (investigator from Eastern District of New York U.S. Attorney's office serving as president of Federal Criminal Investigators Association notes that only 3 districts have own investigative units).

³¹⁹Id., at 29 (having a separate investigative unit allows a U.S. Attorney to "get thing done" "if there's a problem between the U.S. Attorney and a SAC [special agent in charge] of a particular agency"). But see CAFLE Hearing, Nov. 12, 1998, at 136 (former deputy director of FBI, Floyd Clark, complaining that some U.S. Attorney's offices have created "their own investigative bodies that go out and conduct investigations many times not even being coordinated with the agencies that have direct responsibility").

³²⁰ On a personal note, I have to say that the USAO investigators I dealt with when I was an assistant were some of the most capable, decent, and savvy professionals I've ever met.

³²¹ See CAFLE Hearing, Apr. 13, 1999, at 14 (testimony of J. Michael Daly, president of Federal Criminal Investigators Association) (noting use of investigators in political corruption cases).

³²²See Martin H. Belsky, *On Becoming and Being a Prosecutor*, 78 Nw. U. L. Rev. 1485, 1512 (1984) ("Increasingly, prosecutors use their own detectives to investigate offenses."); U.S. Dep't of Justice, Bureau of Justice Statistics, *National Survey of Prosecutors: State Court Prosecutors in Large Districts*, 2001 (December 2001, NCJ 191206) (staff investigators comprise 9.9% of total personnel in prosecutors' offices in large districts (those serving populations of 500,000 or more)).

(NAIA), a majority of local prosecutors' offices have in-house investigators. For example, the Manhattan, New York District Attorney's office has more than 100 investigators and the District Attorneys' offices in Dallas, Texas and Miami, Florida have their own investigative staffs. These offices are comparable to the District of Columbia United States Attorney's office in their primary mission of prosecution of violent crimes in their communities.

Unlike most federal cases, where defendants are arrested after a thorough investigation, a case in the District of Columbia Superior Court Division usually begins with a preliminary investigation, followed by an arrest by the Metropolitan Police Department (MPD). An arrest by the MPD is based on probable cause to believe that the arrestee has committed a crime. It thus signals the beginning, rather than the culmination, of an in-depth investigation into the circumstances surrounding the crime. Hence, the MPD presents the prosecutor with felony cases that require a substantial amount of investigative effort in order to secure an indictment by the Grand Jury and a conviction thereafter.³²³

For our purposes, if we accept the department's claim of need as valid and provisionally presume that it would make similar requests if prosecutors faced similar evidentiary gaps elsewhere in the federal system,³²⁴ we can ask (but not yet answer) some interesting questions: Is there something about violent crime that leads police forces to focus on the apprehension of perpetrators and not recognize a duty to stay with cases until conviction, or to be derelict in that duty? If so, what is that something? The simple press of business that leaves police forces with a readily monitorable responsibility (something that federal agencies generally lack) and insufficient resources to both keep the peace and prepare for trial? Are the career incentives in police forces so different from those in federal agencies?³²⁵ Moreover, is there even a "problem" here? Are local systems actually working extremely well, with police forces allocating their resources most efficiently, and the evidentiary gap between arrest and conviction so small that a relative handful of investigators can bridge it? Or is there some sort of obstacle to efficient allocation, arising out of the fact that prosecutors and police officers generally don't share the same political chain of command³²⁶ – just the kind of obstacle that federal prosecutors face in D.C. to far greater extent than elsewhere?³²⁷

³²³ Testimony of Mary H. Murguia, Dir. Exec. Office for U.S. Attorneys, Dep't of Justice, before the House Appropriations Subcomm. On the Dep'ts of Commerce, Justice, State & Judiciary, Mar. 23, 2000, Federal News Service. The Justice Department's position may reflect its assessment of the D.C. police force in particular. See *supra* note __ (re use of GJ subpoenae). But given the general trend in large metropolitan district attorneys' offices to have in-house investigative units, I am inclined to take its explanation at face value.

³²⁴ Cross-ref to section where explain why evidentiary gaps likely to be comparatively small in fed system

³²⁵ See William McDonald, Prosecutors, Courts, and Police, in William A. Geller, ed., *Police Leadership in America*, 203, 207-08 (1985) (noting how police reward structure not linked to officer's ability to get convictions).

³²⁶ It should be noted that in New York City detective squads in the district attorney offices, albeit working out of prosecutorial offices, report to the NYPD Chief of Detectives and are part of NYPD. See <<http://www.manhattanda.org/office_overview/investigation/support/daos.htm>>.

Exploration of these issues would advance our understanding of the prosecutor-agent or prosecutor-police dynamic. In the absence of reason to believe that federal prosecutors face systematic evidentiary gaps outside of D.C., however, we ought to view investigative units as question-raising sources of prosecutorial power, rather than as compensatory measures.

4. Presentation of Information to Sentencing Judges

While the forgoing discussion had investigative agencies as moderating influences on prosecutors, agency monitoring can also ensure adequate prosecutorial zeal. One way this could be done is through the rules and practices relating to the presentation of sentencing information to judges.

Sentencing information has always been a significant determinant of sentences, but never more so than under the Federal Sentencing Guidelines, which set presumptive sentences according to such factors as the quantity of drugs involved in a conspiracy, or the size of the monetary loss inflicted or intended by fraudulent conduct. In a system of negotiated dispositions, the government's sentencing presentation (and thus, to a considerable degree over sentencing³²⁸) is as much a prosecutorial tool as is charging discretion. And a prosecutor's willingness to characterize a drug conspiracy as "really" involving only 5 kilograms of cocaine (as opposed to the 30 kilograms suggested by an alternate interpretation of the evidence), or a fraud as involving only \$100,000 (instead of \$1 million), will be a considerable boon to a defendant, making a guilty plea far more likely.³²⁹

In his valuable study of U.S. Attorneys' offices, written before the advent of the Guidelines, James Eisenstein noted:

[F]ederal investigators handle fewer cases and more often become personally involved in the outcome of their cases than do local police. As a result, they possess both the incentive and information needed to monitor plea bargaining practices. It is not clear how successful agency attempts to shape bargains are But prosecutor

³²⁷ See GAO, D.C. Criminal Justice System: Better Coordination Needed Among Participating Agencies, GAO-01-187 (Mar. 2000) at 58 (while 30 other agencies may make arrests in DC, Metropolitan Police force "makes a large majority").

³²⁸ Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 Cal. L. Rev. 1471 (1993).

³²⁹ For reports of prosecutorial manipulation of sentencing facts see David Yellen, Probation Officers Look at Plea Bargaining, and Do Not Like What They See, 8 Fed. Sentencing Rep. 339 (1996) (approximately forty percent of probation officers believe that guideline calculations set forth in plea agreements in a majority of cases are not "supported by offense facts that accurately and completely reflect all aspects of the case"); Joseph S. Haff, Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?, 87 Iowa L. Rev. 587, 608-09 (2002).

anticipations of agency reactions to overly lenient bargains undoubtedly contribute to existing stringent practices.”³³⁰

Since then, the Sentencing Guidelines have given agents a better-marked avenue for their contributions. As Stith and Cabranes have noted, the “independent” investigation that probation officers are required to do under Guidelines “provides an opportunity for the police or law enforcement agents to assert their version of what happened, and their views on an appropriate sentence, directly to the court, via the Probation Office, by-passing the prosecutor’s censorship” and consequently undermining prosecutors’ ability to make commitments during plea negotiations.³³¹

How much this actually happens is unclear. But if it is happening, what are we to make of agency efforts to present an ostensibly more complete picture of a defendant’s culpability to sentencing judges? The question is hard to answer at a descriptive level. Do agents see this as an opportunity to shift authority away from prosecutors whom they perceive as too prone to compromise strong cases in order to further career goals or to avoid the hard work of trials? Are these agency contacts actually fostered by prosecutors who, having had little to do with the investigation of a case that soon ended in a guilty plea are happy to rely on the agents who know the facts? Or by prosecutors who, having obtained a conviction, care little about how much time the defendant actually serves? Or, more nefariously, by prosecutors happy to play both sides, getting a plea by a phantom concession and then encouraging agents to nullify defendant’s gain?

At the normative level, however, we should embrace agency contributions as a monitoring tool, or at least a spur to closer collaboration between agents and prosecutors. Measures that encouraged agency presentations at the sentencing process would probably be institutionalized in greater prosecutorial consultation with agents about plea dispositions, and apparent unanimity within the government camp at sentencing. And if this didn’t happen, agency contributions would provide a helpful check on undue prosecutorial leniency, since the contributions would presumably consist of aggravating data (though one can imagine situations in which agency information would mitigate sentences as well).

What of the defendant, whose guilty plea was based on an understanding with the prosecution about an appropriate guideline sentencing range? If an agency submission thereafter leads the court to impose a harsher sentence, he can fairly complain that he was blindsided.³³² But the solution here ought to be rules that ensure he can withdraw his

³³⁰ Eisenstein, *supra* note __, at 181.

³³¹ Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 87 (1998) (quoting Gerard Lynch).

³³² A defendant may lack such a claim where the plea agreement leaves the government free to add to the record “at all times concerning the facts and circumstances of [defendant’s] offenses,” as was the case in *United States v. Pollard*, 959 F.2d 1011, 1026-27 (D.C. Cir.), cert denied, 506 U.S. 915 (1992). See also *United States v. Prince*, 204 F.3d 1021 (10th Cir. 2000) (plea agreement not violated when prosecutors gave probation department FBI reports of defendant’s post-plea agreement criminal conduct)

plea, not ones that silence agencies.³³³ This would protect a defendant's legitimate expectation interests, while promoting agent-prosecutor collaboration. It would also promote the sentencing goals of horizontal equity, by making judges better equipped to determine whether offenses that prosecutors have presented as factually similar really are.³³⁴ Moreover, while, as we have seen, prosecutorial discretion might be fatally undermined were agencies able to grant defendants immunity without prosecutorial participation,³³⁵ the cost to prosecutorial power here would be more limited, going only to the magnitude of sentencing concessions. A cost justified by the gains in collaboration, judicial authority, and transparency.

Giving the defendant the ability to claim breach and withdraw his plea is a spur to agent-prosecutor collaboration, in addition to a matter of simple fairness. When, as in a number of states,³³⁶ defendants are given no relief when police departments effectively undercut prosecutorial sentencing concessions, prosecutors have less reason to reach a consensus with the police up front as to appropriate dispositions. There may be a few savvy defendants who decline to enter plea agreements under these conditions, or demand police participation, but the result in this regime is more likely to be blindsided defendants and apathetic prosecutors. Those states that treat police and prosecutors as independent actors in the plea agreement context would do well to reconsider a framework that seems blind to the virtues of coordination within the enforcement bureaucracy. Here again, as we saw in the Brady context, treating the "government" as a single unit when it comes to defendant rights makes it more likely that enforcers will productively collaborate.

C. Unilateral Organizational Measures

Not all measures promoting the mutual monitoring model would have to be implemented across agency boundaries, or by legislative or judicial action. Were there concern that prosecutors were lacking the information, incentive, or professional perspective needed for effective monitoring, a U.S. attorney's office could unilaterally consider a variety of organizational measures.

³³³ Ordinarily, the selection of a remedy (rescission or specific performance) for a breached plea agreement is generally left to judicial discretion. See *United States v. Carmichael*, 216 F.3d 224, 227 (2d Cir. 2000); *United States v. Day*, 969 F.2d 39, 47 (3d Cir. 1992).

³³⁴ See Albert Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901 (1991).

³³⁵ Cross ref

³³⁶ Compare *State v. Sanchez*, 146 Wn.2d 339 (Wash. S. Ct. 2002) (independent statement by investigating officer at sentencing hearing did not violate prosecution's commitment not to recommend a sentence because officer deemed not a party to the plea agreement); *State v. Rogel*, 116 Ariz. 114, 116, 568 P.2d 421 (1977) (suggesting that law enforcement officers are not agents of state and thus not bound by plea agreement); *State v. Thurston*, 781 P.2d 1296, 1299-1300 (Utah App. 1989) (police department not bound by plea bargain) with *Lee v. State*, 501 So.2d 591, 593 (Fla. Dist. Ct. 1987) (prosecutor's plea bargain binds all state agents, including state law enforcement officers).

One area for consideration would be the degree to which an office is organized vertically (leaving assistants responsible for cases from start to finish) or horizontally (assigning assistants to just one stage of case development). The goal of promoting the involvement of prosecutors in investigative decision making would of course be furthered by any measures that put prosecutors in the thick of investigative calls. And having a different set of prosecutors do gatekeeping at the charging stage would preserve some magisterial perspective. But if the goals are to ensure that a gatekeeping prosecutor's priorities are considered as evidence is developed, that she has a textured understanding of the evidence when making her gatekeeping decision, and that her office can fully leverage its gatekeeping power over charging into the investigative stage, vertical organization will be preferable, at least where non-routine cases dominate an office's or a unit's caseload. Although trials rarely happen any more, this investigative oversight and gatekeeping would best be done, as Richard Uviller has suggested, by mature prosecutors able to summon up a degree of dispassion.³³⁷

Another area could be the extent to which individual prosecutors work with a particular group of agents or kind of case. Perhaps there is some optimal period of service, sufficient for the prosecutor to develop the specialized knowledge and agent trust that would facilitate productive exchanges, but not so long as to foster a sub-culture divorced from the professional mainstream of the office.³³⁸

One might also target hiring and retention patterns for assistants. But though this would surely have significant effects, what those effects would be is hard to determine. As Jerry Lynch recently noted: "We have little real notion of what mix of backgrounds, credentials, achievement patterns, skills, and temperaments works well to produce effective prosecutors under the traditional adversary model, and still less whether the same blend functions as well where the prosecutor increasingly serves a quasi-judicial role."³³⁹ How, for example, does prior criminal work on the defense side affect prosecutorial behavior? One might theorize that, having had this experience, a prosecutor is more likely have an arms' length relationship with agents, having been trained to focus on their excesses and weaknesses. Moreover, it has been suggested that "greater investment in occupation-specific," as opposed to "firm-specific" human capital will make a lawyer more committed to the profession as a whole.³⁴⁰ On the other hand, defense lawyers trying to reconcile their duties to court and client understandably tend to develop just the agnostic deference to the adversary system that could promote a laissez-

³³⁷H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *Ford. L. Rev.* 1695 (2000).

³³⁸Cross ref to note re El Rukn case

³³⁹ Lynch, *supra* note ___, at 2150.

³⁴⁰Jean E. Wallace, *Organizational and Professional Commitment in Professional and Nonprofessional Organizations*, 40 *Admin. Sci. Q.* 228, 239 (1995); see *id.* ("Lawyers who have more experience outside the current workplace and who have attended an elite law school have invested more in their legal career and should therefore be more committed to the profession.").

faire attitude toward investigative processes.³⁴¹ As for retention policies: Limitations on assistant tenure could foster greater orientation to the outside legal community and promote a professional solidarity in contradistinction to agency culture. But shorter tenures could also limit prosecutorial experience, leaving assistants to rely more agents' enforcement expertise, and therefore more deferential. These avenues for inquiry ought to be pursued.

IV. Conclusion

This is very much a work in progress. Part of the challenge comes from the very nature of the model of decisionmaking this article embraces. The "Governmental (or Bureaucratic) Politics Model" of decision making described by Graham Allison in his masterful study of the Cuban Missile Crisis seems particularly apt for studying the federal enforcement bureaucracy because of its studied refusal to see policy as the product of a unitary actor.³⁴² But this model can make one too open to nuance. As Allison noted, it "tells a fascinating story, but it is enormously complex. The information requirements are often overwhelming and many of the details of the bargaining may be superfluous."³⁴³

Another part of the challenge comes with the period of flux in which it has been written. It is too soon to say how much enforcement agencies have changed their priorities since September 11, but they have changed. And as investigative agencies focus more on prevention,³⁴⁴ and presumably less on pursuing cases in court, agency dependence on prosecutors will likely be reduced. Although recent corporate scandals may herald a renewed interest in the area, any reduction in the priority given to white collar cases,³⁴⁵ where prosecutors have particular advantages, will have a similar effect.

³⁴¹See Barbara A. Babcock, *Defending the Guilty*, 32 *Clev. St. L. Rev.* 175 (1983); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal On Behalf of People Who Do Terrible Things*, 28 *Hofstra L. Rev.* 925, 954 (2000) ("It is the prosecutor's responsibility to anticipate and counter defense strategies--even those that play into juror prejudice. If they fail to do so, why blame the defense?"). The allure of this "epistemological demurrer" can be felt by lawyers outside the criminal defense bar as well. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589, 618 (1985).

³⁴² Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* 144 (1971).

³⁴³ *Id.* at 274.

³⁴⁴See Abraham McLaughlin, *Secret Service Dons New Roles For a New Era*, *csmonitor.com*, Feb. 6, 2002 (noting that "since Sept. 11, demand for the service of this gold-standard in global security has exploded") <http://www.csmonitor.com/2002/0206/p02s02-uspo.html>, visited Feb. 8, 2002; Dan Eggen, *Ashcroft Plans to Reorganize Justice, Curtail Programs*, *Wash. Post*, Nov. 9, 2001, at A17 (AG Ashcroft declares "that the primary mission of federal prosecutors, FBI agents and immigration officers must become thwarting future terrorist strikes.").

³⁴⁵See Oliphant & Davidson, *supra* note __, at 11 (noting that with new focus on counterterrorism, "the FBI will be of significantly less assistance to the Justice Department on matters such as white collar crime, health care fraud, or contractor malfeasance. And for those cases that the Justice Department continues to pursue, they will have to rely on other options besides G-men as investigators"); See Eric Lichblau, *FBI Turns Down Hundreds of Ex-Agents Offering Help*, *L.A. Times*, Nov. 6, 2001, at A1 ("One defense attorney in Atlanta who asked not to be identified quipped that with the massive resources the FBI is

And parallel developments in the private sector may end up reinforcing this power shift, since the boom in private security³⁴⁶ increases the demand on the side of the market for ex-agents³⁴⁷ that is not dominated by ex-prosecutors, even as the likely decrease in white-collar prosecutors threatens to reduce the demand for ex-agents in internal corporate investigations presided over by ex-prosecutors. But, at least so far, these are just speculations.

So let us conclude not by divining the “real stories” behind the headlines, but by following Heraclitus of Ephesus as well as Graham Allison. All is indeed in flux within the federal enforcement bureaucracy, but it has always been in flux, with relations between agents and prosecutors a changing function of the interplay between exogenous enforcement priorities, institutional structures, and procedural rules. To understand how enforcement bureaucracy exercises discretion, one must recognize the degree to which its constitutive structures influence, as well as are influenced by, enforcement priorities.

In the end, the empirics are difficult. And there is a temptation to leave things at the level of “may” and “might” that dominates the literature, including this article. But even those who would take issue with the particulars of my account must recognize that equilibria exist between agency and prosecutorial authority and that they play important role in shaping decision making within the large space of indeterminacy created by substantive law. The important point is that this is the direction to go if we want to think profitably about the wisdom of a number of rules, imposed judicially or legislatively, that tend to shift the prosecutor-agency equilibrium one way or another. In part because the dominant mode of criminal procedure analysis is still rights-driven – and therefore focuses on the balance between citizen and a unitary state, and not on structures within the state – the rules are rarely considered in these administrative terms. But they ought to be. As we rearrange the landscape, at least ought to have better sense of the models our measures favor, and of their normative consequences.

devoting to the fight against terrorism, ‘this is a great time to be a white-collar criminal.’”). MORE CITES [CHECK TRAC STATS IN 2002]

³⁴⁶See Patricia R. Olsen, Corporate Protection In a Violent World, N.Y. Times, June 23, 2002, Bus. Sec., at 14; Al Baker, Fear Feeds Bull Market in Private Security; After Sept. 11, Former Law Enforcers See a Surge in Demand for Their Skills, N.Y. Times, Oct. 27, 2001, at D1; Angela Shah, Corporate Security At Last Moves to Front Burner, Dallas Morning News, Dec. 1, 2001, at _ (former FBI agent running security and investigative firm in Texas reports security business as “absolutely skyrocketing”).

³⁴⁷ Ex-agents (like ex-cops) are likely sought not just for expertise but for their contacts in law enforcement agencies.