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Recommended Citation

Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

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ARTICLES

OUR ADMINISTRATIVE SYSTEM OF CRIMINAL JUSTICE

Gerard E. Lynch*

IN HONOR OF WILLIAM M. TENDY

Bill Tendy was already a legend among federal prosecutors when I first served as an Assistant United States Attorney for the Southern District of New York in the early 1980s. To us youngsters, Bill even then seemed a survivor from another era, when prosecutors really did resemble the tough-talking Hollywood DAs played by actors like Brian Donleavy—while we felt more like insecure young lawyers who should be played by Michael J. Fox or Calista Flockhart.

Partly, of course, this was just a function of age and experience; hard as it was to imagine, there must have been a time when Bill too was young and new to the job—though probably not insecure. Partly, though, it was a function of the fact that Bill's experience did indeed reach back to an era, before the innovations of the Warren Court, when law enforcement had a different, and somewhat rougher, style, and prosecutors were unambiguously associated with that style.

In the fall, the Fordham University School of Law will hold a symposium in honor of Bill Tendy, called "The Changing Role of the Federal Prosecutor." The following essay suggests that this symposium is timely indeed, and that prosecutors today should be conceived as occupying a very different role from the one they played when Bill began in the business. Although the developments I discuss are not limited to federal prosecutions, they are most pronounced in the federal system, particularly in white-collar cases in districts containing major cities. I do not know that Bill approved of all the changes in the criminal justice system that he witnessed in the course of his long career, but I do know that he understood the process of change, and the need of the system, and of those who work within it, to adapt to the inevitable evolution of the legal order in response to social and political change.

LAWYERS in the common law tradition like to emphasize the differences between the Anglo-American "adversarial" system of criminal justice and the continental or civilian "inquisitorial" system. The conventional wisdom among U.S. lawyers tends to glorify the American system, which is claimed to be more protective of liberty, more democratic, and less dominated by agents of the government establishment than the civil law tradition, thanks to the role of the lay jury, the formal equality between the representatives of the government and of the defendant, and the "neutral" independence of the judiciary. Increasingly, however, academic experts—and occasional public commentators influenced by them—tend to make the same sharp comparisons with a reverse twist, praising the inquisitorial system as more rational, more effective, and even more careful to avoid conviction of the innocent, thanks to the dominance of professional judges with a mandate for finding the truth, the reduced importance

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of manipulative defense counsel, and—particularly importantly—the absence of plea bargaining.¹

The purpose of this essay is twofold. First, I want to describe more realistically the theory and practice of plea bargaining in the United States, so as to defend and explain the purposes it serves. And second, I want to situate that practice with respect to the adversarial/inquisitorial distinction. I will attempt to show how the practice of plea bargaining, which in ideological terms is often used as the very symbol of the distinction between the adversarial and inquisitorial systems, in practice tends to soften the distinction between them. In fact, I will claim, the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize.

I. PLEA BARGAINING IN AN ADVERSARIAL SYSTEM

The typical criminal procedure course in an American law school describes—albeit in greater detail—a process that students essentially recognize from their high school civics courses. Grand juries accuse defendants of crimes that are carefully defined in the penal code. After appropriate motion practice to sharpen the issues for trial, prosecutors attempt to convict the defendant by persuading jurors of guilt

1. For just a small sample of the many articles and books from the last 25 years that criticize the adversarial system in civil and criminal procedure, often with specific reference to continental systems, or that defend the Anglo-American system from such attacks, see Marvin E. Frankel, *Partisan Justice* (1980) (criticizing the adversarial system of justice and suggesting changes to improve this system); Stephan Landsman, *The Adversary System: A Description and Defense* (1984); Lloyd L. Weinreb, *Denial of Justice: Criminal Process in the United States* (1977) (criticizing the American criminal process and advocating an alternative process); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506 (1973) (critiquing the adversarial system and suggesting that the continental system may be better suited to finding "truth"); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 Yale L.J. 1549 (1978) (advocating the importation of some aspects of the continental system into the adversarial system); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 Minn. L. Rev. 1 (1984) (discussing the civil litigation explosion and suggesting reform of the adversarial system); Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buff. L. Rev. 361 (1977). Of course, many of these authors recognize that the contrast between the "adversarial" and "inquisitorial" systems overstates and oversimplifies the differences between the actual legal systems of particular countries. See, e.g., Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* 4 (1986) (stating that as each system embraces characteristics of the other, the "premises of the opposition [become increasingly] uncertain or ambiguous"); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009, 1019 (1974) ("European criminal procedures are no more purely inquisitorial than ours are purely [adversarial]."). The description in the text is deliberately drawn in broad strokes, to suggest the oversimplified composite or popularized account of a much more nuanced academic debate that has entered the vernacular discourse among American lawyers.

beyond a reasonable doubt, in an adversarial trial against a vigorous and effective defense lawyer. If the jury finds guilt, a judge imposes a sentence by assessing the aggravating and mitigating circumstances applicable to the offense and the offender.

To the extent that such courses step back from the particulars of the constitutional, statutory, and judge-made rules governing the details of this system, and attempt to characterize the system as a whole, in comparative terms, the Anglo-American procedural system is typically described as "adversarial," in opposition to supposedly "inquisitorial" continental European systems. That is, the litigation is controlled by the parties—the state and the criminal defendant—who stand equal before a neutral court. A jury of lay citizens, rather than professionally-trained judicial officers, determines whether guilt has been proven. The judge acts as a relatively passive "umpire" who settles legal issues between the parties but does not actively seek to control the selection or presentation of those issues, or to guide the process to a factually accurate and legally just result. Evidence is taken primarily orally, on the occasion of the formal trial, and neither the jury nor even (for the most part) the judge possesses a written file or dossier or other record of evidence gathered during the course of the government's investigation of the case.

In addition to criticizing and defending particular rules or doctrines within this system, scholars and lawyers occasionally debate the merits of the system at a broad level. Partisans of the Anglo-American model dismiss the inquisitorial process as insufficiently protective of human rights. Professional judges are seen as subservient to the state, predisposed to accept the written record of a thorough investigation. The role of defense counsel is limited. The crucial devices of confrontation and cross-examination are minimized. American lawyers who have observed criminal trials in a country that combines continental procedure with an undemocratic political system (say, China) typically come away appalled, and prepared to advise European or Latin American colleagues that their system is really just a step away from the politically-manipulated show trials of outright dictatorships.

Those who are less enamored of the common law model tend to concentrate on what they perceive as the theatrical, irrational aspects of our procedure. The use of non-professional juries opens the process to appeals to prejudice and emotion, necessitates wasteful and complex rules of evidence, and diverts legal analysis of substantive criminal law into the construction of convoluted, largely hypothetical, and often misunderstood jury instructions. Cross-examination produces more heat than light, and tends to make the persuasiveness of a witness's testimony depend less on its intrinsic logic and consistency than on the witness's demeanor and appearance on a given day—not to mention the skills of the lawyers who variously coach the witness in advance or bully her at the trial. The fact-finders, and even the

judge, have little or no opportunity to pursue factual questions that seem important to them, and are kept in ignorance of any evidence or information that the lawyers in the case, through ineptitude or tactical calculation, choose not to present, or that is precluded from their consideration by categorical rules of exclusion premised on assumptions about the capacities of lay fact-finders.

Of course, modern procedure texts note that the adversarial model so elaborately defined, defended, and attacked, is not in fact a perfect description of what actually occurs in our criminal courts. It is acknowledged that the grand jury is largely the tool of the prosecutor; that guilty pleas, often the result of carefully-negotiated plea bargains, dispose of far more cases than are tried; that those bargains, sometimes in combination with sentencing guideline systems, often dictate the sentence to be imposed on the defendant. It is recognized, almost as an aside, that in cases disposed of without trial there is no jury at all, no witnesses appear for cross-examination, such factual information as the judge receives beyond the defendant's own acknowledgment of guilt—and there may be none—will likely be presented in written summary rather than in oral form. And most importantly, the only real assessment by the institutions of justice of whether the accused is actually guilty of the offense charged is made by the police and prosecutor, not by the (absent) jury or by the judge (who simply accepts the voluntary and intelligent decision of the defendant to waive trial).

These inconvenient facts, however, are typically seen as distortions of, or excrescences on, the elegant model of procedure that applies in principle, but that, sadly, is often departed from in practice. Plea bargaining and prosecutorial discretion may control the fates of most defendants, but these practices are rarely seen as a system in their own right. One seldom sees an acknowledgment, in the debates over the superiority or inferiority of the adversarial system, that for most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode.

When plea bargaining is discussed in the context of the adversarial system, it is typically justified as a somewhat extreme by-product of the adversarial culture of American criminal justice. After all, in that system, the court does not function as an organ of the state charged with inquiring into the facts, applying legal rules to what really happened, and thus arriving at what society would regard as a just result. Rather, the court sits simply to resolve disputes between formally equal parties. While some special rules apply to criminal cases, in its essential structure a criminal case is nothing more than an ordinary lawsuit: the state, like a private party in a tort or contract action, is just one entity that may come before the court to present a claim for relief, and the defendant is nothing more or less than the party from

whom that relief is sought. Just as in a civil case, if the plaintiff party elects to withdraw its complaint, or if the defendant acknowledges his liability and agrees to the relief, there is no longer a dispute for the court to resolve. And as in a civil case, the parties may settle their disagreement by jointly agreeing to some compromise, and if they do, the court will not (much) inquire into whether that is the "right" result under the law, for their compromise once again has the effect of leaving no dispute for the court to arbitrate.

Plea bargaining, in this sense, grows directly out of the adversarial notion that the parties stand as equal autonomous disputants before the court, and that the court is not an independent engine for state administration of justice, but rather an arbitrator of such disputes as parties choose to bring before it. Just as at trial the parties will control the way in which evidence is presented, each putting forth only such information as it thinks relevant to the case it wants to make, so in advance of the trial, or outside the presence of the court, the parties are free to compromise or settle their dispute in any way they see fit.

But if plea bargaining grows out of an adversarial ideology, its widespread practice has resulted in the development of a system of justice that actually looks, to most defendants, far more like what American lawyers would call an inquisitorial system than like the idealized model of adversary justice described in the textbooks. Perhaps the time has come to conceptualize what actually happens in most U.S. jurisdictions not as a perversion of the classic due process model, but as a potentially reasonable system of its own. The strengths and weaknesses of such a system should be assessed in terms more appropriate to its own implicit premises, rather than in comparison to an idealized adversarial model. What happens if we think of the American criminal justice system as one in which an administrative agency, call it the Department of Justice, administratively decides, subject to judicial review, who is worthy of criminal punishment?

II. WHERE IS GUILT DETERMINED?

A Martian anthropologist, sent to observe criminal justice in an urban federal district court, but lacking access to our textbooks, would have relatively little to say about trials. It is commonly understood that most cases are disposed of without trial. The exact percentages are hard to compute on a system-wide basis, but in major federal courts somewhere around eighty to ninety percent of felony indictments fail to produce a trial, being disposed of instead by a plea of guilty by the defendant and/or the withdrawal of charges by the state.² How does the system determine guilt in such cases?

2. Meaningful statistics are elusive. Because of the fragmentation of criminal justice among the 50 states and the separate federal jurisdiction, and the different ways of defining what counts as a criminal case—do we include traffic violations or petty

Formally, of course, any determination of culpability occurs in court, even in cases disposed of without trial. The court enters a judgment based on the defendant's judicial admission of guilt in a plea of guilty. Sometimes this plea follows a fairly extensive course of judicial proceedings—indictment, discovery, motion practice, even evidentiary hearings by the court—but in many cases it occurs at the very outset of the formal process. In a substantial number of cases, the judicial "process" consists of the simultaneous filing of a criminal charge by the prosecutor (often by means of a prosecutor's "information" rather than an indictment, with the defendant waiving the submission of the evidence and charge to a grand jury) and admission of guilt by the defendant. The charging document may be quite skeletal, the defendant's account of his guilty actions brief, and the judicial inquiry concerned more with whether the defendant is of sound mind and understands the consequences of what he is doing than with the accuracy of the facts to which he is attesting.³

Critics complain that this is entirely inadequate. How can a civilized country send people to prison for many years based on such a perfunctory judicial analysis of the facts and law? Mustn't we do much more than this to avoid mistaken convictions?⁴

If we insist on seeing the formal judicial proceeding as the locus of adjudication, then the critics are undoubtedly correct. In most guilty plea proceedings, the judge does not have enough information to make an intelligent determination of whether the defendant's guilt is even likely, let alone certain.⁵ A system that actually adjudicated criminal cases on this basis would be indefensible.

misdemeanors? do we include only cases in which a formal charge is filed or all cases in which the police make arrests?—it is difficult to compare or aggregate statistics compiled on the basis of different substantive and procedural categories. But there is no real dispute that, however defined or calculated, the vast majority of cases are disposed of without a formal trial; whether that number is assumed to be 80% or 95% or some other percentage of the total is probably an artifact of the definitions being used and does not much matter for purposes of this essay.

3. In contrast, when the prosecutor decides not to bring a charge, typically there is no formal judicial action whatsoever. If the government in its wisdom chooses not to assert a claim against a person, no action by the court is required or appropriate. Just as an individual can choose to forgive those who wrong him, or elect to ignore an injury rather than to take the time, trouble, and expense to seek a judicial remedy, so may the state. The individual victim of an alleged crime, of course, remains free to seek civil redress from the alleged perpetrator.

4. At least, this is the criticism from the left. More conservative critics generally complain that our system provides defendants with too much process rather than too little. They may be more concerned that the plea agreement represents an unjustified and unadjudicated decision to punish the defendant less than she deserves.

5. Indeed, in a fairly typical recent case, a court held that when a federal defendant enters a guilty plea, the judge need not satisfy herself that a jury would convict, nor even that guilt is more likely than not, but simply that the conduct the defendant admits is in fact an offense under the relevant statute. *See United States v. Maher*, 108 F.3d 1513, 1524 (2d Cir. 1997). The federal rules require the court to find only that

In fact, however, society is not relying on the judiciary to decide guilt in these cases. The substantive evaluation of the evidence and assessment of the defendant's responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor. The brief formal procedure in court obscures what can be an invisible, but elaborate and lengthy process of adjudication of the defendant's guilt. This process is rarely governed by formal legal standards, other than the basic definitions of offenses, and the procedures by which it operates are not usually written down anywhere. But it is this process that our alien anthropologist would surely identify as the actual adjudication process for criminal cases.

III. THE PROSECUTOR: JUDGE IN HER OWN CASE?

Criticism of American criminal justice often stops right here. Having demonstrated that the judiciary plays a severely limited role in determining guilt, and that the prosecutor is the controlling figure in the typical criminal case, the (liberal) critic rests, confident that the system has now been laid bare as self-evidently hypocritical and unfair. The prosecutor is one party to what is supposed to be an adversarial proceeding, and to show that he is really the judge in his own case is ipso facto to discredit the system. If further evidence of unfairness is necessary, the critic need only point to the disparity of power and resources between the state and the typical criminal defendant, and conclude that the system in actual operation—as distinct from the theoretical model—offers little to protect the innocent.

We must be careful, however, to separate the claim of intrinsic unfairness from the objection to unfair instances in operation. It is true that guilty pleas are often entered by frightened, powerless defendants on the advice of over-worked or under-qualified appointed defense lawyers, under the threat of lengthy prison sentences if convicted at trial, facing pre-trial detention that may itself—even if the defendant is ultimately acquitted—exceed the sentence being offered as part of the plea bargain, in cases that may have received as little attention from equally over-worked or under-qualified prosecutors. But this reflects the unfortunate maldistribution of resources in the United States more than any intrinsic difference between bargained or administered justice and the trial system. The poor and ill-represented may also fare badly at trial, where the lack of preparation or empathy of their lawyers, the prejudices of jurors, and the great resources of the state may equally secure an unjust conviction—just as the state may fare badly when an effective and conscientious defense lawyer is matched at trial against an inexperienced or poorly-prepared prosecutor.

there is a "factual basis" for the plea, not that the defendant is actually guilty, let alone guilty beyond a reasonable doubt. Fed. R. Crim. P. 11(f).

The claim that a non-adversarial process conducted by an official who happens to be called a prosecutor is *intrinsically* unfair begs the question, by presupposing the superiority of the adversarial model, and by imagining the prosecutor in light of the role she plays in the (largely vestigial) trial system that is based on that model. If we put aside for the moment our conception of the prosecutor as one side of an anticipated adversarial courtroom procedure, and focus on the function of the prosecutor at the investigative stage, it is easy enough to re-imagine the prosecutor as the agent of an inquisitorial state process for determining the facts and assessing the culpability of persons who are or might be accused of crime.

Such a process may not be preferable to the traditional common law system; it may not even be acceptably fair. But it is hardly self-evident that a system in which a responsible government official is assigned to investigate allegations of crime, by investigative means strictly limited to protect the rights of suspects, and then to make decisions based on the results of the investigation after hearing evidence and arguments presented by the suspect, is beyond the pale of civilization. Indeed, that is not so very different from the model of criminal procedure used in most of the world, as it appears to both defenders and critics of the adversarial regime.

IV. THE PROCESSES OF ADMINISTERED JUSTICE

Because our governing ideology does not admit that prosecutors adjudicate guilt and set punishments, the procedures by which they do so are neither formally regulated nor invariably followed. Most commonly, in all likelihood, the prosecutor simply accepts the results of the police investigation, and any process of independent adjudication occurs at the instigation of defense counsel. Just as the trial process only comes into play when the defendant contests the prosecutor's judgment, so the administrative process depends on the defendant's decision to question, within the prosecutorial bureaucracy, the conclusions of the police or investigative agency.

Notably, the rules of criminal procedure do not give a suspect or defendant a right to be heard by, or to present evidence to, the prosecutor. The rules conceive of the prosecutor as an autonomous party to an adversary proceeding, who has no more obligation to listen to his adversary's arguments before acting than does any civil litigant. Any discussion between the parties is conceived as a species of settlement negotiations, in which a party will participate only to the extent that he deems it in his interest to do so.⁶

6. Of course, during the investigative phase, defense counsel may play an active role in monitoring the investigation. In certain limited respects, as when a motion is made to quash a subpoena or to assert an evidentiary privilege, a subject of the investigation and her counsel may even involve the courts in a limited adversarial proceeding in which the court will adjudicate between the state's interests and those of the

Thus, the defense attorney who wishes to have any influence over the inquisitorial process of the prosecutor is largely limited to the power of persuasion. The prosecutor has the unilateral authority to decide what to investigate; to the extent that certain steps require the assent of other bodies (the grand jury to issue subpoenas, judicial officers to authorize warrants) the prosecutor's presentations to those bodies are *ex parte*—the epitome of non-adversarial process. The ultimate decision whether to bring a charge, moreover, or whether to accept a guilty plea or some other disposition in satisfaction of the government's claims, is left to the prosecutor's essentially unreviewable choice.

Sophisticated defense counsel, however, have long understood that this does not leave them without recourse. Although the prosecutor is not under any legal obligation to listen to a defense lawyer's protestations of innocence or arguments for leniency, it is almost always in the prosecutor's interest to do so. Prosecutors are reluctant to bring cases that they will lose, or that will be sharply criticized by judges or by the public as unfair or oppressive. Fair-minded prosecutors, moreover, take seriously their obligation to bring charges only when justified, and will typically be willing to listen to arguments that they are pursuing an inappropriate target. And for any prosecutor, there is, at a minimum, a tactical advantage in hearing in advance a defendant's likely defenses at trial. Thus, even in the absence of a formal right to be heard, prosecutors are generally prepared to grant such an opportunity. And once that hearing is had, the power of persuasion, in the hands of skilled and effective counsel, can be a power indeed.

The practices characteristic of federal white-collar criminal investigations involving well-financed defendants disclose a system fairly far along in the transformation from "plea bargaining" to "administrative justice," and therefore provide an opportunity for examining a somewhat idealized version of the plea bargaining process. Such cases are not necessarily typical of the operation of plea bargaining or prosecutorial discretion in all American cases, but they do represent the system in its most elaborate form, partly because the defendants in such cases typically have the most resources to avail themselves of effective defense counsel, partly because white-collar defendants have the greatest incentive to avoid, if possible, even the bringing of charges that could ultimately be defeated in court, and partly because

party being investigated. But the circumstances in which the court's power can be invoked are relatively restricted. Indeed, such circumstances are generally much the same as those in which similar protections can be invoked against an administrative agency that has authority to issue subpoenas and that is formally empowered to enter final orders against individuals or corporations.

prosecutors are particularly reluctant to bring losing cases against prominent or respectable defendants.⁷

Defendants in white-collar cases almost always actively attempt, from a very early stage, to influence the conclusions of the prosecutor. The typical investigation of an allegation of past white-collar misconduct is essentially overt. The materials that the prosecutor needs to examine to determine the facts—typically, financial and business records—usually cannot be obtained without the knowledge of the subjects of the investigation, since they must either be produced in response to a subpoena or seized pursuant to a search. Once an investigation becomes overt, however, and its targets known, defense counsel can try to influence the prosecutor's conclusions. This may be done in a variety of ways, with varying degrees of formality.

Defense counsel's contacts with the prosecutor during the preliminary stages of an investigation range from informal contacts designed to find out the nature of the allegations under investigation and the identity of its targets, to elaborate formal presentations arguing that prosecution is not appropriate, that the evidence is insufficient, or that a particular plea and/or sentence would represent a fair disposition of the charges. Virtually any action taken by the prosecutor may be contested by counsel in such meetings. Counsel meet with prosecutors to negotiate the terms of subpoena compliance, the scheduling of witness interviews, the prosecutor's treatment of materials seized pursuant to a search warrant, and a host of other investigative decisions that, by law, would appear to be solely matters of prosecutorial prerogative.

As the investigation reaches its conclusion, defense counsel will often make extensive, formal arguments to the prosecutors about the appropriate ultimate disposition of the case. Such presentations typically include the proffer of factual information and evidentiary materials, as well as arguments concerning the merits of the case and factors relevant to prosecutorial discretion. These presentations are not limited to the prosecutor in charge of the matter; if the line prosecutor rejects the defense's contentions, counsel may seek "appellate review" by the prosecutor's supervisors, at ascending levels of prosecutorial bureaucracy, from unit chief to criminal division chief, to the United States Attorney or District Attorney, and in federal cases, even to the Department of Justice in Washington.⁸

7. The account that follows is based primarily on years of first-hand familiarity with this area of practice, and will be quickly recognized by those who share that experience. Kenneth Mann's excellent study, *Defending White-Collar Crime* (1985), contains a detailed description of the activities of white-collar prosecutors and defense attorneys in New York, and that is generally consistent with my observations.

8. Of course, not all investigations are overt. In some cases, typically those involving alleged criminal activities that are believed to be both dangerous and ongoing, the state undertakes to investigate by covert means such as undercover infiltration or electronic surveillance. The very existence of such investigations is intended to be hidden from their subjects, and, to the extent the government is successful in

It is easy to see in these proceedings an informal but nevertheless quite distinct system of administrative adjudication. Although both the defense lawyers and the prosecutorial bureaucracy may operate with one eye on the eventual litigation that may result at the end of the internal process—surely an influence not unknown in administrative agencies formally conceived as adjudicatory—it would be a mistake to analogize these decisions too closely to settlement discussions involving private parties. The prosecutors involved in these decisions typically see themselves as public officials making a decision that is in substantial part adjudicatory. That is, prosecutors are not seeking simply to maximize the amount of jail time that can be extracted from their adversaries, regardless of guilt or innocence; rather, they undertake to determine, in response to the defendant's arguments, whether the evidence truly demonstrates guilt, and if so, what sentence is appropriate. Moreover, the process used to make that decision involves an opportunity for the affected parties to argue, and even to present evidence, that they are not guilty—or at least cannot be demonstrated to be guilty beyond a reasonable doubt to be—guilty of the charges the prosecutor is contemplating.⁹

hiding them, defendants can have no influence on prosecutorial decisions, perhaps even up to the time of an arrest.

This does not mean, however, that defendants in such cases lack an opportunity to challenge prosecutorial decisions as to appropriate disposition of the case. At some stage, even an investigation that begins with covert steps will become overt, as the investigators seek to develop their leads by searches and seizures, interrogations of possible witnesses, or arrests. In such cases, the presentation of information and argument to prosecutors will typically occur post-arrest or post-indictment, as part of the more familiar plea-bargaining process. As elaborated below, this process too will typically involve substantive arguments, about the defendant's guilt or innocence and the appropriate level of punishment, addressed to the prosecutor as a critical governmental decision-maker.

It would be a mistake, moreover, to assimilate the distinction between overt and covert investigations to that between white-collar and common law offenses. Most police investigations of violent crimes are essentially overt: the offense and the fact that the police are seeking its perpetrator are generally matters of public knowledge, and many of the steps taken by police and prosecutors, while perhaps undertaken discretely, are susceptible to monitoring by interested parties with good sources of intelligence. If suspected perpetrators of homicides or bank robberies typically do not obtain legal counsel until after a formal charge is made, that is primarily a result of their lack of means or sophistication, or of the tactical inadvisability of prematurely surfacing as an interested party in an investigation directed to identifying suspects. Where an investigation has focused on a suspect who has retained counsel, even in a case of violent "street" crime, there is no reason why counsel cannot attempt to influence the charging decision in the manner discussed in the text.

9. The decision, also like other administrative decisions, is not exclusively adjudicatory, but is made in the context of implementing broader executive policy goals. For example, the exercise of prosecutorial discretion not to bring charges, or to bring lesser charges than the law and the evidence strictly permit, will often be based not only on the just deserts of the party, or the arguments for mercy intrinsic to his situation, but also on the prosecutor's administrative goals of crime reduction, including resource constraints or the benefits to the public of securing the cooperation of the

That such procedures exist, and that they undertake a quasi-judicial function, does not mean that they are necessarily fair. As noted above, there is no set form for these "proceedings." Some characteristic features can be noted, however. Internal prosecutorial process is never formally adversarial. In some circumstances, one could roughly envision the prosecutor as adjudicating between competing positions being asserted by the police or investigative agency on the one hand and the defense on the other. Or, in the later, "appellate" stages of review, one might see the supervisor as adjudicating disputes between the line prosecutor and the defense. But if these analogies emphasize—correctly, in my view—the role of the prosecutor as an adjudicator of the merits of various positions, the process by which those decisions are made is neither neutral nor adversarial. Unlike a judge or jury, the prosecutor remains free to speak *ex parte* with either the defense lawyer or the police, and frequently does so. Moreover, the extent and nature of these *ex parte* contacts are hardly symmetrical. In my experience, police or federal agents are usually present in at least the most formal stages of defense presentations, and remain present after the defendants' representatives are dismissed. However suspicious law enforcement agents may sometimes be of whether prosecutors fully share their priorities and values, and however much the common culture of the bar may at times unite the prosecutors and defense lawyers against their respective lay "clients," in the final analysis the prosecutor is part of a law enforcement complex that shares policy goals with the police. Law enforcement agencies and prosecutors are thus in critical respects part of the same "team," and their discussions, unlike those between prosecutors and defense lawyers, are affirmatively concerned with accomplishing shared goals. If the prosecutor functions as an adjudicator, she clearly does not function as a neutral "umpire," and the process over which she presides does not fit an adversarial, due process model.

Even more importantly, the usual burdens of production and persuasion tend to be reversed in these proceedings. In a "normal" adversary hearing, the government—as the party seeking to change the status quo—would be required to serve a notice of charges, and to present its case for imposing sanctions, before the defendant would be required to respond. The internal prosecutorial process is entirely different. The initiative in seeking a hearing is on the defense; only if counsel seeks a meeting will the defense position be heard before formal judicial proceedings are invoked. The prosecutor, moreover, does not begin by laying out the case against the suspect. The burden is typically on defense counsel to rebut a case that may have been disclosed to her only in the sketchiest form. The precise nature of the charges has not usually been specified, and the evidence on which

defendant in the investigation or prosecution of others. This subject will receive further attention below.

they will be based is not often disclosed. In effect, the defense must shoot in the dark, at a possibly moving target, whose identity is uncertain. The decision-maker, moreover, is under no obligation to give reasons for a rejection of the defendant's arguments.

These features significantly limit the fairness and efficiency of the internal process. Because the procedures are not codified, however, but negotiated case-by-case in the context of customary practice, in particular instances the process can extend greater protections to defendants. An effective means for potential defendants to present arguments that could result in an agreed disposition offers the prosecutor great benefits in efficiency, as well as the tactical benefit of hearing the defense position long in advance of trial. Unless the prosecutor discloses enough about the nature of the charges and the evidence to enable the defense to make a truly responsive presentation, these advantages will be lost. Moreover, because the process takes the form of an on-going negotiation, the prosecutorial decision is never fixed until a final judicial judgment is entered. Thus, the defendant can return for additional argument after formal proceedings are commenced, discovery is had, and the issues to be litigated sharpened. In practice, therefore, the defendant's opportunity to be heard is far from meaningless, in spite of procedural weaknesses that may render that opportunity less than ideally fair.

The prosecutor, then, is making a determination of guilt or innocence (and, we will shortly see, often also one of the appropriate punishment). If that is the only meaningful adjudication many defendants receive, it is not necessarily a casual or unfair one. In many cases, our Martian visitor would surely identify the process internal to the prosecuting agency as the "real" trial or procedure by which society adjudicates the case, and would not for a moment mistake the formal guilty plea proceeding for a dispositive event. Moreover, at least when the process operates at its best (it may not do so always, or even often—but the same can be said of jury trials), the process cannot be dismissed as arbitrary. It is not, however, an adversarial or judicial system. It is an inquisitorial and administrative one, characterized by informality and ad hoc flexibility of procedure.

V. PLEA "BARGAINING"

Seen in the light of this administrative adjudicatory structure, it becomes apparent that the very term "plea bargaining" is something of a misnomer. The term itself is a barrier to seeing our existing system of justice as a *system* rather than as an improvisation. In effect, the very language we use to describe the phenomenon presumes the primacy of the adversarial trial, and interferes with our ability to understand existing practice.

For all but the most doctrinaire free market micro-economists, the very term "plea bargaining" is distasteful. Justice, critics of plea nego-

tiations point out, is not a matter of bazaar haggling, but of thoughtful adjudication of claims. "To bargain" is different than "to present reasoned arguments," and to reach a "bargain" or even an "agreement" is different than to obtain a "judgment." The more colloquial meaning of "bargain" is even worse. A "bargain" is a discount, something obtained at a cut-rate. If judges and scholars squirm at the notion of "bargained justice," the public, especially in our fearful times, is even more unhappy about defendants who "get off cheap."

In either case, the language used implicitly condemns the process. Something called "plea bargaining" can hardly be other than an expedient stepchild in a judicial system. It may be, and frequently is, defended as an unpleasant necessity in overcrowded courts, but no one pictures "plea bargaining" as a rational way to determine guilt or innocence.

Of course, any look at what actually goes on in plea bargaining undermines the applicability of both senses of the word. First of all, in many courts not all that much haggling goes on. Many, perhaps most, cases are processed pursuant to fairly standard rules: the policies of a particular United States Attorney may permit a drug courier or "mule" to plead to a standard reduced charge, for example, or a district attorney may offer any mugger who does no physical injury a standard disposition (perhaps further varied depending on whether a weapon was used) somewhere short of the theoretically-applicable offense of robbery. The rules are more like those of the supermarket than those of the flea market: there is a fixed price tag on the case, and you will get no farther "bargaining" with the prosecutor than you will by making a counteroffer on the price of a can of beans at the grocery.¹⁰

On the other hand, not every case comes off the rack; some need, and receive, custom tailoring. As suggested by the description above, in a typical white-collar fraud investigation, defense counsel do not look like shoppers at a "take-it-or-leave-it" department store. They will often spend hour after hour in the prosecutor's office, making presentations and arguments, eventually perhaps making and receiving proposals and counter-proposals for the disposition of the case, looking, in short, very much like negotiators.

But the burgeoning literature of negotiation tells us of a process very different from the untutored image of "haggling." After all, even the simplest bargaining is not usually just a matter of "I'll give you five dollars"; "I'll take ten"; "Seven-fifty?"; "Done." The response to the five dollar bid is likely to be more in the nature of an *argument* than a counter-offer: "But these are *magic* beans"; "I paid nine dollars for

10. In these standard cases, the only "adjudicative" question to be addressed is the strength of the evidence against the defendant; assuming the evidence is strong, the level of punishment demanded by the prosecutor will depend on the policy goals being pursued. These goals will be addressed more fully below.

them myself"; "If I weren't hard-up for cash I could go to the next village and get twelve for sure"; "Everybody else has been happy to pay ten." And as the negotiations become more sophisticated, and the parties' goals, interests, and information become more complex, the early stages of the discussion come to focus even more on exchange of information and positions than on the ultimate terms of the bargain. Negotiators of complex mergers or international treaties do not begin by putting positions on the table, to be traded back and forth, but by describing the goals of their side, their expectations of what the other side wants, needs or deserves, and the considerations of justice or fairness that should govern the outcome.

Such broader concerns are especially central in the case of plea negotiations, because of the self-perceptions of the parties. The prosecutor in particular does not see herself as an interested party seeking personal advantage, or even as a representative of the narrow interests of another. Rather, she will typically define herself as a public official, seeking "justice" or "the public interest." My point is not that the prosecutor's self-defined purity of motive makes her a worthier or more trustworthy negotiator, or one more likely to advocate a substantively fair result—though this may on occasion be true. Rather, the point is that the self-definition of the prosecutor affects the nature of the arguments that can be used in negotiation. Because the prosecutor is, in principle, looking for a "fair" price rather than the highest price, arguments couched in terms of justice will have more currency than they might in a purely economic negotiation. The ideology of at least some marketplaces permits the merchant openly to rely on superior bargaining power and to reject arguments from fairness; prosecutors, who will often have the power to impose terms, would be sharply criticized if they declined to consider arguments that the terms imposed are unjust.

The prosecutor's proclaimed commitment to fairness, moreover, will typically permit defense counsel to appeal not only to general considerations of justice but to specific precedent. As in any adjudicatory system, constant reversion to first principles is fatiguing, unpredictable, and inefficient. "Fairness" may come to mean not abstract justice—about which debate can be endless—but satisfaction of the more limited but still important goal of horizontal equity among similarly-situated persons. In most prosecuting offices, the argument that a disposition similar to that being sought was granted to another defendant on similar facts counts as a strong argument for according the same leniency to the present defendant. In effect, a kind of common law of plea bargaining may arise, sometimes shaped by formal office "policy," and sometimes by individual negotiation. Within a single investigation, a prosecutor who accepts a particular plea from one defendant will generally feel bound not to insist on more severe treatment for another defendant unless she can give a reasonable ex-

planation for the distinction: the first defendant was less culpable, more cooperative, or less readily proven guilty. And, at least among counsel who are aware of the dispositions in that case, the prosecutor will be hard put to take a radically different stance in the next investigation. Of course, unlike the opinions of courts, such decisions are not published, permitting discriminatory advantage to defendants represented by "insider" counsel who are well informed about local prosecutorial practice, and leaving the precise "holdings" of prior cases subject to reinterpretation, shifting memory, and policy change.

The frequent disparity of power between the prosecutor and the defendant makes the role-definition of the prosecutor particularly important to the outcome of the negotiation. At the extreme, as noted above, the prosecutor's terms may be non-negotiable; at least when secure in a strong case, the prosecutor's self-definition as a seeker of justice may lead to an insistence that only one outcome is acceptable. But even in cases in which individualized bargaining is being conducted, the prosecutor may hold the virtually unilateral power to inflict pain on the defendant. In many cases, for example, potential defendants perceive that an indictment alone, even if it ultimately results in acquittal, is an unbearable outcome; the financial and reputational costs associated with a lengthy trial might make even a not guilty verdict a Pyrrhic victory. In other situations, conviction may be a certain and harsh outcome at trial, given the elastic definitions of substantive crimes, the severe and unpredictable (or in the case of mandatory sentences, all too predictable) sentences that may be applicable, and the strength of the evidence that may be available. In such cases, the defendant is often likely to take, in the end, whatever plea the prosecutor can be persuaded to offer. Defense counsel's bargaining posture may implicitly threaten a trial, but both sides may know that the defense is very likely arguing to the ultimate decision-maker about the nature of a fair outcome, rather than proposing an exchange of values based on relative bargaining strength.

Hence, the images conjured by the verb "to bargain" are somewhat misleading in the context of typical plea bargaining discussions. There is, to be sure, an element of trading involved: the defendant does have an expensive set of procedural rights that can be invoked, and so always has at least something—the certainty and ease of a conviction that will not need to be processed through the adversarial judicial process—to trade to the prosecutor for a reduced charge.¹¹ But the typical guilty plea process already bears far more indicia of an adjudication by the responsible government agency of a defendant's

11. As the Federal Sentencing Guidelines demonstrate, the component of a reduced penalty that represents a discount in exchange for foregoing a trial can be, at least for routine cases, specifically quantified and standardized, leaving the "bargaining" process to focus entirely on the merits. See U.S. Sentencing Guidelines Manual § 3E1.1 & cmt. 3, at 249 (1994).

arguments that he should not be found guilty, or should be found culpable only to a limited degree, or should only be punished a certain amount, than of a commercial transaction. Encouraging the parties to see it that way should promote the dignity and fairness of the process, while seeing it as the illegitimate offspring of a system that really should be making the decisions in an entirely different forum and by an entirely different process, can only demoralize the process.

The implication of “bargain” as a noun—that the defendant gets a discount in a plea bargain—is similarly misleading. In effect, we are concerned with a matter of perspective. While populist critics of plea bargaining play on the public perception of easy terms for hardened criminals, liberal academics and defense lawyers argue that a discount for pleading is more accurately seen as an unconstitutional premium imposed on those who exercise their right to contest the charges.

Our bias in favor of trials actually lends ammunition to both sets of critics. The very surface of the liberal argument trades on the sacrosanct institutions of the due process model: the jury trial is the normative procedure for determining criminal charges, and a practice that diverts defendants from what is by hypothesis the fairest and most protective forum must be problematic. But the more conservative version also trades on the normativity of the trial. From this perspective, it is the projected *outcome* of the trial, rather than the process itself, that is defined as fair. A downward departure from the sentence projected to result from a full trial is in principle a discount. This argument, I suspect, has a tremendous rhetorical advantage over the liberal claim: anyone with a stake in the due process model—and liberals have an enormous investment in that procedural system—is at a disadvantage in arguing that its results are not normative, or that outcomes achieved by an alternative process might in general be more fair or satisfactory.

Both standard criticisms of negotiated dispositions thus privilege the trial model. If that privilege is set aside, however, the debate about whether the disparity between trial and plea results counts as a plea discount or a trial premium becomes meaningless. To the economist, the two may be indistinguishable in any case. To the extent that a large part of the plea “discount” simply compensates the defendant for accepting a punishment that is certain, the two sentences are (to the economist, at least) identical: a certain sentence of five years is equivalent, *ex ante*, to a fifty-fifty chance of acquittal or a ten-year term. The defendant is presented with two choices, which in most cases, if the lawyers as expert market participants are doing their jobs effectively, will be fairly close equivalents. There is no particular

point in seeing either as the "correct" outcome from which the other is a deviation.¹²

A philosopher of justice may well question this economic approach. Whatever the fairness of the *ex ante* choices offered to defendants, society is still choosing to impose a particular punishment on someone who has committed a given crime. Whether the appropriate level of sentence is governed by retributive justice or by consequentialist goals, there is considerable apparent difficulty in treating two different sentences for the same behavior as equally just. But there is still little reason to privilege the trial outcome, simply because of the process that produced it. For the philosopher of justice, the question of which sentence is more fair turns on which sentence—if either—is *substantively* normative. If ten years in prison is the "right" sentence for a particular offender, based on your particular preferred blend of retributive and utilitarian concerns, then a sentence of twelve years after trial is an unfair premium over a bargained sentence of ten, and an eight-year sentence after a plea would represent an unmerited discount. In either case, however, there is little reason in principle why plea "bargains" need to be seen as discounts, or why it should be assumed that sentences imposed after trial are substantively more likely to reflect what the philosopher would regard as just or efficient dispositions.

In effect, the populist conservative's objection to plea "bargains" is dependent on the independent assumption that sentences generally, including those imposed after trial, are already likely to be too lenient. A further reduction in exchange for a guilty plea only worsens the situation. Presumably the objection to perceived discounts would disappear if the resulting sentences seemed adequate.

None of this, of course, constitutes a substantive defense of plea bargaining or of its results. Perhaps our sentences *are* too lenient, and if so, the system of prosecutorial sentencing that produces most of them may be to blame. Or, our sentences in the aggregate may be too harsh, either because legislators ratchet up the punishments applicable after trial for fear that those sentences will rarely be imposed, or because unequal bargaining power between prosecutors and defense lawyers leads to unjustly severe results. Whether the average sentence is high or low, one may still be troubled by the lack of horizontal equity between those convicted of similar crimes, but through different processes.

My point is simply that the language of bargaining, and the privileging of the trial process and its results, promotes a misunderstanding of

12. Of course, disparities of information or of skill could lead the parties to differing perceptions that could in turn lead—outside the land of economic model-building—to bargaining deadlocks, or to outcomes that do not effectively mimic an "objective" assessment of the likely trial outcomes, but instead constitute more severe or more lenient results than a trial would produce.

the actual issues. Negotiated dispositions are hardly divorced from the merits of the case. They are not arrived at through the haggling of the bazaar, nor are they properly seen as intrinsically lenient. Rather, negotiated dispositions involve a different process for resolving a social dispute. In that process, the prosecutor acts as the administrative decision-maker who determines, in the first instance, whether an accused will be subject to social sanction, and if so, how much punishment will be imposed. The prosecutor does not sit, in this process, as a neutral fact-finder adjudicating between adversarial parties, nor as a representative of one interest negotiating on an equal footing with an adversary, but as an inquisitor seeking the "correct" outcome. Defendants influence the decision by submitting their arguments and evidence to the decision-maker, who can give these arguments such weight as she thinks they deserve. In this system, the formal adversarial jury trial serves as a kind of judicial review, in which a defendant who is not content with the administrative adjudication by the prosecutor has a right to *de novo* review of the decision in another forum.

Because American lawyers have a large investment in the myth of the adversarial system, it is hard for us even to see this administrative system of punishment, let alone to approve of it. We cannot easily see the prosecutor as an administrator, because in the adversarial proceedings that may follow the administrative decision, the prosecutor will play the role of an adversarial party. Because the prosecutor represents one side in an anticipated adversarial proceeding, to acknowledge her role as a *de facto* adjudicator would be to make her the judge in her own case.

Of course, if we continue to see the prosecutor as an adversarial "bargainer," settling her client's dispute with the defendant, this problem disappears, for this kind of bargaining between adversaries is an accepted part of an adversarial system. Legitimizing plea bargaining by insisting on the prosecutor's role as an adversarial bargainer, however, may encourage prosecutors to indulge exactly the wrong aspects of their divided mentality. For all that we verbally exhort prosecutors to adopt Justice Jackson's view that they should act as particularly high-minded versions of the honorable advocate,¹³ the incentive structure of the adversary system intrinsically undermines that role. If defendants are entitled to a vigorous defense, and the adversary system functions best (as many believe) when both sides are equally vigorously represented, it is difficult to sell the notion that prosecutors should operate with restraint within the adversarial procedure. Treating pre-indictment decision-making and plea bargaining as an aspect of the adversary process makes it inevitable that decisions that ought

13. See Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc'y 18 (1940).

to be taken in a spirit of judgment will be heavily influenced by considerations of adversarial tactics. Justice is much better served when prosecutors determining whether to indict or making plea offers see themselves as quasi-judicial decision-makers, obligated to reach the fairest possible results, rather than as partisan negotiators looking to extract every ounce of advantage for their client.

VI. PROSECUTORIAL "DISCRETION"

Thinking of the prosecutor as an administrative official may also affect our understanding of prosecutorial discretion. Once again, the prevailing terminology subtly prejudices our thinking. Although "discretion" does not have as negative a set of connotations as "bargaining," overtones of arbitrariness and lack of standards do lurk around the edges of the term. Moreover, even a more positive understanding of "discretion" may sit uneasily with the modifier "prosecutorial." Why should a prosecutor, as representative of the people, have discretion not to pursue a well-founded allegation of criminal conduct? Why shouldn't all crimes known to the authorities be submitted for adjudication to the adversarial trial system? Isn't the prosecutor, in taking it upon himself to decline to prosecute, "usurping" the role of the courts? American academics who have studied European or Latin American criminal justice frequently remind us that many countries purport to require that prosecutors proceed in every case in which the evidence could support a criminal charge.

Like plea bargaining, prosecutorial discretion tends to be defended as a kind of unpleasant necessity. Just as there are too many criminal cases for all of them to be tried (necessitating plea bargaining), so there are too many crimes for all of them to become criminal cases in the first place. Limited resources inexorably require prosecutorial triage.

Few would dispute that there are too many crimes, in two different senses. Certainly, just about everyone would agree that too many seriously harmful criminal acts are committed. Most legal academics, however, would probably also agree that there are too many criminal statutes on the books, and that those statutes are frequently too broad and too vague. Thus, there are too many bad acts, and also too many laws that permit punishment of acts that may not be so bad after all.

The same traditional liberal model of criminal justice that requires the rigorous procedural protections of due process also demands that criminal laws be narrowly drawn, and insists that punishment be imposed only for violations of clear and understandable regulations. In fact, however, many American criminal statutes do not comply with these standards. So long as our criminal codes contain too many prohibitions, the contents of which are left to be defined by their im-

plementation,¹⁴ or which cover conduct that is clearly not intended to be punished in every instance,¹⁵ or which provide for the punishment of those who act without wrongful intent,¹⁶ prosecutors must exercise judgment about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment. (And, given the number of legitimate cases that could be brought, so long as crime rates remain high and the resources devoted to criminal justice remain inadequate to deal with them all, prosecutors must also make decisions about which cases constitute the best use of limited judicial and law enforcement resources.)

Some would argue that these problems should be solved by defining crimes more carefully to cover only the conduct we actually mean to punish (and by devoting more resources to criminal justice). But this response is inadequate, both as a matter of practice and in theory. Whatever legal philosophers might prefer, our existing system of criminal law (especially of *federal* criminal law, which, for historical reasons, has been less influenced by academic codifiers than the laws of the states), does not measure up to due process ideals, and there is little realistic expectation that it ever will. Mail fraud, money laundering, and a host of strict liability regulatory offenses are only the most notorious examples of statutes that are ill-defined, overbroad, or insufficiently concerned with culpability. Statutes like RICO¹⁷ encompass a huge range of different levels of crime, including under the same rubric violent and non-violent acts, criminal organizations and legitimate businesses gone wrong, relatively limited schemes and open-ended, decades-long criminal endeavors. Statutes prohibiting appallingly destructive conduct are jumbled together with others prohibiting relatively minor violations of social mores. The political tendency in the United States over the past quarter century has only exacerbated this problem, as politicians compete for popularity by enacting ever more numerous, more severe, and more expansive criminal laws, in an effort to appear tough on crime. Criminal statutes are

14. For example, the federal mail fraud statute, 18 U.S.C. § 1341 (1994), which prohibits the use of the mails to further "schemes . . . to defraud," has been developed by judicial interpretation into an extremely flexible prohibition of dishonest dealings, extending well beyond common law fraud.

15. The federal conflict of interest statutes, for example, prohibit a wide range of conduct by attorneys and other current and former employees of the federal government. *See, e.g.*, 18 U.S.C. §§ 205, 207 (1994). Any violation of the rules constitutes a criminal offense punishable by imprisonment. 18 U.S.C. § 216(a) (1994). It is quite evident, however, that Congress drew up these rules as a broad code of conduct for government employees, and did not intend that every technical violation be prosecuted.

16. As Justice Frankfurter pointed out, statutes providing for strict liability depend heavily on "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries" if they are to operate fairly. *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

17. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994).

clearly written in the expectation that prosecutors will proceed only in "appropriate" cases.

But is our reliance on discretion merely a matter of unpleasant necessity? The purist may recognize that our laws currently require broad discretion in prosecutors, but still complain that in principle things ought to be different: Either we should pay the price required to enforce all these laws equitably and fully, or we should pare back the code to include only those offenses that we do want to pursue aggressively. Repeal the minor criminal statutes, provide clearer definitions for the crimes that remain, and sharpen the distinctions between offenses. Like the opponent of plea bargaining who wants us to declare every defendant either guilty beyond a reasonable doubt and subject to the full weight of the assigned punishment or not guilty at all, the opponent of loosely-drawn statutes made tolerable by prosecutorial discretion wants us to choose between fully enforcing the norms we profess and legalizing conduct we are not prepared to see prosecuted vigorously.

Almost certainly, however, this is *not* what most people want. Most people want exactly what we now have: a system in which criminal prohibitions can function as symbolic condemnation of behavior we seriously disapprove of, but without imposing severe sanctions on every ordinarily law-abiding person who on occasion indulges in it; in which criminal laws have sufficient flexibility that those who violate core moral precepts cannot escape through loopholes in narrowly-crafted statutes, and yet at the same time, it is understood that the closing of those loopholes may result in potentially inappropriate applications of the literal language of the law; and in which unforeseeable factual variants and individual circumstances can be taken into account to soften enforcement of rules that, in the abstract and on average, are appropriately made severe. Full enforcement of all criminal laws would be oppressive, true, but it does not follow that people are prepared, or should somehow be required, to purge the statute books of criminal prohibitions that do reflect public moral standards or that are drafted broadly to forestall the creative ingenuity of the dishonest.

The public may also want a system in which, within broadly defined zones of anti-social conduct, law enforcement officials set priorities and move resources effectively from one area to another depending on social need. Full enforcement of all social norms, even if it were otherwise desirable, would be very expensive. Moreover, the social cost of aggregate violations of any particular statute is not a constant, but rises and falls depending on the frequency and seriousness of violations at any given time, and the relative importance attached to the norm at different times.

Legislative alteration of the penal code, however, is an awkward tool for responding to changing law enforcement priorities. First, such

change is often too slow to accommodate rapidly shifting trends in crime. Because the political pressure necessary to effect statutory change takes a long time to build, legislative change is necessarily more responsive to longer-term trends in public attitudes (general perceptions of the appropriate severity of punishment, long-term shifts in beliefs about the seriousness of particular conduct) than to fine-tuning the mechanics of deterrence to immediate or localized changes in crime rates.

Second, legislative change may be too dramatic a reaction to changing perceptions of the costs of crime. The penal code reflects gross judgments about the severity of different crimes, not the shifting ambivalences of public understanding of the present scope of social problems. Rape, for example, has always been defined as one of the most serious of crimes. For much of our history, however, male-dominated social judgment was uncertain not only about where the line between consensual and non-consensual sex should be drawn, but also about the seriousness of at least some instances of conduct that was widely agreed to cross the line into criminality. In recent years, increased women's political power and resulting changed social attitudes have significantly altered public perceptions of the seriousness of rape as a social problem. The necessary legal response to these developments is not a change in the symbolic place of rape in the hierarchy of crimes as reflected in the penal code—already near the top—but an increase in the enforcement resources devoted to the crime, and in the seriousness with which individual cases (particularly those that were traditionally regarded as less serious variants of the offense) are treated. In a similar way, the degree to which drunken driving, possession and use of marijuana, or jaywalking are seen as social problems meriting vigorous law enforcement measures changes over time, not necessarily to the extent that such conduct may seem to violate or not to violate generally-accepted social norms—we may hold fairly consistently to the view that these activities should remain illegal—but to the degree that actual social tolerance of such activities varies from time to time and place to place within the same legal jurisdiction. Discretion in enforcement permits rapid adjustment of priorities as the extent and perceived obnoxiousness of such offenses wax and wane.

In short, the limited resources of the criminal justice system represent a choice, not a necessity, and it is a choice made with the understanding that specialized agencies will, subject to political control, allocate priorities in a sensible way. As a consequence, prosecutorial decisions inevitably combine judgments of desert with judgments of resource allocation.

In practice, moreover, these judgments are so intertwined that they cannot easily be separated. Where penalty tariffs are relatively uncontroversial, and there is a general consensus favoring full or nearly full

enforcement, the prosecutorial judgments to be made in particular cases will be more narrowly adjudicatory: determining the strength of the evidence and the presence or absence of fairly specific and commonly-accepted mitigating or aggravating circumstances. But with crimes that are less serious or more controversial, social judgments about the importance of enforcement are more likely to fluctuate with available resources. The strength of the evidence in the case (the measure of the suspect's guilt or innocence) comes to be a function of the amount of effort society is willing to expend to investigate, as well as of the likelihood of guilt, and the degree of the offender's culpability begins to be measured not only by comparing his conduct with that of others who have been charged and convicted, but also by factoring in the moral and policy consequences of our unwillingness to expend the resources to catch very many of those who offend.

Prosecutors' decisions on whether to pursue a particular case, and what level of punishment to demand, are thus routinely influenced by questions of priority and cost. The bargaining model sees the cost of prosecution as a bargaining chip wielded by the defendant: the defendant gets to cash in the expense to the government of a full trial by offering to plead guilty, sparing the government that expense, in exchange for a reduced sentence. There is certainly some truth to this perception. As the Federal Sentencing Guidelines reflect, some component of the spread between a theoretical sentence after trial and a reduced actual sentence after a guilty plea represents a standard discount offered in exchange for the reduced resources expended in a case disposed of without trial. But the resource allocation decisions involved in prosecutorial discretion go well beyond that narrow issue. The initial deployment of police and prosecutorial personnel to particular tasks will have a profound influence on the standard dispositions available to defendants charged with different crimes. A district attorney's homicide unit will have far more resources to spend per case than a unit processing misdemeanor cases, and plea discounts will accordingly be lower. Decisions to increase the priority given to a particular offense—the creation of special sex crimes or repeat offender units, for example—will limit the bargaining power defendants have to extract concessions in exchange for pleas. In effect, the prosecutorial agency, by assigning more staff, can not only increase the number of cases that are handled, but can also increase the operative penalty for crimes that are of particular public concern or that are perceived to require increased deterrence, by manipulating the “discount rate” resulting from limitations on prosecutorial resources.

Prosecutors can also choose to expend resources pursuing particular categories of cases more vigorously. The increased attention to insider trading through the 1980s appears to have represented a conscious attempt by prosecutors to change the standard of behavior on Wall Street by giving more defined content to vague standards of

fraud, by prosecuting criminally violations of the securities laws that, while always technically in violation of criminal prohibitions, had previously only been pursued civilly, and by applying sufficient resources to prevent cases from being compromised. Defendants in many cases resisted the prosecutorial determination that punishment was appropriate, and sought "review" in the courts. Despite victories by a number of defendants, the prosecutors were largely successful in defining a new set of standards. It is not at all clear that the newly-refined rules are now being enforced, or were intended to be enforced, with exceptionless rigor. Like other administrative agencies, prosecutors had in effect issued a new set of regulations, defended them in the courts until a refined and modified version won judicial acceptance, and then settled back to enforce the regulations as and when they deemed enforcement necessary to achieve a reasonable level of compliance.

VII. TOWARD A MORE FORMAL ADMINISTRATIVE LAW MODEL?

The realities of guilty plea disposition and prosecutorial discretion, and the gaping disparity between those realities and the prevailing due process model of procedure and the just deserts perspective on substance, are well known and widely acknowledged. At least two different approaches to those realities can be imagined.

The first view—and the most widely held among those who call attention to our failure to live up to the prescribed adversarial model—simply argues that practices that depart from the traditional model are illegitimate. That the vagueness of a statute effectively transfers power to the executive branch is taken simply as an argument against the statute. That most cases are disposed of without resort to trial is seen as in itself a sign of the degeneracy of the system. That prosecutors in effect determine the sentences imposed on most defendants—despite the formal allocation to judges of the power to impose sentences—must mean that the factors that produce or reinforce such an outcome (like, say, the Federal Sentencing Guidelines) are to be condemned.

By now it should be apparent that I do not share this view. It is not that I favor vague statutes, dislike jury trials, or prefer prosecutors to judges as sentencing authorities. These and other aspects of our actual criminal justice system, however, need to be evaluated on their own merits and in their proper context, for the role they play in a functioning administrative system of punishment—not presumed invalid because they depart from a formal model that has long been discarded in practice, and has little hope of ever being revived. Such departures from that model by now represent not random mutations or aberrations, but aspects of a genuine procedural system, with a particular logic of its own. Arguing that the existing structure of prosecutorial adjudication and discretion should simply be dismantled

because it is at odds with our theoretical ideals is naive and unrealistic. Novel legal and bureaucratic structures typically appear when older ones fail. The existing system of prosecutorial administration has arisen because the traditional adversarial model has become too expensive, contentious, and inefficient to be restored, at least given present levels of criminal conduct and judicial resources. Perhaps every criminal defendant could have a jury trial when jury trials were rougher and readier procedures, when most defendants did not have legal counsel, when the substantive law was simpler, and when defendants' procedural rights were rudimentary. But as the procedural complexity of the formal due process model increases, it becomes natural for the law to seek more efficient solutions, and over time such solutions have evolved into a *de facto* administrative system.

Moreover, as discussed above, the jury trial, with its largely binary outcomes, may sometimes oversimplify the messy realities of uncertain proof and graduated culpability. Administered justice allows a substantive flexibility that—however at odds with the combination of just deserts punishment philosophy and strict presumptions of innocence that lies behind the traditional model—serves the interests both of defendants seeking certainty of result and a public that sees the primary purpose of the system as the protection of the public and the reduction of crime. Our trial system preserves the symbolism (and, for those who elect to submit themselves to it, the reality) of preferring that some number of guilty might go free over the conviction of the innocent. At the same time, in what seems to me a reasonable strategy, we allow the state to compromise with those of the guilty who might prefer not to bet on being one of the lucky beneficiaries of this policy, to assure in turn the certainty of some punishment. But this strategy demands that those who administer it have *both* the power to adjudicate (subject to appeal) the culpability of those accused *and* the policy-making responsibility to decide when crime reduction goals are best served by compromise. Such a system does not aim at an unattainable ideal of divinely-apportioned justice, but at the humbler goal of reducing crime while avoiding punishment in excess of culpability.

Nor is it clear that the abandonment of the jury trial model for most criminal adjudications leaves us with a system incurably biased in favor of the state. As those who urge the inquisitorial civilian model on us are fond of pointing out, most of the world gets by without the heavy participation of lay citizens in adjudication that the common law countries hold dear. True, many of the countries that adopt this approach are not models of liberty and justice, but the fault lines between freedom and oppression do not match those between common law and civilian legal systems. Admirers of the civil law system are right that countries with a strong tradition of liberty, a democratic form of government, and a free press can operate fair punishment sys-

tems while relying heavily on professional, state-employed functionaries to adjudicate criminal cases; they simply fail to realize that the United States is one of those countries.

A second, more radical, approach would acknowledge, at least in part, that our system has taken on an administrative law tinge, and then insist that it at least live up to the standards of administrative law. If prosecutors are deciding what cases to bring and not bring, let them declare the standards by which they make those decisions. If prosecutors are going to give specific content to vague prohibitions, let them write regulations identifying in advance the conduct they intend to attack under the statutes. If prosecutors are really the all-but-final arbiters of guilt, let them proceed with formal hearings, and let the system of internal appeals to supervisory authority be regularized and defined. And of course, let us have judicial review of prosecutorial decisions, not (or not only) by a risky and arbitrary appeal to a *de novo* jury trial, but by regular review of the reasonableness of plea offers, at the request both of defendants and of victims or other public advocates.

This approach is more attractive than an unrealistic condemnation of present practice for departure from the civics-book model. Even if one believed that traditional Anglo-American criminal procedure is far more fair and effective than the *de facto* administrative system that has emerged within it, it is reasonably evident that the United States is not willing to expend the resources that would be necessary to restore the traditional model to reality.¹⁸ Trying to increase the fairness of what we actually have seems far more promising than complaining that we are supposed to have something very different, but that is not plausibly available.

But the seductive logic that whispers that if we cannot have a purely "adversarial due process model" of criminal justice, then we should move instead toward formalizing and purifying an alternative "administrative law model" ultimately shares the same fatal attraction to theory, and the same refusal to recognize the functional advantages of the system that has developed under the adaptive pressures of reality, that condemn the present system for its departure from adversarialism. We should not—and of course, as a matter of practical politics, we will not—abandon the due process model in favor of a formalized administered system, that would substitute for judicial judgment in criminal cases an administrative finding by a "Criminal Adjudication

18. Nor is it likely that we will soon scrap our adversarial traditions and prosecutor-dominated practices for a European-style inquisitorial judiciary. Nor should we want to. The excesses of adversarialism that constitute the centerpiece of the case for such change are characteristic of a small subset of the already small minority of cases that are actually litigated through that system. Moreover, as will be developed below, the symbolic virtues and occasional public utility of our traditional system are well worth preserving.

Agency," with the power to both elaborate criminal prohibitions by regulation and to adjudicate cases, and then subject that Agency's operations to the procedural dictates of the Administrative Procedure Act,¹⁹ with judicial review in all cases of the reasonableness of its determinations. Such a formal change would both underprotect defendants and overregulate prosecutors, depriving us of both the moral force of the formal due process model and the flexibility of the de facto administrative process that exists in tension with it.

First, despite the rarity with which it is fully applied, our traditional adversarial procedure has both a symbolic and a real importance that should not be easily abandoned. Like the substantive criminal law rules that prohibit conduct we disapprove of but that we do not really intend to live by or fully enforce, the conventional model expresses an aspiration to fairness and equity that we should not readily discard in the name of brutal realism. The delegation to the executive branch of power to make substantive criminal law rules should not be swallowed easily. The academic insistence that criminal statutes should not be overbroad, should rarely if ever impose strict liability, and should carefully define criminal conduct, is a valuable reminder of the traditional aspirations of our criminal law.

Nor should we easily accept the risks created by allowing prosecutors to determine, through a loosely-supervised system of plea bargaining, questions of guilt or innocence or degree of punishment that our formal rules reserve to judges and juries. Like the repeal of unenforced criminal statutes, a formal acceptance of the reality that prosecutors act in a quasi-legislative or quasi-judicial capacity would deprive us not of a convenient fiction or myth, but of a valuable force in an on-going dynamic. So long as the formal prohibition remains on the statute books, even if largely unenforced, it has the power to shape conduct: people may not often comply with a fifty-five-mile per hour speed limit, but they drive slower than if the limit is removed or raised. Not only that, the existence of the norm on the books permits a fairly rapid return to stricter enforcement when conditions make that advisable. In much the same way, continued judicial and academic recitation of the norms of due process, the regular if proportionately infrequent resort to the adversarial trial procedure, and the constant criticism of various laws and procedures that fall short of our theoretical norms (and the occasional judicial intervention when the short-fall exceeds some ill-defined zone of tolerance) keep at least a loose rein on executive power, and provide a structure through which the reins can be tightened. So long as the de facto administrative process operates within the shell of the due process model, defendants retain the power to opt out of that process and submit themselves instead to a formal judicial procedure that is bound strictly by due

19. 5 U.S.C. §§ 551-559, 701-706 (1994).

process rules. That is a much stronger protection for the innocent than a deferential reasonableness review of prosecutorial decisions.

Second, formal substitution of an administrative law regime, or superimposing a full set of administrative law norms on prosecutorial actions taken within the present system, would vastly increase the complexity and expense of the prosecutorial agency. Operating within a system that denies them a formal adjudicative role, prosecutors remain largely free of bureaucratic requirements, and retain considerable flexibility to implement changing views of the public interest. Granting them formal power would require a much expanded formalized structure within district attorneys' offices. The power of prosecutors has grown precisely because of the limits of the more formal due process model. Requiring a more bureaucratized mode of procedure would eventually replicate the process that has produced prosecutorial power at the expense of more formalized judicial procedure. As this formalized administrative system grew increasingly cumbersome, some other alternative process—more expeditious, less binary, more certain, less formal—would surely evolve.

VIII. IMPROVING A COMPLEX HYBRID SYSTEM

A defense of existing prosecutorial practice by reference to an administrative law model, coupled with a reluctance to impose administrative law standards on prosecutors, sounds suspiciously like an endorsement of the status quo—a dangerous position for an academic. So I must hasten to insist that I am not arguing that our existing hybrid of administered justice with an appeal to an adversarial trial system is incapable of improvement. I claim only that it represents an organic and largely acceptable resolution of the tensions that necessarily inhere within a criminal justice system that seeks both efficiency and fairness, and that attempts to satisfy both a set of traditions closely associated in our society with basic liberties and the public need for effective and flexible law enforcement. No evolutionary program insures that whatever is, is ideal; what is, however, may be a better guide to the social demands on a system than any ideal model. An understanding of the different functions of the administrative and judicial aspects of our current system, moreover, should help us to identify areas in need of change—and areas where change is not needed.

First, an appreciation of the true role of the jury trial in our system might make us a little more cautious about efforts to streamline courtroom procedure in the interest of more efficient law enforcement. In our actual system, efficient processing of routine cases is simply not the domain of the judge and jury, but of the prosecutorial-administrative system. The jury trial serves: (1) as a ceremonial reminder of the aspiration to due process; (2) as a protection against the punishment of those of whom the government disapproves, but about whose

blameworthiness there remain troubling doubts, and (3) as the fail-safe appellate process that promotes the reasonableness of prosecutorial-administrative determinations by setting the limits within which it operates. That trials are cumbersome does not *directly* harm the efficiency of criminal procedure, because most cases do not involve trials at all.

Modifications of trial procedure might better be evaluated by their likely effects on the system of administrative adjudication. If trials are so expensive and/or so likely to produce acquittals that resort to trial proves too easy an escape for the guilty, that will affect the administrative system by reducing the number and onerousness of punitive dispositions imposed by the system. But the focus for concern about the severity and efficiency of the system should be on those cases that do not go to trial: if the trial system in the aggregate produces enough convictions that cases disposed of without trial result in adequate punishment, the occasional unjustified acquittal or excessively-litigated case, however high-profile such cases sometimes are, presents little threat to the overall severity of the system.²⁰

Conversely, if trials are so burdensome to defendants, or so unlikely to produce a favorable outcome, that defendants are at the mercy of prosecutors' plea offers, jury trials cannot serve their function of checking prosecutorial overreaching and setting the parameters of the bargaining system. If the trial ceases to serve as both the real and symbolic guarantor of the rights of the innocent, the entire expensive process becomes little more than entertainment for viewers of Court TV (and not such great entertainment at that: trials where the prosecution always prevails will not provide much excitement). This result is already visible at the lowest levels of overcrowded American urban courts. In many urban jurisdictions, there are too few misdemeanor trials to serve as an effective appeals process to regulate prosecutorial decisions, because the incentive structure for defendants mandates quick guilty pleas. Long trial delays, the difficulty of prevailing against police testimony, and the ready availability of lenient plea offers for minor charges make the price and risks of going to trial prohibitive, especially for those defendants who are jailed pending disposition of their cases. Pleading guilty at the first opportunity in exchange for a sentence of "time [already] served" is often an offer that cannot be refused. Accordingly, fully-adjudicated cases may be too rare to serve as a meaningful check on the executive authorities. Developing an expedited trial procedure that could induce defendants in some marginal cases to go to trial might be a useful reform, not

20. Of course, highly-publicized trial outcomes that are widely perceived as unfair can have a significant negative impact on law enforcement by eroding public confidence in the system. My point is not that we need not care about such outcomes, but rather that the public reaction likely mistakes the actual importance of such outcomes for law enforcement.

because we should aspire to provide judicial process for the vast number of misdemeanor cases—even a stripped-down bench trial would be too expensive to provide in such a huge number of cases—but because prosecutorial administration will work better if some meaningful number of prosecutorial decisions can be tested in court.

Whether non-unanimous jury verdicts should be permitted might also be better tested by examining the effects of such verdicts on the plea system than by looking at their effects on trials. Hung juries represent a small minority of the small minority of criminal cases that go to trial. The costs and benefits of turning some of those hung juries into convictions (and a tiny number into acquittals) will necessarily pale before the potentially enormous indirect effects on the administration of making convictions easier. If most cases already result in the defendant's acceptance of a prosecutorial adjudication of guilt and adequate punishment, making convictions at trial easier could lead to an undesirable decrease in the number of trials, and a harsher, less careful administrative regime.²¹

Second, understanding that prosecutors are substantially engaged in adjudicating guilt should affect our thinking about how prosecutors should behave. Even if prosecutors are not subjected to a full range of administrative law restrictions, it is likely that some reforms involving greater formality of procedure could enhance the fairness of the process. In my view, the two strongest candidates for formal recognition involve greater discovery rights, and the formalization of the opportunity to be heard before prosecutorial decisions are made.

While all American jurisdictions provide a defendant with at least some discovery of the evidence against him after a formal charge is brought, and many provide very full disclosure of the evidence, there is no provision for discovery in connection with the prosecutorial decision to charge—because the decision to charge is seen not as an adjudicatory act but simply as a unilateral decision by the government to institute a proceeding. In a proper inquisitorial system, defendants have access to the dossier compiled by the authorities. In our system, defendants often have to make critical decisions about whether to accept the prosecutor's determination of guilt before any significant discovery of the prosecutor's evidence is required. Prosecutors can thus find the defendant guilty without giving the defendant an opportunity

21. These speculations are not intended as developed arguments for or against particular propositions about jury trials. Rather, they are simply sketches of the kinds of arguments, and of the kinds of empirical research, that legal academics today rarely pursue. For a rare and fascinating exception, see Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 Va. L. Rev. 939 (1997), in which Professor Richman provocatively evaluates the potential impact of a Supreme Court ruling on an evidentiary issue, see *Old Chief v. United States*, 117 S. Ct. 644 (1997), not in light of its effect on jury adjudications, but in terms of its potential impact on prosecutorial decision-making. We need much more of this kind of thinking.

to make use of exculpatory evidence or to find weaknesses in the state's evidence. Perhaps the plea-bargaining "market" and the defendant's option not to accept the prosecutor's decision until later in the formal process provide adequate controls. Or perhaps the fact that defendants are sometimes pressured by the absence of discovery to accept a somewhat shaky prosecutorial offer functions rather like the absence in most inquisitorial systems of a strong right against self-incrimination: the guilty defendant, fearing what evidence the prosecutor might have, is disadvantaged, and is more likely to be convicted. But we might also conclude that the right to know the evidence against you before being convicted is so powerful that, once we realize that the prosecutor serves substantially as the sole finder of fact in most cases, we will be inclined to provide defendants with a stronger right to review the evidence on which plea offers are based.²²

The right to be heard in connection with charging decisions is even more fundamental. In the best prosecutorial agencies, defense attorneys have customary access to supervisory prosecutors to address the merits of charging and plea bargaining decisions. But this practice is nowhere required by law, and is far from universally observed. Defendants should have a right to be heard, both by the prosecutor in charge of a case and by supervisory prosecutors, not only because that is sensible prosecutorial policy (it is usually better for the prosecutor to hear a strong defense in advance of trial than to have the weakness of the evidence embarrassingly exposed at trial), but also because citizens have a right to be heard before a public official makes what is effectively a decision to impose punishment.²³ There should be a universal recognition that a surprise indictment absent some exigency is an abuse of prosecutorial power, and that defendants or targets of in-

22. Although the issue has not been authoritatively settled by the Supreme Court, many courts recognize that prosecutors have an obligation to disclose material exculpatory information during plea negotiations as well as during trial. *See, e.g.,* *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) ("The government's obligation to make [exculpatory] disclosures is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty."). But the restricted definition of materiality for *Brady* disclosures, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"), means that not even all exculpatory information is required to be disclosed, and there is no obligation to provide any discovery of inculpatory information in connection with a plea offer. Informal discovery at the discretion of prosecutors is common, but there is little empirical information about the extent of such discovery in practice, and almost no systematic thinking or discussion among prosecutors—let alone among theorists—about the proper scope and conditions of such discovery.

23. Of course, any more formal right to advance notice and an opportunity to be heard before charges are brought would have to contain exceptions for cases in which danger to the community or fear of flight require that investigations be covert or that charges be brought by a surprise arrest. In many cases, however, the defendant is already aware of an investigation, or has already been arrested by the police before the case is referred to the prosecutor, or presents no danger of flight.

vestigation are entitled at their request to some meaningful review by supervisory prosecutors of plea offers or other dispositive decisions

These suggestions are put forward tentatively, as examples of cases in which a recognition of the administrative-adjudicatory role of prosecutors might lead to changes in prosecutorial practice. The exact parameters of any system of discovery or appellate administrative review would require careful thought, beginning with much closer empirical studies of the informal systems that operate in the best-run prosecutors' offices, to determine the conditions in which such practices already are or are not followed. Whatever the merits of these particular suggestions, however, increased understanding that prosecutors often play a role tantamount to judges will surely lead to increased demands for due process within the prosecutorial process, and those demands will have to be addressed carefully.

The most important effect, however, should be on prosecutors themselves. We have long recognized, at least in principle, that prosecutors are not bound simply by the rules of adversarial trial ethics, and that as public officials seeking justice they have a higher goal than the seeking of convictions. Once we conclude that prosecutors, in their discretionary charging and plea bargaining decisions, are acting largely as administrative, quasi-judicial decision-makers, this recognition must necessarily be strengthened. Whether or not formal rules to increase the fairness of prosecutorial procedures are the answer, a well-run district attorney's or United States Attorney's office must do whatever it can—as the best such offices already do—to instill a sense of fairness in the mostly young lawyers who serve on the front lines. Far more important than any rule permitting defense attorneys to be heard is the spirit in which such hearings are conducted. Prosecutors should be trained to approach their determinations of appropriate dispositions in a spirit of fairness and neutrality, as befits a governmental decision deeply adverse to a member of the community.

Greater attention should also be paid to the selection of prosecutors, and to the nature of their career paths. In civilian systems, both prosecutors and judges are career civil servants, selected at an early age by merit-based criteria, and then advanced over the course of their careers by normal bureaucratic processes. American prosecutors are a much more mixed bag. Some are career civil servants, who join a prosecutor's office shortly after admission to the bar, and remain in that role essentially for the rest of their career. Others, who might also join the staff at a very young age, are more transient, seeking a few years of excitement, public service, or intense trial experience before pursuing private sector opportunities as criminal defense lawyers or civil litigators. The district attorneys and United States attorneys who direct their efforts may be elected or appointed, and constitute a mix of career prosecutors, prominent members of the bar, and politically-active lawyers, according to the preferences of the elec-

torate or the appointing authority. We have little real notion of what mix of backgrounds, credentials, advancement patterns, skills, and temperaments works well to produce effective prosecutors under the traditional adversarial model, and still less whether the same blend functions as well where the prosecutor increasingly serves a quasi-judicial role. Some greater measure of independence and judiciousness would seem suited to officials who have the awesome and often final power wielded by prosecutors today, as compared with the image of a fierce adversarial gladiator fighting in court against the adversaries of law and order. On the other hand, our somewhat depressing experience with special prosecutors appointed under the Independent Counsel Act²⁴ cautions against any notion that prosecutors can or should be "above politics."²⁵

No doubt the suggestion that prosecutors should rethink their role will strike some readers as idealistic. It surely would require a change in the spirit in which many prosecutors operate. But we should not be entirely cynical about the possibility that government officials can conduct themselves with fairness and in the broadest public interest. First, it is a simple fact that most do. This does not mean that we do not need institutional checks on government officials; those checks function, after all, not primarily to detect those who act in bad faith, but to prevent the excesses that can be committed with good intentions. But it does mean that a proper understanding of the prosecutor's role should help to instill proper prosecutorial standards.

Second, our own judiciary demonstrates that institutional actors can develop a self-image of independence and fairness that can be a guarantor of liberty. Concededly, judges often have greater structural independence than prosecutors, as well as typically greater experience and maturity. But that cannot be the sole basis for public confidence that judges will not be over-influenced by the government's desires. State judges generally lack the life tenure held by their federal counterparts, and often have to seek election. Even more to the point, judges in civil law countries are not only members of a state bureaucracy, but are often no older or more experienced than American prosecutors, yet in many such countries the judiciary has a proud tradition of fairness and integrity. There is no reason why more American prosecutors cannot adopt such an attitude, already characteristic of the best. A proper understanding of the power that they wield, and its quasi-judicial nature, should facilitate this development.

24. See Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599 (1994).

25. For a powerful critique of the operation of this statute, see Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463 (1996). See also *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting) (contending that the statute violates the principle of separation-of-powers).

The dramatic contrast perceived by many observers between the formal requisites of the adversarial and inquisitorial systems of procedure, then, is perhaps less in practice than in theory. Americans overly disdainful of the civilian practice need to recognize first, that most defendants in the United States are effectively convicted by government officials rather than by independent judges and lay juries, and second, that our failure to acknowledge this fact helps to perpetuate a situation in which those officials are encouraged to view themselves as partisan adversaries of the defendant rather than as neutral adjudicators. Critics of the common law jury system need to base their criticisms more carefully on the actual role of the jury trial in the system as a whole, rather than on its obvious inadequacies for a role it no longer plays. And those who emphasize the unfairness of executive decision-making in criminal cases should look less to an unrealistic rejection of departures from adversarial theory, or to the equally unrealistic effort to import a European or Latin American model, and more to ways of strengthening the indigenous administrative-inquisitorial structures that in fact process most American criminal cases already.

Notes & Observations