Prosecutors and Their Agents, Agents and Their Prosecutors

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

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INTRODUCTION

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


3. See, e.g., Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901, 926 (1991) ("The sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors."); Frank O. Bowman, III, The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 Wis. L. Rev. 679, 748 (1996) ("[T]he limitation of unaccountable judicial discretion is, on balance, a beneficial result of the Guidelines. The fact that other participants in the criminal system . . . exercise far more influence over sentencing than they did before the Guidelines is no cause for alarm."); Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 Cal. L. Rev. 1471, 1475 (1993) ("By determining sentencing outcomes as a function of charging decisions, the sentencing guidelines have had the unintended effect of giving more control over the sentencing outcome to the person who controls charging, the prosecutor.")

advances have generally proved to be just chits to be traded for lower sentences—but through attention to what Jerry Lynch has called the "indigenous administrative-inquisitorial structures that in fact process most American criminal cases."*

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

The first goal of this Article, pursued in Part I, is to replace this picture with one showing how the iterated interactions between agents and warfare means no swift retreats either. See Dickerson v. United States, 530 U.S. 428, 432 (2000) (reaffirming Miranda); see also Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2471–2503 (1996) (showing relative stability under Warren, Burger, and Rehnquist Courts of constitutional norms regarding police practices).

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


7. See Daniel C. Richman, Old Chief v. United States: Stipulating Away Prosecutorial Accountability?, 83 Va. L. Rev. 939, 981–89 (1997) [hereinafter Richman, Old Chief] (recognizing that motivations other than mere conviction maximization lie behind prosecutorial decisions about which gun cases to bring); see also Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. Legal Stud. 289, 295–96 (1983) (explaining that a prosecutor "attempts to obtain the maximum deterrence from his available resources... by bringing new prosecutions until the marginal deterrence available from investing extra resources in a given prosecution is the same as the return available from investing in some other prosecution"; William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61, 63 (1971) (arguing that prosecutors seek maximization of convictions weighted by sentence).


9. See Frank W. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 338–40 (Frank J. Remington ed., 1969) [hereinafter Miller, Prosecution]; Sarah J. Cox, Prosecutorial Discretion: An Overview, 13 Am. Crim. L. Rev. 383, 412 (1976) ("Because the prosecutor occupies a central position in this [system that includes other agencies and officials, and] which requires cooperation, coordination, and compromise of all its participants, his own need to cooperate, coordinate, and compromise restricts his exercise of discretion.").
prosecutors will affect investigative and adjudicative decisionmaking and the allocation of enforcement resources. Although the resulting equilibria elude specification, the factors that affect the allocation of power at least can be identified. Because general discussions about the police-prosecutor dynamic that ignore institutional structures and procedural rules miss some of the most important of these factors, the focus here is on a single system—the federal.

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

The insights of the administrative law literature are not the only ones left untapped, to the detriment of criminal justice analyses. So too has been work, mostly in corporate law literature, relating to the institutional role of lawyers. While the relationship between prosecutors and agents

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


14. See, e.g., Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 Md. L. Rev. 869 (1990) (using the analytical tools of law and economics to investigate lawyers’ professional standards); Reiner H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857 (1984) (hereinafter Kraakman, Corporate Liability Strategies) (discussing “the circumstances under which liability rules should directly target the incentives of leading corporate participants,”
is at heart very different from that between lawyers and clients, the obstacles to coordination that this literature labels “agency problems” may still enter into that bureaucratic interplay, and the agent-prosecutor dynamic can be illuminated from this perspective. Similarly, one can also profitably draw on insights from the behavioral law and economics and cognitive psychology literatures, which counsel that we temper rational choice analysis with a recognition of systemic biases that may have behavioral, as well as institutional, origins.15

Drawing on these analytical perspectives, the methodological project here is to reduce the insularity of the criminal enforcement literature, and engage in the kind of “microanalysis” envisioned by Edward Rubin: “an institutionally grounded analysis of the classic question concerning the role of pluralistic and rational decisionmaking in a democratic system.”16 The goal is to make sense of interactions at a middle level of theory, particularized enough that actors would recognize the world they live in, but streamlined enough that theoreticians and empiricists who look askance at my uncomfortable straddle might find profitable avenues for more rigorous study. The risk of facing charges that my model simply generalizes the experiences of one former prosecutor in an atypical district under superseded conditions17 is just one I’ll have to take.18

In Part II, the article moves from the descriptive to the normative and asks what the prosecutor-agent dynamic should look like in the federal system. Hitching a normative project to an all-too-tentative descriptive endeavor may seem foolhardy, but there is a good necessity defense.

15. This is not to suggest that the administrative law literature is not also exploring these insights. See, e.g., William N. Eskridge, Jr. & John Ferejohn, Structuring Lawmaking to Reduce Cognitive Bias: A Critical View, 87 Cornell L. Rev. 616 (2002) (using cognitive psychology in combination with other theories to investigate the manner in which public policy decisions are made); Jeffrey J. Rachlinski & Cynthia R. Farina, Cognitive Psychology and Optimal Government Design, 87 Cornell L. Rev. 549 (2002) (drawing on cognitive psychology to explore the poor choices and errors in human judgment the authors contend are the root of failing public policy). But see Samuel Issacharoff, Behavioral Decision Theory in the Court of Public Law, 87 Cornell L. Rev. 671, 673 (2002) (noting limitations of literature).


The way power is allocated between agents and prosecutors is a function of their organic relationship, political preferences, and exogenous contingencies like the attacks of September 11, 2001. It is also, however, a function of conscious or unreflective choices about particular rules of interaction or organizational arrangements—choices that are not constitutionally or even politically required, and could easily be different. So long as these choices are being made anyway, they might as well be made on the basis of some vision of how prosecutor-agent relationships should be structured. After considering the attractions of hierarchical and coordinate models, Part II suggests that the distinctive incentives of prosecutors and agents can most productively be harmonized if the two enforcement elements are seen as mutually monitoring members of a working group.

The working group paradigm may seem to some like a fancy way of describing the status quo. Perhaps it is, and we live in the best of all possible worlds. Given the range of agent-prosecutor dynamics across the federal system, however, it is far more likely that there is room for improvement (to put it mildly). Part III explores some mechanisms for such improvement. Casting its net broadly, it shows how a focus on institutional dynamics reveals opportunities in some surprising places for criminal procedure law to promote healthier relationships among law enforcers and, by doing so, to advance some of the same values we strive to protect through the judicial process.

A note on the quiet comparativism of this Article. Thinking broadly about separation of power dynamics within criminal enforcement systems obviously could have payoffs outside the federal system. One might even gain insights into how to structure an enforcement system from scratch, as is being done in the European Community and in the area of international criminal law, where the tensions between Hague prosecutors and their NATO enforcers, highlighted during the Kosovo crisis, were (depending on one's perspective) a source of embarrassing inaction or of increased moderation and accountability. But the main effort here is

19. See infra Part III (exploring how legal and institutional changes could affect allocation of power between prosecutors and agents).
21. See Louise Arbour, The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results, 3 Hofstra L. & Pol'y Symp. 37, 40 (1999) (discussing a prosecutor for International Criminal Tribunals for Former Yugoslavia and Rwanda who "find[s] it personally appalling to suggest that the participation of SFOR [Stabilization Force] troops in arrests would jeopardize the fundamental operational principal [sic] of evenhandedness and that arrests should,
not to devise some unified field theory of enforcement discretion, or suggest the need for transplantation (or exportation). Indeed, one of this Article’s aims is to highlight how attention to institutional and procedural context must dominate any inquiry into such discretion. The references to analogous or divergent practices in other systems are primarily intended to encourage consideration of alternative possibilities, choices, and historical paths. Yet they also might point the way to a richer comparative literature on how institutional structure can promote the striking of an appropriate balance between criminal enforcement and the rule of law.

I. CONSTITUENT ASPECTS OF NEGOTIATION

What Mirjan Damaskka characterized as the American embrace of the “coordinate mode of organization”\(^{22}\) —where organizational alignment is horizontal rather than vertical, and divisions enjoy equal as opposed to superior or subordinate status—is nowhere more evident than in the federal criminal enforcement system. In state and local systems, the separation of authority that leaves elected executive officials and their appointees bringing criminal cases to prosecutors or county attorneys with their own electoral source of authority\(^{23}\) is attributable to some combination of historical tradition and popular preference. In the federal system, the comparatively late development of criminal enforcement agencies\(^{24}\) and


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

Although all federal prosecutors are housed within the Justice Department (either in the litigating divisions of “Main Justice” or in United States Attorneys’ Offices), not all federal investigative agencies are. The Secret Service (which handles financial and computer crimes in addition to its protective duties) and the Customs Service, previously in the Treasury Department, are now both in the Department of Homeland Security, as is the enforcement arm of the Immigration and Naturalization Service, hitherto in the Justice Department. The criminal agents in the Internal Revenue Service report to the Secretary of the Treasury. Postal Inspectors—whose jurisdiction over mail fraud sweeps in a broad array of criminal activity, and who gained a new visibility in the anthrax investigation—are part of the U.S. Postal Service. And criminal investigations are also conducted by personnel within various regulatory agencies, including the Securities and Exchange Commission and the Environmental Protection Agency, and such executive departments as Agriculture, Labor, and Interior. Even within the Justice Department, special agents in the FBI, DEA, and (since the 2002 Homeland Security legislation) the renamed “Bureau of Alcohol, Tobacco, Firearms and Explosives” report not to prosecutors, but to other agency officials, with only the Attorney General and Deputy Attorney General exercising (or at least possessing) hierarchical authority over them. One often hears rookie prosecutors refer to “my agents.” Most soon learn to drop the possessive.

If neither a line prosecutor nor her chief can dictate how an agency should deploy its resources or run an investigation, and agency officials cannot control the adjudicative process, how are the terms of this coordinate relationship set? Part of the answer lies in the macro policymaking that comprises an administration’s criminal justice agenda. Congressional agendas may have similar effects as well. Policy formation and


27. Id. §§ 1111–1113.


29. For an example of how administration and congressional agendas can affect prosecutor-agency relations, see Daniel C. Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369 (2001) [hereinafter Richman,
decisions about implementation (assuming for the moment that the two are analytically distinct) will also occur at the subcabinet level, within the Justice Department or at the upper reaches of enforcement agency hierarchies. Even specific cases, because of their importance and national ramifications, may be coordinated and controlled at the highest levels of the executive branch.

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


30. See Keith Hawkins & John M. Thomas, The Enforcement Process in Regulatory Bureaucracies, in Keith Hawkins & John M. Thomas, Enforcing Regulation 3, 10 (1984) [hereinafter Hawkins & Thomas, Enforcing Regulation] (drawing rough but necessary distinction between "policy formation"—a "process whereby the agency interprets and translates legislative goals into rules, standards, and plans of action"—and "implementation"—"enforcement of these agency directives," including the "operating routines used by field-level personnel and applied to targets of regulation, decisions about the application of regulations, and means for obtaining compliance with rules").


32. Hagan, supra note 22, at 122.

33. For an exploration of some of the influences that the political branches have on federal criminal enforcement policy, see Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757 (1999) [hereinafter Richman, Federal Criminal Law]; Richman, Project Exile, supra note 29; see also Alfred Blumstein, Coherence, Coordination and Integration in the Administration of Criminal Justice, in Criminal Law in Action: An Overview of Current Issues in Western Societies 247, 257 (Jan van Dijk et al. eds., 1986) (noting that design of criminal justice system at the "micro level," with "independent and highly fragmented institutions," "usually results in great difficulty in coordinating efforts at the macro level in order to maintain an appropriate balance of workload and resources").
cies and prosecutors to negotiate the terms of their interaction and that set those terms?

To capture these dynamics, the strategy here is to make three passes over the system, increasing complexity with each pass. We start with the basic institutional structures for investigating and prosecuting cases and explore the extent to which agency control over investigations and prosecutorial control over the adjudicative process create a bilateral monopoly. Then, we add an overlay of procedural rules that tend to inject prosecutors into investigative decisionmaking. Finally, we consider the diverse cultural forces that both separate and bind the two groups.

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

A. Prosecutorial Gatekeeping Monopoly

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


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

36. See 28 U.S.C. § 516 (2000); United States v. Providence Journal, 485 U.S. 693, 693–94 (1988); Eisenstein, supra note 17, at 156; Philip B. Heymann, The Politics of Public Management 96 (1987) ("To see a case carried through to conviction, those investigative agencies that are not within the Department of Justice must win the support of prosecutors
the interactions that determine how enforcement discretion is exercised on the ground.

Let us refine the prosecutorial side of the equation. Federal prosecutors would have monopoly power only if they were able to act through some central "purchasing" agent. And they aren't. Traditions of local independence, advantages of local knowledge, and the limited resources they have because of Congress's affinity for decentralized power are all barriers to the entry of litigating units from Main Justice into a district without cooperation from the U.S. Attorney. Those units remain at least potential entrants, however, offering a limited counterweight to the U.S. Attorney's Office's control over its district's criminal docket. Grand jury investigations into alleged communist infiltration in the late 1940s were, for example, spearheaded by a team of "Special Assistants," dispatched to the districts from Washington. Although the Assistant Attorney General in charge of the Criminal Division explained to a congressional committee that the goal was merely to ensure uniformity and gushed over the "wonderful" spirit of cooperation between his office and the districts, such flying squads would have been (and still are) potent reminders of what the Department can do when it fears that districts do not share its priorities.

One U.S. Attorney's Office can also face competition from another. Where a metropolitan area is divided among two or more federal districts (as when a large city lies near a district's border), flexible federal venue rules will allow an aggressive investigative agency to play one U.S. Attor-
ney's Office off against another, steering its "best" cases to the district that has given the agency the best service by taking less alluring cases or offering the "best" (i.e., the most accommodating) legal support for investigations. Indeed, the malleability of venue doctrine—and the broad geographical reach of all too many criminal enterprises—allows rivalries between non-contiguous districts to develop as well, even as Washington strives to develop means of resolving such differences.

The possibility that another federal prosecutorial office can take cases from its jurisdiction may not be of great concern to a U.S. Attorney's Office. Disputes may occur when two offices simultaneously reach for a high-profile case holding the promise of institutional and personal glory, but ordinarily the universe of potential federal cases is large enough (and low profile enough) to allow any number of offices to pursue territorially overlapping matters with little friction. The important point for our purposes, however, is that the overlap of prosecutorial authority inevitably reduces the ability of each office to control investigative agencies' access to federal court, and consequently reduces the extent to which an office can leverage its gatekeeping power into control of those agencies' agendas.

The overlap between state and federal criminal law also offers agencies some choice, at least in theory. Although the federal system is generally thought to offer significant procedural and resource advantages over

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


Author's note: The citations to the hearings of the Commission for Advancement of Federal Law Enforcement and quotations from those hearings are based on verbatim notes the author of this article took of the hearing transcripts while they were posted on the Internet, on the website of the Criminal Justice Institute of the University of Arkansas. The transcripts have since been removed from that site and, despite the best efforts of the author and the Columbia Law Review, have as yet been unattainable. (A request remains pending at the National Archives.) The unavailability of these transcripts is particularly regrettable, as they provide a valuable window into the works of the federal enforcement bureaucracy.
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state criminal processes, the difference will not always be significant, or, if significant, may still be outweighed by the desire to circumvent federal prosecutorial gatekeeping. A U.S. Attorney will not mourn whenever federal agencies take cases to the local D.A.’s office and will often want cases falling below some threshold level to go there. Yet an agency’s interaction with local authorities will limit the U.S. Attorney’s control, and even knowledge, of agency activity.

Finally, the size and organization of a single U.S. Attorney’s Office can limit its power if agents can play one assistant or unit off against another. If agents can “shop” cases around until they find a sympathetic assistant, gatekeeping standards can fall victim to a “race to the bottom,” in which those individual prosecutors with the lowest standards (or, from another perspective, the greatest zeal) will be the ones to whom agents most prefer to take cases. Since there are limits to how many cases even the most acquiescent assistant can take, office standards are unlikely to fall all the way to his level. But the risk is that agents will reserve for him the cases over which they want to exercise the most control—which may be precisely those cases most in need of prosecutorial oversight. If, be-


46. See, e.g., Bowman, supra note 3, at 739 n.219 (describing five-kilogram cocaine powder guidelines for United States Attorney’s Office for the Southern District of Florida in the early 1990s); Clymer, supra note 45, at 706 n.276 (“In the Central District of California, where I practiced as a federal prosecutor from 1987 until 1994, screening decisions for many cases involving duplicative federal statutes were made according to predetermined guidelines based largely, but not wholly, on drug weights and dollar amounts.”).

47. See Vanessa Blum, Who Is Thomas DiBiagio, Anyway?, Legal Times, Nov. 4, 2002, at 12 (The new Maryland U.S. Attorney instituted a “resurrection of an old policy allowing law enforcement agents to bring cases directly to individual prosecutors. By encouraging lawyers to build relationships with investigators, DiBiagio hopes to foster an entrepreneurial climate that rewards feisty, hard-working prosecutors.”).

48. See Robert Jackall, Wild Cowboys: Urban Marauders & the Forces of Order 102 (1997) (telling how one New York City detective “like many [others], was shopping his cases, looking for [a prosecutor] with the stomach to ‘break the fingers’ necessary to get robbers off the streets”); Miller, Prosecution, supra note 9, at 16 (describing measures taken in one prosecutor’s office once it was recognized that police officers, “familiar—at least as they saw it—with the individual characteristics and reaction patterns of various assistants . . . , ‘shopped around’ for the particular assistant who, they believed, would regard their requests for [arrest] warrants most sympathetically”); see also Kraakman, Gatekeepers, supra note 14, at 72-73 (noting how wrongdoers can evade interdiction by seeking out multiple gatekeepers); Robert L. Nelson & Laura Beth Nielsen, Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations, 34 Law & Soc’y Rev. 457, 470 (2000) (documenting inside counsel’s belief that if he behaves “too much like a cop[, t]he business people will simply go without legal advice, or they will engage in an intra-organizational version of ‘forum shopping,’ bringing their problems to the lawyer in the company who is least likely to challenge the business-person’s project”).
cause of their significance, these cases are among the most personally rewarding for prosecutors to work on, other assistants will be tempted to lower their standards as well. Offices can, and do, counter this problem by establishing some centralized screening mechanism. But circumvention may still be possible, as sometimes occurs when an assistant pursues a “related” matter.

These qualifications aside, a U.S. Attorney’s Office still has considerable market power when it comes to “purchasing” the fruits of an agency’s criminal investigation. Even in these days of interstate and transnational criminal activity, much of what any particular agency field office wants to pursue will, as a practical matter, fall within the bailiwick of only one such office, and the refusal of that office to prosecute will end the matter.

How deeply does gatekeeping by U.S. Attorney’s Offices cut into the agendas of the various agencies that present cases for prosecution to them? As in any team production context, an assessment of each component’s contribution to the joint output evades outside inquiry. Studies can and have been made of declination rates, and the reasons offered for declination. But given that every case file is an artifact, what is one to make of the many cases declined for insufficient evidence? As Nicola Lacey has noted:

Cases do not simply come into the world ‘weak’ or ‘strong’; to a significant extent, they are made so by the commitment or non-commitment of investigatory resources. . . . Thus, the whole conduct of police investigations—distribution of resources and operational priorities, proportion and patterns of cases taken up, styles and thoroughness of questioning—is central to how the

49. See Miller, Prosecution, supra note 9, at 16-19 (showing examples of how the “shopping around” problem can be addressed through some system of centralized supervision by more senior assistants and random assignment).

50. Even the most aggressive U.S. Attorney’s Office will, for example, not pursue the fraud whose perpetrators, victims, and means lie wholly within another office’s territory, or the street gang whose members rarely venture beyond turf wholly within another office’s borders.

51. See generally Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777, 779 (1972) (“With team production it is difficult solely by observing total output, to either define or determine each individual’s contribution to this output of the cooperating inputs.”).


53. Compendium, supra note 52, at 35 (citing “weak evidence” as reason for 21.3% of 31,004 declinations by U.S. Attorneys’ Offices between October 1, 1998 and September 30, 1999).
cases which get further into the system are selected and presented.\textsuperscript{54}

The extent to which case strength is a function of agency interest will be particularly great in the federal system, where the offenses targeted usually have a universe of potential witnesses far less circumscribed than one is likely to find in, say, a street corner robbery.\textsuperscript{55} The declination of a weak case may thus reflect only a slight disjunction between agency and prosecutorial judgment.

Under other circumstances, a prosecutorial declination may not reflect any disjunction at all. As long as agency executives, congressional funders, and others use presentation figures as a measure of agency activity,\textsuperscript{56} agents will view a reasonable number of declinations with equanimity, even alacrity.\textsuperscript{57} An agency might even be keen to get a case declined,

\textsuperscript{54} Nicola Lacey, Introduction: Making Sense of Criminal Justice, in Criminal Justice 1, 13 (Nicola Lacey ed., 1994); see also Mike McConville et al., The Case for the Prosecution 56 (1991) ("The police have, at a most fundamental level, the ability to select facts, to reject facts, to not seek facts, to evaluate facts and to generate facts. Facts, in this sense, are not objective entities which exist independently of the social actors but are created by them.").

\textsuperscript{55} See Eisenstein, supra note 17, at 156 ("The ability to decline prosecution provides assistants with their most potent discretionary power, but many of the cases presented leave little room for the exercise of discretion. Some are so trivial or so weak that prosecution would be ridiculous."). For a fascinating exploration of the interaction of agency priorities and tactics in a very different context, see Eric A. Johnson, Nazi Terror: The Gestapo, Jews, and Ordinary Germans 362–75 (1999) (finding, in analysis of Gestapo investigations, that targeting was proactive and generally flowed from strategic agenda, not denunciations).

\textsuperscript{56} Exactly what part arrest or presentation statistics play, or are perceived to play, in agency funding decisions is hard to determine. See Letter from Laurie Ekstrand, Director, Justice Issues, U.S. Gen. Accounting Office, to Senator Jeff Sessions, The Drug Enforcement Administration's Reporting of Arrests 5 (Feb. 13, 2002), at\url{http://www.gao.gov/new.items/d02276r.pdf} (on file with the\textit{Columbia Law Review}) (responding to Senator's request for an investigation into whether DEA arrest figures had been inflated in order to obtain more resources, GAO's "review of DEA's budget justifications showed that prior years' arrest data have been used as output information within performance indicator tables but not as performance goals or outcome measures"); The FBI's Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to September 11, 2001: Hearing Before the Joint Comm. on Intelligence, 107th Cong. 5 (2002) (statement of Eleanor Hill, Staff Director, Joint Intelligence Inquiry Staff), available at\url{http://intelligence.senate.gov/0210hrg/021017/hillunclass.pdf} (on file with the\textit{Columbia Law Review}) [hereinafter Statement of Eleanor Hill] (reporting comments by FBI field office agent that "counterterrorism and counterintelligence have always been considered the 'bastard stepchild' of the FBI because these programs do not generate the statistics that other programs do, such as Violent Crimes/Major Offenders or drugs").

\textsuperscript{57} See Rabin, supra note 12, at 1056 ([A]n agency's self-evaluation criteria might make it insensitive to the regular declination of its complaints on de minimis grounds, so long as the agency received credit for an appropriate number of complaints tendered.); see also James Q. Wilson, The Investigators: Managing FBI and Narcotics Agents 129–31 (1978) [hereinafter Wilson, Investigators] (recounting how, after an early 1970s FBI survey found that U.S. Attorneys "were tired of having to go through the motions of declining prosecution on cases that the FBI knew could not be prosecuted but that Bureau rules required be presented to the USA," the new Director, Clarence Kelly, instituted a "Quality over Quantity" program).
when that allows it to "pass the responsibility" for a failure to prosecute.\textsuperscript{58} It is a responsibility that U.S. Attorneys, with their blended claims of technical expertise and political independence, their ties to the local community, and their large portfolio of unquestionably worthy cases, are particularly well-suited to bear. One would expect such consensual declinations to occur most frequently in cases where an agency is under some sort of political pressure to proceed, or wants to avoid claims of favoritism. And it is thus not surprising that the highest declination rate in 1999 occurred for civil rights offenses: 92.8\%, or 1583 out of 1705 suspects.\textsuperscript{59} Not surprising because a large percentage of these suspects appear to have been law enforcement officers.\textsuperscript{60}

Agency desire to at least share responsibility (and not, say, insufficient prosecutorial vigilance) may also explain the relatively high proportion of declinations in "domestic or international terrorism" cases in the fiscal year ending September 30, 2001.\textsuperscript{61} With heavy pressure from Congress to spend funds allocated for antiterrorism efforts,\textsuperscript{62} the FBI may well have found it helpful to send marginal cases to U.S. Attorneys' Of-
fices and let the culling happen there. And a similar story of sharing responsibility may (but need not) explain the 61% declination rate for terrorism cases in the six months after September 11, 2001.63

Such stories give a taste of the declination dynamic. Yet only a taste. High declination rates can reflect a disjunction between an agency's agenda and those of the U.S. Attorneys' Offices. But they are equally consistent with a managerial strategy of seeking political insulation, using prosecutors to monitor insufficiently supervised field offices, or impressing funders, or with an agency strategy of regretfully bowing to prosecutorial gatekeeping authority,64 or with some combination of these, with variation over districts or regions. Put differently, the fact that the FBI had a declination rate of 43% in 1998–1999, compared to a DEA rate of 18.3%, says something.65 But we cannot be sure what.66

Conversely, one might expect a low declination rate where there is intense and indefeasible political pressure on federal enforcers to take a particular kind of case,67 and especially where state and local authorities lack or systematically decline to exercise concurrent criminal jurisdiction. In 1994, responding to sustained calls by border states for increased federal immigration enforcement,68 the Justice Department launched “Op-

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63. See Seper, Senators, supra note 58 (reporting on letter from Senators to Attorney General Ashcroft and FBI Director Mueller which notes that 61% declination rate “raises troubling questions about whether the FBI and the Department of Justice are devoting sufficient resources to counterterrorism [and] how well the FBI conducts terrorism investigations” (quoting letter from Senators Patrick J. Leahy and Charles E. Grassley)). There is no reason to believe that the number of declinations indicates a lack of interest in counterterrorism cases at any agency. Indeed, the extent of departmental interest may have led to the overstatement in the number of cases classified as “terrorism-related.” See U.S. Gen. Accounting Office, GAO-03-266, Justice Department: Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics (Jan. 2003), available at http://www.gao.gov/new.items/d03266.pdf (reporting that USAOs mischaracterized 132 of 288 reported “terrorism-related” convictions in fiscal year 2002).

64. See Rabin, supra note 12, at 1055 (discussing “feedback effect” in which an agency “react[ed] to a consistent pattern of declinations . . . by shaping its referral policy accordingly”).

65. Compendium, supra note 52, at 29 tbl.2.3.

66. See William Landes, Comments, in The Economics of Crime and Punishment 227 (Simon Rottenberg ed., 1973) [hereinafter Landes, Comments] (noting that “[t]o the extent that prosecutors and investigators collude so that each internalizes the interests of the other,” a system that formally separated prosecution from investigation would be “operationally equivalent to one that combined the functions”).

67. See Rabin, supra note 12, at 1051 (noting, in context of Selective Service violation prosecutions in 1970, that “[s]ometimes a type of violation is regarded as so serious that selective enforcement will not be tolerated, despite the strain on prosecutorial resources”).

68. See Editorial, Immigration Costs: State Should Not Back Away from Lawsuit, Dallas Morning News, Aug. 17, 1994, at 24A (supporting Texas’s suit against federal government seeking reimbursement for immigration-related costs now borne by the state, and noting that “even when [suspected criminals] are apprehended [at the border], they are let off with a slap on the wrist by U.S. attorneys who are responsible for their prosecution”); Michael Paulson, States Seek Compensation for Incarcerating Criminal
operation Gatekeeper.” As a result of this and other efforts comprising the “Southwest Border Initiative,” immigration prosecutions in five border federal districts increased “more than seven-fold” between 1994 and 2000, and convictions in INS cases rose from comprising 12.0% of all federal convictions in 1992 to 20.5% in 2001. The INS’s declination rate, always comparatively low, was the lowest in 1998–1999 (3.4%) for any of the high-volume federal investigative agencies.

Regrettably, one regains one’s moorings only by moving from the quantitative to the qualitative or just plain impressionist. By these measures, no one doubts that federal prosecutors exercise a considerable degree of discretionary power in their case selection decisions, and that they regularly diverge from agency preferences in this regard. At its core, prosecutorial power is primarily negative, and hardly absolute—not the

Immigrants, Seattle Post-Intelligencer, Dec. 23, 1994, at A9 (reporting that governors of “at least seven states” had sued the United States government, “demanding that they be reimbursed for the cost of incarcerating illegal immigrants” and argued that “if the federal government had done its job securing the nation’s borders, the states would not have as large a problem with criminal immigrants”); Maggie Rivas, Gaps in the Fence: Immigration Reform Seems Far Cry from Reality at Mexican Border, Dallas Morning News, Jan. 3, 1994, at 1A (noting complaints by local officials of inadequate federal efforts against illegal immigration).


72. Compendium, supra note 52, at 29 tbl.2.3. The percentage of INS referrals prosecuted went from 83% in 1992 to 92% in 2001. TRAC, Recent Trends, supra note 71 (percentages calculated from figures presented on website). Why the INS declination rate was low even before “Gatekeeper” is best explained by a former U.S. Attorney from the Southern District of California: “Given the local DA’s unwillingness to prosecute border cases, we do not have the traditional federal prosecutor’s tool of declination to state authorities to bring the number of cases into line with the resources.” William Braniff, Local Discretion, Prosecutorial Choices, and the Sentencing Guidelines, 5 Fed. Sentencing Rep. 309, 312 (1993).

73. See, e.g., Eisenstein, supra note 17, at 156—69 (describing U.S. Attorneys’ relationships with federal investigative agencies); Wilson, Investigators, supra note 57, at 139; CAFLE Hearings, supra note 44, Dec. 1, 1998, pt.1, at 118 (author’s notes) (testimony of FBI Director Louis Freeh) (explaining that cases are chosen based on priorities and personalities of U.S. Attorneys).
power to make an agency pursue a kind of case that the agency does not want to pursue, or even the power to say "no" to every single case of the sort that an agency very much wants to pursue. But the leverage that flows from prosecutorial gatekeeping authority ought not be underestimated.

B. Agency Control over Investigative Resources, Tactics, and Agenda

On the investigative side of the equation, tactical choices and enforcement agendas are inextricably intertwined, sometimes dramatically. The decision to arrest and handcuff a Wall Street executive on his trading floor,74 the decision to conduct a "surprise interview of Monica Lewinsky incommunicado for as long as she would allow"75—each of these raises a question of "proportionality" that cannot be answered without taking a position on the nature and seriousness of the conduct being investigated.76 To what degree do investigative agencies decide whether and with what intensity any matter or set of matters is pursued? To what extent are they monopolists when it comes to providing the investigative support that prosecutors need to bring and pursue criminal charges?

Here, again, truisms have a substantial basis in reality. Maybe some federal prosecutors leave the comfort of their offices to pound the pavement investigating cases. But this generally happens only in the movies—which don't have to worry about niceties like the rule precluding a lawyer from acting as both advocate and sworn or unsworn witness77—if at all.78 Enforcement agencies have the expertise, the manpower, the technical


75. Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 Fordham L. Rev. 723, 729 (1999) [hereinafter Little, Proportionality].

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

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

resources, and, perhaps most importantly, the informational networks that no U.S. Attorney's Office possesses, and without which few cases could be brought. Indeed, save in the exceptional cases—where the news media or a victim brings a case directly to its attention—a U.S. Attorney's Office generally will not even know that a crime has been committed until an agency informs it.

In recent years, state and local enforcement agencies have found it politically and financially expedient to develop robust alliances with their federal counterparts, sharing information and manpower in exchange for such benefits as technical assistance, overtime pay and "buy money," and access to favorable federal fora (for criminal cases and forfeiture proceedings). The balance of power in this area may recently have shifted, as state and local enforcers have moved from being principally supplicants, seeking federal aid in combating violent crime, to being sometimes eager and sometimes grudging providers of the manpower needed for fine-grained nationwide terrorism investigations. But the primary point of contact between federal and local enforcers has, at least so far, been at the agency level.

Why haven't federal prosecutors reduced their reliance on federal agencies by dealing directly with state and local agencies, trading the advantages of federal jurisdiction for investigative support? This has occurred, and may occur more, as the federal government reaches out for

79. See CAFLE Hearings, supra note 44, Aug. 25, 1998, at 18 (author's notes) (Oklahoma Public Safety Commissioner notes that he accepts federal entry into the area of traditionally local crimes "because it gets me money. It gets overtime pay for my people."); Richman, Changing Boundaries, supra note 59, at 95; Richman, Federal Criminal Law, supra note 33, at 784.

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

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

82. See, e.g., Richman, Project Exile, supra note 29, at 406-07 (describing how Maryland U.S. Attorney bypassed ATF and reached out directly to local police for gun cases); Gail Gibson, Ehrlich Reloads Debate on Screening Gun Cases, Balt. Sun, June 30, 2000, at 1B (describing Maryland U.S. Attorney's appeal to local police rather than ATF for gun cases); see also Dick Lehr & Gerard O'Neill, Black Mass: The True Story of an Unholy Alliance Between the FBI and the Irish Mob 257 (2000) (recounting federal prosecutors' requests for support from state authorities when targeting a mobster who was then under the protection of the FBI agents he worked with as a sometime informant); Office of
more local assistance in terrorism investigations. But there are obstacles. Although agents and police have their rivalries, they have similar professional perspectives. After Attorney General Ashcroft placed U.S. Attorneys in charge of joint terrorism task forces around the country, a former FBI executive expressed his concern that the move would "undermine the effectiveness of the FBI's relationship with state and local authorities," and noted that "several police chiefs" had advised that they were "not comfortable in such a relationship led by U.S. Attorneys."

In any event, federal prosecutors are bound to federal agencies by asset specialization. Federal agents have a special familiarity with federal law, and because they cater primarily to federal prosecutors, they are likely to have developed informational networks with prosecutorial demands in mind. As in any long-term contractual relation, each side is likely to have developed structures that make exit difficult.


87. See Kraakman, Gatekeepers, supra note 14, at 63 n.24.
Yet prosecutors, too, can take advantage of overlapping jurisdictions to play their federal counterparts against one another. The FBI dominates traditional organized crime cases, but when a group engages in drug dealing or gun running, the DEA or ATF may have an interest as well. In the white collar area, the Postal Inspection Service’s jurisdiction over mail fraud makes that low profile agency a fit instrument for prosecutors seeking to go where the FBI would prefer not to venture (or to control an investigation to a degree that the FBI would not tolerate). Thus, when Rudolph Giuliani’s U.S. Attorney’s Office pursued Wall Street cases in the late 1980s, it initially would create ad hoc investigative teams from the Postal Inspection Service, the IRS, and the SEC. Only after these cases garnered considerable positive media coverage did the FBI enter the area. In another district, a U.S. Attorney recently explained why he liked the overlap between FBI and Secret Service jurisdiction in white collar cases: The U.S. Attorney’s Office, he noted, “doesn’t want to put all their investigative eggs in one basket” because “at different times [the two agencies] have different resources and different commitments to different types of white collar cases.”


90. See Rifka Rosenwein, Giuliani’s Securities Unit Struggles with Caseload, Manhattan Law., Aug. 30–Sept. 12, 1988, at 1, 17.


Over time, the costs of competition have led agencies, or their political sponsors, to clarify these jurisdictional boundaries. Yet such clarifications have their own costs, and the current degree of blurriness may reflect some recognition of its advantages, which include the benefits of competition and the deterrence of corruption.

Interagency competition is not the only source of prosecutorial bargaining power at this structural level. Where an agency is particularly weak and poorly organized, prosecutors may be able to gain substantial control over its agenda. This appears to be what happened to the IRS's Criminal Investigation Division (CID), at least until recently. Housed in an agency under constant political attack for aggressiveness, reporting to district managers for whom criminal prosecutions were a secondary concern, and authorized to "pursue a broad range of investigations with

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


96. See Albert Breton & Ronald Wintrobe, The Logic of Bureaucratic Conduct 128 (1982) (noting that because "optimum market structure for maximizing entrepreneurial competition or innovative activity is not perfect competition but some degree of monopoly," assignment of "quasi-property rights within organizations" will stimulate entrepreneurial activity by ensuring that "bureaucrats will obtain the benefits from an increased allocation of resources to their bureau"); Richard S. Higgins et al., Dual Enforcement of the Antitrust Laws, in Public Choice and Regulation: A View from Inside the Federal Trade Commission 154, 177 (Robert J. Mackay et al. eds., 1987) (concluding, after studying FTC-Justice Department liaison agreement governing antitrust cases, that "far from resulting in wasteful duplication, bureaucratic competition leads to more efficient resource use"); see also Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 354 (1998) (discussing benefits of mild interagency competition).

97. See Lehr & O'Neill, supra note 82, at 245 (describing how control by corrupt FBI agents of information about their drug-dealing informants was threatened when DEA agents launched their own investigation of the informants' trafficking).

little regard to the impact these investigations had on overall tax compliance," CID agents responded by offering their financial expertise to U.S. Attorneys' Offices, which in turn "determine[d the Division's] investigative agenda." It remains to be seen whether the recent reorganization of the Division will succeed in shifting agents' attention more specifically to tax compliance goals.

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


100. Id.; see also David Burnham, The F.B.I.: A Special Report, Nation, Aug. 11, 1997, at 22 (describing a "prosecutor in the New York area" who noted that when the FBI refused to pursue "a serious official corruption matter in the district, and [his] boss—the U.S. Attorney—was not prepared to make an issue out of it," he "[g]ot around the problem" by "[s]hop[ping] around for help, finally recruiting some I.R.S. agents").


102. For a tentative exploration of such matters, see Richman, Federal Criminal Law, supra note 33, at 793–99.

103. For sources exploring political and economic theories on institutional design, see supra note 13.

104. Carpenter, supra note 89, at 358.

105. Id. at 4.
from the Progressive Era is one of the postal inspectors leveraging their department's "reputation for moral vigor"—developed during the 1890s through the enforcement of morals legislation—into a new focus on fraud in the 1910s and 1920s that "made the fraud order one of the most powerful forms of economic regulation in the new, advertising-driven economy."106

There is no reason why we have to choose between these theories. Indeed, we find evidence of both at work in the federal criminal enforcement bureaucracy and can see how they can reinforce one another. Is the FBI "story" one of the inevitable power that flows from control of the national security "beat,"107 or of the Bureau's ability to manage its relationships with Congress,108 the rest of the executive branch, and the media?109 It is surely both. And however beleaguered the Bureau may seem today,110 no prosecutor will discount its

106. Id. at 148-49.
107. As Richard Gid Powers writes:

The search for spies, the hunt for disloyal government officials, the extirpation of the Communist party in the courts of law during the early years of the cold war were all part of a struggle to redefine the limits of political respectability. And J. Edgar Hoover's official position naturally placed him at the center of the loyalty, spy, and Communist cases.

108. See Wilson, Investigators, supra note 57, at 166 (arguing that the FBI manages to maintain autonomy in part because it cultivates support from Congressmen).


110. The Bureau may have appeared particularly autonomous during the Clinton years. See David S. Cloud, Polite Prosecutor: The Attorney General Gets Little Respect, Wall St. J., Jan. 27, 2000, at A1 (suggesting that FBI has "wide latitude"); John F. Harris & David A. Vise, With Frech, Mistrust Was Mutual, Wash. Post, Jan. 10, 2001, at A1 (describing how "dysfunctional relationship" between Clinton Administration and FBI prevented effective oversight); David A. Vise & Lorraine Adams, Revelations Inflame Rift Between Justice Dep. and FBI, Wash. Post, Sept. 27, 1999, at A3 (depicting "unusually hostile relations between Justice and the FBI"). Its insulation from oversight appears to have ended, however, with the arrival of an administration not targeted by special prosecutors and the disclosures about the agency's errors in the Oklahoma City bombing case and the swirling allegations concerning the Bureau's mishandling of its counterterrorism investigations before September 11. See Cheryl W. Thompson & Claudia Deane, FBI's Ratings Suffer in Light of Blunders: Handling of McVeigh Case Worries Majority, Poll Finds, Wash. Post, May 22, 2001, at A3 (discussing the Oklahoma City bombing); Michael Isikoff, The Culture of "Yes Men": Freeh Explains How FBI Let Documents Fall Through Cracks, Newsweek Online, May 16, 2001 (on file with the Columbia Law Review) (same); Romesh Ratnesar & Michael Weisskopf, How the FBI Blew the Case, Time, June 3, 2002, at 24 (discussing FBI employee who accused her superiors of ignoring warning signs of the events of September 11, 2001); Richard C. Shelby, September 11 and the Imperative of Reform in the U.S. Intelligence Community: Additional Views of Senator Richard C. Shelby, Vice Chairman, Senate Select Committee on Intelligence 7, at http://intelligence.senate.gov/shelby.pdf (on file with the Columbia Law Review) ("The story of September 11 is . . . replete with the FBI's problems of internal counterterrorism and counterintelligence . . . coordination, information-sharing, and basic institutional competence."). For a discussion of how the FBI's autonomy
The limited bargaining power of ATF, which exists in large part because opponents of gun control wanted a weak agency responsible for gun enforcement, may be more a matter of institutional design, but one still finds the agency striving to establish "political legitimacy" by touting its violent-crime fighting capabilities and working to forge strategic alliances with local law enforcement authorities. The important point here is not to get a fix, or even place a rough estimate, on the absolute or relative power of any agency, but rather to recognize that such power will greatly affect the extent to which prosecutors can impose their priorities on agencies.

Where there is a disjunction between agency and prosecutorial priorities, can agencies leave prosecutors in the lurch by presenting "investigated" cases that (from a prosecutorial perspective) have not been sufficiently developed? Certainly post-indictment prosecutorial investigative work occurs, and the bright line that the civil immunity cases draw between investigating a case and preparing one for trial is quite artificial. Part of the problem may be that "cost savings from guilty pleas instead of

suffered in the wake of mid-1970s revelations, see Wilson, Investigators, supra note 57, at 179-82.

111. See CAFLE Hearings, supra note 44, Nov. 13, 1998, at 44-45 (author's notes) (comment of former U.S. Attorney and FBI Director William Webster) (arguing that although the "U.S. Attorney is, as many of them like to say, the senior federal law enforcement officer in the area," "[t]he truth of the matter is that the lines of investigation generally are based on instructions from doctrine, policy and so forth from [FBI] headquarters"); Walter J. Kendall, III, A Brief Argument for Greater Control of Litigation Discretion—The Public Interest and Public Choice Contexts, 25 J. Marshall L. Rev. 215, 225 (1990) ("The influence of the FBI on the priorities of the U.S. Attorney's office was acknowledged to be significant."); Burnham, supra note 100 ("The theory is that the U.S. attorney... is the top dog in the area when it comes to federal enforcement," said one senior investigator. 'But in many districts the SACs [special agents in charge] have more experience and political connections in Washington than the U.S. attorney.'").

112. See Richman, Federal Criminal Law, supra note 33, at 796 (finding that ATF "has never been a particularly powerful agency on Capitol Hill, to put it mildly"); see also William J. Vizzard, In the Cross Fire: A Political History of the Bureau of Alcohol, Tobacco and Firearms 155 (1997) (describing how political pressure from opponents of gun laws contributed to extensive congressional hearings on ATF raid on Branch Davidian compound).

113. Richman, Project Exile, supra note 29, at 399. How the ATF will fare now that it has been transferred from the Treasury Department to Justice remains to be seen. See Dan Eggen, Move to Justice Dept. Brings ATF New Focus, Wash. Post, Jan. 23, 2003, at A19 (noting concerns about interaction between ATF and FBI).

114. For example, in Buckley v. Fitzsimmons, the Court stated: There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." 509 U.S. 259, 273 (1993) (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).
long trials cannot be transferred" from prosecution to agency budgets, leaving little room for agencies to negotiate efficient deals directly. Even so, prosecutors generally may not have a pressing need to address the evidentiary gap created by agents' inattention to adjudicative needs. Under the present system of easily obtained indictments and negotiated dispositions, prosecutors can let agencies freely arrest suspects, frequently without even giving prior notice, knowing that an indictment will be easy to obtain even on a quick clock and that a combination of minimal disclosure obligations and big sentencing differentials will generally induce guilty pleas. Giving free rein to agencies allows U.S. Attorneys' Offices to operate at maximum capacity, and keep their own statistics up (which they need to do to compete with other districts for funding and other resources). And because prosecutors are hard pressed to identify ex ante which cases will go to trial, even if they had in-house investigators, such personnel would be of limited use in closing the evidentiary gaps.


116. As Wilson noted:
"Making a case" is the most common expression agents use to describe what they are doing... Once a case is "made"—which usually means, once it has been accepted for prosecution—the agent thinks of himself as having fulfilled his task. His work is by no means done—he must still fill out reports and appear in court—but "work" is simply energy expended and is not at all the same thing as "the job." Wilson, Investigators, supra note 57, at 160; see also Jacoby, supra note 23, at 112 (noting police officer's role changes from authority figure, with discretionary power during investigation and arrest, to justifier during the intake stage, to coordinator of witnesses and evidence—and maybe witness—at trial).

117. See Sourcebook of Criminal Justice Statistics 2001, at 414 tbl.5.17 (Ann L. Pastore & Kathleen Maguire eds., 2002), available at http://www.albany.edu/sourcebook (on file with the Columbia Law Review) (showing that over 87% of felony terminations in federal district court in 2000 were based on guilty pleas); id. at 445 tbl.5.44 (reporting that 94% of state felony convictions are based on guilty pleas).

118. For an insightful normative challenge to this way of doing business and an exploration of the relationship between the prosecutorial screening and plea bargaining, see Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29 (2002).


120. See infra notes 343–351 and accompanying text.
Besides, prosecutors may do better in a system in which agencies are responsible for gathering evidence for trial. If there were a clear line between investigative information gathering and adjudicative information gathering, agencies would have a greater incentive to shift costs to U.S. Attorneys' Offices by presenting weaker cases for prosecution. In any given case, prosecutors could respond by declining to bring charges. And if this happened over a category of cases of middling importance, large-scale declination would be the answer. If the pursuit of cases in a category were politically non-negotiable, however, the consequences of investigative inaction would be unfavorable dispositions. The U.S. Attorney could try to blame the agency for these, but it would be hard to make the charge stick. To be sure, agencies are not fully accountable under the present system either, since allocating responsibility for an acquittal or unfavorable plea bargain will always be difficult. Was it because insufficient evidence was collected? The indictment poorly drafted? The case poorly tried? But, at the very least, agencies' distasteful obligation to assist at trials gives them an incentive to gather sufficient evidence to make guilty pleas more likely, and to weed out poor cases early.

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

At a minimum, the involvement sensitizes the U.S. Attorney to the pre-referral resource investment of the agency, and leads most U.S. Attorneys to be open about the reasons for declination when the agency feels aggrieved. In turn, the post-referral work probably sensitizes the agency to some of the concerns of the prosecutor which it otherwise would not share. Specifically, the involvement gives the agency some feel for the trial considerations that exercise a continuing influence on prosecutorial decisions at every stage of the development of a case.

Contributing to the adjudicative effort reinforces agency interest in obtaining convictions—an interest that, in some general sense, is shared with prosecutors, and that likely has many of the same sources: congressional oversight, political accountability within the executive branch, ego

121. See Rabin, supra note 12, at 1063 (relating that U.S. Attorneys declined "out of hand" cases referred by the Department of Agriculture because of the poor quality of that agency's preparatory work).

122. For a discussion of how team-production theory points to a solution to the problem created by outsiders' ability to measure federal enforcement "output," see infra notes 278–284 and accompanying text.

123. See Raaj Kumar Sah & Joseph E. Stiglitz, The Architecture of Economic Systems: Hierarchies and Polyarchies, 76 Am. Econ. Rev. 716, 729 (1986) ("[A] higher quality screening at the lower bureau improves the portfolio to be evaluated by the higher bureau, but it also costs more because a larger number of projects are evaluated at the lower level.")

124. Rabin, supra note 12, at 1068.
satisfaction, internal promotion, and so forth. Indeed, the difficulty that the relevant audiences (funders, citizens, or targets) have in apportioning responsibility for unfavorable dispositions makes the term “feds” a reputational commodity all enforcers need to protect. If when agents show up for an interrogation, or prosecutors for plea negotiations, they are greeted with, “Oh, you’re the guys who can’t put anyone in jail,” the conversation is likely to go downhill from there.

Our first pass at the underlying structure of agency-prosecutor relations thus finds U.S. Attorneys’ Offices maintaining substantial control over federal adjudicatory resources but with few investigative resources of their own. For their part, federal enforcement agencies, to one degree or another, control federal (and to some extent, state and local) investigative resources but cannot achieve their missions without access to the adjudicatory process, for which the U.S. Attorneys’ Offices are gatekeepers. A rich dynamic of interaction could arise out of this mutual dependency, with interagency competition ebbing and flowing in the face of “[c]hanging task environments.” Yet the constituting backdrop

125. For an exploration of prosecutorial motivation, see Richman, Old Chief, supra note 7, at 966–69 (citing other sources of prosecutorial motivation).

126. See Rabin, supra note 12, at 1056 (“[A]gency-prosecutor friction is diminished, but not eliminated, by the necessity of living with each other.”).


128. Jonathan B. Bendor, Parallel Systems: Redundancy in Government 43–44 (1985) (“If one organization’s program demonstrates its superiority, other organizations may leave the field, transforming competition into monopoly. . . . But the short-run gain is likely to become a long-run problem. Changing task environments may render old success ineffective . . . .

The FBI’s specialized expertise and jurisdictional domination in the area of “traditional” organized crime, for example, gave it leverage over prosecutors, but may, at least in part, have been responsible for the slowness with which the agency responded to the threat posed by “non-traditional” organizations (e.g., Russian, Asian, etc.) in the 1980s. See Margot Hornblower, Asian Mafia Seen Spreading: Experts Say Far-East Crime Cartels Are Operating in America, Wash. Post, Oct. 24, 1984, at A3 (reporting that chief of FBI organized-crime section had indicated that Bureau “was deciding whether to target Asian organized crime as one of its nationwide enforcement priorities”); James Rosenthal, Russia’s New Export: The Mob, Wash. Post, June 24, 1990, at C1 (reporting complaints of state and federal prosecutors that the FBI was giving insufficient attention to Russian mobsters in Brooklyn). Other agencies, federal and local, began to enter these emerging “markets.” See, e.g., Mark Arax & Jack Jones, LAPD Blamed for Killing Anti-Gang Unit: Coolness to Plan for Multiagency Force Doomed Proposal, 2 Chiefs Say, L.A. Times, Jan. 12, 1985, at 29 (reporting that Los Angeles police department apparently scuttled plans for federal-local task force targeting Asian organized crime because department felt own efforts in area were successful); Barbara Lyne, The Women of One Hogan Place: Three Who Play Key Roles in Morgenthau’s Inner Circle, Manhattan Law., Mar. 1990, at 5, 24 (describing how Assistant District Attorney brought Asian organized crime case that had been developed by police gang squad to U.S. Attorney’s Office). This left the Bureau to play catch-up once the new threats became bright enough on the political radar screen to demand its attention. By 1998, “international organized crime” was an FBI priority, indeed one of several recognized “threats to U.S. national security.” Threats to U.S. National
to the agent-prosecutor relationship goes beyond these structural arrangements to include some basic features of federal criminal procedure.

C. Prosecutorial Controls over Investigatory Tactics

Even if prosecutors lacked any formal say in the tactical decisions of investigative agencies, their control over the charging process and relative expertise in predicting how the use of particular tactics would play out in the adjudicative process (as a matter of law or of jury response) would give them a significant voice in agency decisionmaking. But we now should add another element: the control that the law has given or encouraged prosecutors to exercise over the use of critical investigative tools.

If they are willing to devote resources and abide by constitutional or subconstitutional restrictions, criminal enforcement agencies can freely resort to a panoply of investigative techniques.129 They can develop informants, go undercover,130 interview willing witnesses, conduct full-blown searches upon consent or where warrants are not required, make "investigative stops," or conduct sustained physical surveillance.131

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129. Constitutional provisions like the Fourth and Fifth Amendments restrict information gathering but still give law enforcement officers considerable freedom where they do not conduct formal interrogations or invade areas in which an individual has a legitimate expectation of privacy. Additional restrictions have been imposed by statute. See, e.g., Peter H.W. Van Der Goes, Jr., Opportunity Lost: Why and How to Improve the HHS-Proposed Legislation Governing Law Enforcement Access to Medical Records, 147 U. Pa. L. Rev. 1009, 1041 (1999) (analyzing "federal legislation that impacts individuals’ health information privacy and law enforcement’s access to such records").

130. In certain sensitive cases, or where undercover tactics are particularly risky, administrative regulations require agents to obtain approval from prosecutors. See infra at Part III.A.2.

131. See Little, Proportionality, supra note 75, at 737 ("Not all criminal investigative techniques require, or even involve, prosecutors. Law enforcement agents may and often do, for example, interview witnesses, obtain public records, and conduct covert surveillance, without ever consulting a prosecutor."); John Schwartz, Some Companies Will Release Customer Records on Request, N.Y. Times, Dec. 18, 2002, at A16 (reporting that nearly 25% of corporate security officers surveyed said they would give customer information to law enforcement officials and government agencies without a court order and that 41% would do so "[i]f an investigation concerned national security"); cf. Ethan A. Nadelmann, The DEA in Europe, in Police Surveillance in Comparative Perspective 269, 285 (Cyrille Fijnaut & Gary Marx eds., 1995) (describing how "prosecutors in almost every European country" gained "at least some role in authorizing, supervising or informally shielding controlled deliveries"—operations in which the police allow drugs to proceed to their destination so as to see who will pick them up).
Where cases can be made based on these tactics, agents will have considerable sway. 132

What agents generally cannot do, however, is invoke coercive processes and require unwilling witnesses to provide evidence under pain of contempt. 133 Strictly speaking, only grand juries have this power, 134 but prosecutors can freely invoke it in the grand jury's name, 135 and thus have a means of curing agency investigative inadequacies. 136 Even where

132. Hagan, supra note 22, at 123 (noting that "prosecutors must often rely on narcotics officers for the information they need in developing cases, and they therefore are often willing to give these officers extra consideration").

133. Recent counterterrorism legislation may (but need not) free enforcement agents from prosecutorial supervision when invoking coercive processes. Under the USA PATRIOT Act,

The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things . . . for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities . . . .


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


136. Commenting on the District of Columbia U.S. Attorney's Office's now-abandoned practice of requiring subpoenaed witnesses to appear for prosecutorial questioning prior to going before the grand jury, one prosecutor recalled that in homicide cases "he would routinely subpoena witnesses to his office in an effort to build a case—which, in the District, is almost always compromised by shoddy police work and
an agency appears to be zealously pursuing an investigation, control over coercive processes allows prosecutors considerable sway in decisions about what directions the inquiry will take. This dynamic is particularly likely to occur in the white-collar context, where grand jury subpoenas are fruitful tools for obtaining useful information that would not otherwise have been voluntarily provided.\textsuperscript{137}

Where information cannot be obtained by grand jury subpoena, prosecutors control other coercive tools: the ability to threaten prosecution, to enter into arrangements that promise leniency or better in exchange for information, and to seek compulsion orders requiring witnesses to testify under grant of immunity. Of these powers, only the last has formally been granted to prosecutors (and not law enforcement agencies) by statute.\textsuperscript{138} The others have been treated as arising out of prosecutorial charging discretion. Even where an agent actually promises a suspect that he will not be prosecuted if, say, he aids in an investigation, the promise will not be binding in the absence of specific (and generally unavailable)\textsuperscript{139} evidence that the agent had authority to bind the U.S. Attorney's Office.\textsuperscript{140}

uncooperative witnesses.” Tom Schoenberg, Prosecutors Nix Witness Strategy, Legal Times, Dec. 11, 2000, at 1; see also Davis, American Prosecutor, supra note 2, at 427 (discussing “office visit” practice of the District of Columbia U.S. Attorney’s Office).

137. See Richman, Grand Jury, supra note 135, at 345 (noting that in white collar area, “potential witnesses frequently operate within an institutional context that both requires the threat of legal sanction as a means of obtaining testimony, and takes that threat seriously”).


139. Recent Justice Department regulations reaffirm the absence of agent authority in this regard:

A [Justice Department law enforcement] agent does not have any authority to make any promise or commitment that would prevent the government from prosecuting an individual for criminal activity that is not authorized pursuant to [specific guidelines], or that would limit the use of any evidence by the government, without the prior written approval of the [Federal Prosecuting Office] that has primary jurisdiction to prosecute the [informant] for such criminal activity. A[n] agent must take the utmost care to avoid giving any person the erroneous impression that he or she has any such authority. The Attorney General’s Guidelines Regarding the Use of Confidential Informants 5 (2002), available at http://www.usdoj.gov/olp/dojguidelines.pdf (on file with the Columbia Law Review).

140. See United States v. Flemmi, 225 F.3d 78, 84–90 (1st Cir. 2000) (holding that FBI agent lacked authority to promise informant immunity); United States v. Cordova-Perez, 65 F.3d 1552, 1554 (9th Cir. 1995) (holding that INS agent who made a “no prosecution” promise could not bind the United States); United States v. Fuzer, 18 F.3d 517, 520–21 (7th Cir. 1994) (holding that ATF agents lacked authority to promise that defendant would not be prosecuted); United States v. Streebing, 987 F.2d 368, 373 (6th Cir. 1993) (finding that FBI agent “lacked any actual or apparent authority to make the alleged promise not to prosecute”); United States v. Kettering, 861 F.2d 675, 676 (11th Cir. 1988) (holding that DEA agent lacked authority to guarantee immunity); In re Corrugated Container Antitrust Litig., 662 F.2d 875, 888 (D.C. Cir. 1981) (finding “no authority for ruling that oral promises of immunity by an investigator [FBI agent], not in accord with statutory
Compare this legal regime to that in England and Wales. There, where the Crown Prosecution Service has had gatekeeping authority over almost all prosecutions since 1986, a 1993 High Court decision held that it would be an "abuse of process" for prosecution to proceed where police had represented to the defendant that no such prosecution would be brought. Although the Crown Prosecution Service protested that it had the exclusive right to decide whether to proceed, the High Court, giving little thought to "how a Crown Prosecutor, without any powers to supervise the investigation stage, could prevent the police making such undertakings," responded: "If the Crown Prosecution Service find that their powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage."

By statute, prosecutors have a gatekeeping role over the use of certain other investigative techniques, such as electronic surveillance under Title III. And although agents theoretically can apply for search warrants on their own, familiarity with legal standards and with drafting make prosecutors sought-after partners in this process as well. Prosecutors also play a bonding role vis-à-vis the judicial officers to whom search warrant applications must be presented. A judicial officer, aware that "good faith" doctrine makes her decision to issue a warrant effectively unreviewable (at least in a criminal case), may be more likely to sign off if the application has been written, or at least sponsored, by an AUSA.
known to the court or whose status as a legal professional makes him more apt to get judicial deference.

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

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

Even when an agency does not need formal ex ante judicial or prosecutorial authorization for some investigative tactic, consultation with prosecutors will often be salutary because of the extent to which agency actions will later be subject to judicial scrutiny. Prosecutors' legal expertise and professional ties to judges can provide agencies with the promise of greater success or some insulation (should their work be con-

147. See Roberta K. Flowers, An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor, 79 Neb. L. Rev. 251, 269 (2000) (discussing how personal relationships between judges and prosecutors are fostered); see also Miller, Prosecution, supra note 9, at 53 n.18 (survey of arrest warrant practices of Michigan state judges in late 1960s) ("One judge responsible for the signing of warrants stated that he, being a former prosecutor himself, placed much faith in the ability of the present prosecutor to screen cases. Consequently, he did little more than scan the information contained in the warrant before signing it.").


150. See Scott Turow, Policing the Police: The D.A.’s Job, in Postmortem: The O.J. Simpson Case 189, 191 (Jeffrey Abramson ed., 1996) (blaming Los Angeles DA's Office for sponsoring perjurious testimony by police officers in O.J. Simpson case and recalling that when he was an AUSA, AUSAs "were available to answer federal investigators' legal questions twenty-four hours a day," and "agents were forbidden to make an arrest or enter a residence without our approval").
demned on review). And agencies may also want to give prosecutors some foreknowledge of (and complicity in) tactics (including warrantless searches and interrogations) that will later be the subject of suppression hearings.\footnote{151} Even when agencies have in-house legal personnel, these considerations (and perhaps perceptions of relative competence in such matters) can lead agents to seek legal counsel from prosecutors.\footnote{152}

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

\[[A]lthough I thought probable cause existed ("probable cause" meaning that the proposition has to be more likely than not, or if quantified, a 51\% likelihood), I thought our United States Attorney's Office, (for a lot of reasons including just to play it safe) in regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75\%-80\% probability and sometimes even higher), and depending on the actual AUSA who would be assigned, might turn us down.\footnote{153} \]

The insulation that prosecutors provide may be based not simply on professional courtesy but on a judicial recognition of prosecutors' risk aversion. The dynamic in this regard has much in common with that in the corporate arena, where lawyers also are frequently perceived as

\footnote{151. See The Activities of the Federal Bureau of Investigation, Part II: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 105th Cong. 46–49 (1998) (testimony of FBI Dir. Louis Freeh), available at http://commdocs.house.gov/committees/judiciary/hju5030.000/hju5030_0f.htm (on file with the Columbia Law Review) [hereinafter Hearing on FBI Activities] (noting that although FBI consulted with local U.S. Attorney prior to interrogation of Richard Jewell, in connection with the 1996 Olympics bombing, he was not told that agents would mislead Jewell into thinking that the interrogation was for a training video).

152. See Webster Report, supra note 99, at 103 ("Field interviews established that CI Special Agents generally have little confidence in the legal advice of their IRS Counsel due to the Counsels' lack of criminal litigation expertise. Consequently Special Agents rely heavily on Assistant United States Attorneys for advice during investigations."); cf. Robert Eli Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 Ind. L.J. 479, 503–04 (1989) (noting that, historically, corporations did not vertically integrate for legal services because "elite firms . . . were the only source for quality legal services").

"naysayers." The analogy has its limits: Prosecutors lack their private counterparts' need to bill more hours and justify high legal fees, and their immunity makes malpractice liability of little concern. But like private attorneys, prosecutors have an interest in building a professional reputation for legal acuity that will often be best served by blocking an action. They may also fear that those they advise, having laid off some of the accountability by bringing in lawyers, may be even more aggressive than they otherwise would have been. Moreover, there is a power dimension, as the overstatement of legal risk—i.e., going beyond simple prudence in the face of legal uncertainty—can be rewarded with control over agency decisionmaking. Where professionals seek "to increase their power and prestige within organizations by constructing the legal environment as a major threat and then claiming the unique expertise to craft an effective response," the advice they give "may be substantially more constraining than the law itself."

The nature of the procedural and substantive rules that prosecutors interpret is itself a source of their professional power. Enforcement agents would still need some legal assistance in a world of well-developed codes of police conduct and of criminal liability. Yet the world in which federal agents operate seems to have been intentionally constructed to render them dependent on lawyers. Common law constitutional constraints dominate the rules governing police conduct, and, though "the Supreme Court has studiously denied that federal common-law crimes exist," the lack of legislative specificity on the substantive side is re-

154. Langevoort & Rasmussen, supra note 14, at 399.
155. Id. at 393 (noting that overstatement of legal risk creates more work for lawyers).
156. See Burns v. Reed, 500 U.S. 478, 487-96 (1991) (holding that prosecutor enjoys absolute immunity in his adversarial role but only qualified immunity in his role as an investigator).
157. See Langevoort & Rasmussen, supra note 14, at 397 ("By overstating legal risks, the lawyer can decrease the reputational penalty that she pays when transactions go awry.").
158. Id. at 379-80.
159. Id. at 430 ("[A] lawyer's status in a client interaction is elevated by the assumption of dominance and control in that relationship, and the leverage a lawyer has to achieve that status is the threat of legal risk. By using it, the lawyer can take charge and displace the client's apparent autonomy." (citations omitted)); see also Lauren B. Edelman et al., Professional Construction of Law: The Inflated Threat of Wrongful Discharge, 26 Law & Soc'y Rev. 47, 77 (1992) ("[T]he professional power perspective suggests that personnel professionals and practicing lawyers have a shared interest in constructing the threat of wrongful discharge in such a way that employers perceive the law as a threat and rely upon those professions to curb the threat."); Langevoort & Rasmussen, supra note 14, at 416 ("The overstatement of legal messages within an organization approaches the blurry line between those intended in good faith to prompt action by the client and those strategically designed to maximize the status and resources of legal players within the enterprise.").
161. Richman, Federal Criminal Law, supra note 33, at 761 (citing cases).
markable.162 Whether prosecutors actively embrace this legal uncertainty is a matter of speculation.163 But they certainly profit from it in their relations with agents.

Prosecutors’ institutional aversion to adjudicative loss—whether in a pre-trial suppression hearing or a post-trial reversal—can also lead them to underestimate the investigative or enforcement value of a proposed investigative tactic. To be sure, the tactic’s success could bring in valuable evidence that would increase the likelihood of an adjudicative victory (by plea or trial). But the prosecutor, having the ability to decline cases she deems “weak” (and probably having less invested in an investigation164) can usually be more cavalier about the risk that a particular investigation will come up dry.

These are all reasons why the rational prosecutor may be quicker to veto an agency’s investigative plans than a close reading of the relevant case law might require. But as Langevoort and Rasmussen have noted in the corporate context, the lawyer’s bias against risk may have a cognitive basis as well. It is true that, unlike their corporate cousins, prosecutors will often be consulting a body of case law skewed toward the approval of a proposed action.165 That is a natural consequence of a system in which criminal defendants are free to bring, and lose, meritless legal claims of improper agency action.166 But, as in the corporate context, the prosecutor will still encounter “asymmetric accountability”167 and be more likely to face review and condemnation for authorizing action than for vetoing


163. See Kahan, supra note 162, at 479–81 (suggesting that prosecutors use power of initiation to guide development of federal criminal law); cf. Mark J. Osiel, Lawyers as Monopolists, Aristocrats, and Entrepreneurs, 103 Harv. L. Rev. 2009, 2058 (1990) (book review) (“The differing social prominence of the bar in the civil and common law worlds is due to contrasting views within these systems over the degree of precision and certainty necessary to the exercise of professional authority.”).

164. To the extent that a prosecutor does have a considerable investment in the success of a particular investigation, because, say, she has devoted much of her time to it, or because she perceives a need to pursue this particular case, her decisionmaking bias may be quite different. See infra notes 251–254 and accompanying text.

165. Cf. Langevoort & Rasmussen, supra note 14, at 433 (noting that in the civil context, there is selection bias toward the “hard” cases, “leading some to predict a roughly 50/50 split between dispositions for plaintiffs and defendants on the merits, regardless of the prevailing standard of law”); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 4–5 (1984) (developing a model which “demonstrates that, where the gains or losses from litigation are equal to the parties, the individual maximizing decisions of the parties will create a strong bias toward a rate of success for plaintiffs at trial or appellants at appeal of 50 percent, regardless of the substantive standard of law”).

166. See Kate Stith, The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal, 57 U. Chi. L. Rev. 1, 29 (1990) (noting that “defense counsel risk little by disputing all available legal issues at trial and on appeal, even where the claim appears to have little merit”).

167. Langevoort & Rasmussen, supra note 14, at 427.
And with the costs of foregone action so often elusive, the temptations to err on the side of caution are great.

There are limits to the costs to agencies of involving prosecutors in investigative decisionmaking. The prosecutor who has helped (or at least thinks he has helped) call investigative shots is more likely to be aligned with the agency’s interests when it comes to making charging decisions. But it would not be surprising if many agents saw prosecutors more as a necessary evil or ambassadors to a foreign realm than as devoted champions. And the “costs” to agencies (measured as power lost to prosecutors) are presumably greatest in those areas in which judicial intervention is most likely, or in which the information acquisition tools controlled by prosecutors are most needed.

D. Culture Clash and Merger

To this point, we have seen the effects of structural arrangements and procedural rules on the prosecutor-agent relationship. The next element to add is cultural. At first blush, it would seem that, whatever their legal and institutional obligations to work together, prosecutors and agents would be pushed apart by their membership in distinct, even antagonistic, professional cultures. Yet here too, particularly in the federal system, there is a degree of convergence that often goes unrecognized.

The basics are well known. Although the FBI has a long tradition of lawyer-agents, most agencies do not. And even the FBI has changed a
lot since the Hoover years. As a general rule, then, most agents have not been exposed to the acculturation process at law school, which not only tends to be process oriented when it addresses criminal enforcement issues, but also exalts a norm of moral neutrality that can (but need not) lead prosecutors to distance themselves from the enforcement projects of the agents they deal with, who may see the world in more Manichean terms.

Law school is only the beginning of the story, though. Far more influential are the differences in the career paths of agents and prosecutors and the aftermarket they face. There are many career, or at least long-serving, prosecutors. But a great many view the job as a way station, a
means of acquiring human capital (litigation experience, familiarity with local legal practices and personalities) that will facilitate their representation of private clients thereafter.\textsuperscript{176} Even those prosecutors who plan to stay with the government will often orient themselves toward their professional counterparts through participation in local bar activities and the like.\textsuperscript{177} In contrast, agents stay a long time. A 1994 RAND report found that "[o]verall attrition in the [FBI] is low," and that, while some agents resign in their first five years, "[m]ost agents either retire at the earliest opportunity [age 50] or remain in the bureau until mandatory retirement [age 57]."\textsuperscript{178}

Agents and prosecutors also have different geographical orientations. AUSAs wishing to move may try to transfer to another U.S. Attorney's Office. They may even be asked by Washington to take on jobs in another city.\textsuperscript{179} But the typical AUSA stays in one city and builds her professional reputation there. Life is very different for agents. According to the RAND report, upon graduation from the FBI Academy, an FBI agent starts with a three- to five-year assignment to a field office that cannot be near her home.\textsuperscript{180} After that, she typically will be sent to another

\textsuperscript{176} See Glaeser et al., supra note 8, at 260–61; Richard T. Boylan & Cheryl X. Long, Size, Monitoring, and Plea Rate: An Examination of United States Attorneys 14–17 (July 10, 2000), available at http://fmwww.bc.edu/RePEc/es2000/0089.pdf (on file with the Columbia Law Review) (suggesting that young prosecutors are prone to take cases to trial to acquire human capital unless they are closely monitored); see also Richard W. Painter, Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers, 65 Fordham L. Rev. 149, 168 (1996) (noting how interest of agency lawyers in "building a reputation for thoroughness, integrity, and zealous representation of their clients" is "reinforced by values of the legal profession that accord the most respect to the toughest government lawyers, and not to the weakest or most accommodating").

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

\textsuperscript{177} Cf. James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 60 (1989) ("In a bureaucracy, professionals are those employees who receive some significant portion of their incentives from organized groups of fellow practitioners located outside the agency.").

\textsuperscript{178} Thie et al., supra note 171, at 321.


\textsuperscript{180} Thie et al., supra note 171, at 317.
field office—"often one of the 'top 12' offices that are larger, have broader operational requirements, and are sometimes difficult to staff—or to headquarters in Washington D.C." Reassignments are "based on the needs of the FBI and whether agents choose to compete for management positions in other locations." As all agents sign mobility agreements when hired, they can be, and are, "reassigned or relocated at regular intervals." Similar policies—including mobility agreements, regular reassignment, and control of the entire process from headquarters—can be found at other agencies.

These cultural differences can drive a powerful wedge between agents and prosecutors. Agents or even agencies seeking to justify their refusal to share information about sources and methods with prosecutors will assert a fear that such data will be misused once the prosecutors enter private practice. This tendency toward non-disclosure is bolstered by concerns that prosecutors have far less "on the line" when it comes to investigative security. An agent's promise to an informant is bonded by his and his agency's professional reputation. The prosecutor who will soon move into another world is not so bound. Agents may worry that prosecutors looking for lucrative private practice berths will be too quick to compromise cases with, or extend professional courtesies to, prospective professional allies, or, alternatively, too quick to tax agency resources by taking cases to trial unnecessarily in order to gain marketable litigation experience. Agents may also see prosecutors as all too ready to credit defense allegations of agent misconduct. Part of the problem may be sheer resentment on the part of agents at the rewards that private practice will bring prosecutors, and perhaps some disdain for the unworldliness of young prosecutors' law school experience. Prosecutors, for their part, may tend to identify with professional adversaries.

181. Id.
182. Id. at 319.
183. Id.
184. See id. at 323–24 (ATF); id. at 329–31 (Secret Service).
186. Cf. Stewart A. Baker, Should Spies Be Cops?, Foreign Pol'y, Winter 1994–1995, at 36, 46 (former general counsel of National Security Agency) ("It is bad security to describe highly sensitive sources and methods to a steady stream of prosecutors—many of them young lawyers who will soon be making a career out of representing criminal defendants.").
189. See James Eisenstein et al., The Contours of Justice: Communities and Their Courts 54 (1988) ("The higher-status members of the criminal court community share more than a common workplace and linked occupations. All are lawyers, sharing the
and see their job as reining in "cowboy" line agents who pay little heed to the niceties of due process.\textsuperscript{190}

Yet other forces reduce the culture gap. A small (but interesting) part of the story is the growing high-end private market for federal investigative expertise. When some of the best retirement jobs an agent could seek were in the security area, they had good reason to pursue bank robbery cases\textsuperscript{191} but no particular cause to get close with prosecutors. But particularly since the advent of the Federal Sentencing Guidelines, which put a high premium on internal corporate investigations,\textsuperscript{192} ex-federal agents have begun to find a new array of lucrative employment opportunities in the private sector.\textsuperscript{193} And the hiring will likely be done, or presided over, by lawyers, often ex-prosecutors who once worked with or around them.\textsuperscript{194}

relatively high status that this profession accords its members and the common experience of attending law school and practicing law.

\textsuperscript{190} Christine Biederman, Busted, Dallas Observer, July 10, 1997, at 21, 31 (claiming that "a good number [of DEA agents] display a devil-may-care attitude toward rules and regulations borne of running snitches, serving as buckshot-fodder, and hunting down drug dealers on unfamiliar, often hostile, foreign soil").

\textsuperscript{191} See Burnham, supra note 100, at 15 (quoting retired FBI executive) ("[A]t the local level, bank robberies are 'often' exciting, and rarely do they require serious work. And don't forget what may be the most important factor: A lot of agents want to please the bankers because one of their favorite retirement jobs is being the chief of security for a bank.").

\textsuperscript{192} See Note, Growing the Carrot: Encouraging Effective Corporate Compliance, 109 Harv. L. Rev. 1783, 1784-88 (1996) (discussing how Federal Sentencing Guidelines have placed corporations under considerable pressure to develop programs for policing employee conduct).


\textsuperscript{194} See Clark, supra note 193, at 125 ("It turns out . . . that many [investigative] agencies claiming to have operatives around the world are really just a couple of ex-prosecutors in an office with the directory of retired FBI agents.").; David M. Halbfinger, Corporate Cops: They're Private, They're Crime Busters and They're Proliferating, Newsday, Mar. 26, 1995, Money & Careers, at 1 (discussing role of ex-prosecutors in investigative industry); Anthony Lin, Lawyers Play Detective in Corporate Scandals, N.Y. L.J., July 26, 2002, at 1 ("Corporations typically hire law firms to spearhead internal investigations. . . . Law firms then decide whether or not to hire an investigative agency, and what role that agency will play."); id. ("[M]ost of the lawyers now leading major corporate investigations possess significant law enforcement backgrounds, whether from stints at U.S. attorney's offices, the Securities and Exchange Commission, the U.S. Department of Justice or elsewhere.").

Another factor is training—although who is training whom can vary. The young prosecutor charged with supervising a wiretap, dealing with a cooperator, or putting a corporate subordinate into the grand jury will frequently find that the street-wise agents on the case are far more perceptive instructors on human nature and criminal machinations than her law school professors, her former law firm colleagues, or even the prosecutors down the hall. \(^{195}\) For their part, an increasing number of agents, many quite inexperienced, \(^{196}\) find themselves looking to prosecutors for guidance and on-the-job training. \(^{197}\) One U.S. Attorney recently noted that the need for assistants to teach agents about white collar crime had increased “as many young agents have been diverted into violent crime investigations.” \(^{198}\) It would be an overstatement to say that the training of prosecutors by agents, or of agents by prosecutors, creates a common culture, \(^{199}\) but these processes certainly tend to bridge cultural and profes-

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\(^{195}\) Of course, a prosecutor’s failure to recognize a training opportunity can increase the cultural gap. See W. Boyd Littrell, Bureaucratic Justice: Police, Prosecutors, and Plea Bargaining 42 (1979) (citing study of justice system in a New Jersey county that notes how “delicate interpersonal problems” can arise when veteran police officers, much older and with more criminal law knowledge than young prosecutors, must defer to prosecutorial authority).

\(^{196}\) Even before September 11, turnover and aggressive agency expansion were producing a relatively less experienced workforce. See Department of Justice FY02 Budget: Hearing Before the Subcomm. for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the Senate Comm. on Appropriations, 107th Cong. (2001) (statement of Louis J. Freeh, Director, FBI), available at http://www.fbi.gov/congress/congress01/freeh051701.htm (on file with the Columbia Law Review) (“Agents hired since September 1993 represent about 41 percent of the agents on board today.”); Chitra Ragavan, FBI Inc.: How the World’s Premier Police Corporation Totally Hit the Skids, U.S. News & World Rep., June 18, 2001, at 14, 16 (noting that Freeh’s “ramping up of staff was combined with a rapid retirement of senior agents in charge and deputies (lured in part by lucrative pensions and large private sector paychecks), leading to a young workforce”). The trend will become even more pronounced in the wake of September 11. See Jerry Seper, FBI Sets “Aggressive Hiring” Goal at 900, Wash. Times, Jan. 30, 2002, at A4; see also Stephen Barr, New Drill in Law Enforcement: Ready, Aim, Hire!, Wash. Post, Feb. 13, 2002, at B2 (“Recruitment programs at Customs, the FBI and other law enforcement agencies are being driven by the war on terrorism and by efforts to improve homeland defense.”).

\(^{197}\) Cf. Dato W. Steenhuis, Coherence and Coordination in the Administration of Criminal Justice, in Criminal Law in Action 229, 243–45 (Jan van Dijk et al. eds., 1986) (An Advocate-General at the Court of Justice, Leeuwarden, Netherlands notes that, in absence of structural changes, “an important instrument to improve the coordination of production in the criminal justice system would be the adoption of a common organisation culture,” which could be accomplished through a common training program and job rotation for police, prosecutor, and judges.).
ional gaps and promote closer coordination in investigative decisionmaking.

Yet another factor, in many districts, is the presence in the U.S. Attorney's Office of one or more representatives of one or more agencies, in the capacity of "task force representative"—the product of an increasing use of these interagency groups. Over and above the coordinating function they play in the cases to which they are assigned, these agents can serve as general mediators between people from their agency and assistants, able to vouch for assistants to agents and vice versa.

Finally, one ought not underestimate the unifying influence of a shared commitment to "getting the bad guys," hardened by the adversarial process, nurtured by mutual respect and need, and on occasion lubricated by alcohol. Organizational theory teaches that "effective coordination always depends, at least in part, on the development of informal norms and conventions through group interaction, socialization, and experimentation." And, as in any other organizational setting, the social relationships that can arise out of constant and routine contacts will provide a solid foundation for trust.


201. State prosecutors have recognized the value of this mediation. See Michael L. Benson & Francis T. Cullen, Combating Corporate Crime: Local Prosecutors at Work 224 (1998) (noting how one local prosecutor in Florida facilitated cooperation with federal agencies by hiring two retired FBI agents as fraud investigators).


203. See Gary J. Miller, Managerial Dilemmas: The Political Economy of Hierarchy 193 (1992) (noting how, in one study, "gambling, games, and social interaction constituted a vital part of the means by which the men reinforced one another's expectations of cooperative play in their team production dilemma"); Nina Burleigh, White Power: Against Arab Terrorists or Wall Street Criminals, U.S. Attorney Mary Jo White Always Plays to Win, N.Y. Mag., July 9, 2001, at 26, 28 ("The U.S. attorney's office has always required a high comfort level with the boys in law enforcement, but White has stood out as a prosecutor's prosecutor, happiest socializing with FBI agents and cops.").

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

E. Conclusion

Where does this leave us? Prosecutor-agent relationships will vary from office to office, and, even within the same office, from agency to agency.\textsuperscript{206} Sometimes, it is just a matter of local "culture." That culture, however, may reflect the exigencies or luxuries of a particular case mix (which may in turn be a function of enforcement priorities). The more "proactive"\textsuperscript{207} the enforcement agenda, the more deeply involved prosecutors are likely to be in pre-indictment decisionmaking.\textsuperscript{208}

There may be districts where agents simply propose and prosecutors simply dispose.\textsuperscript{209} There may even be districts where, in doing so, each actor is largely indifferent to how the other will exercise his discretion. The goal of this Part, however, has been to show how institutional structures, legal rules, and professional interactions combine to bind the bureaucratic elements of the federal enforcement system far closer together than has been generally understood, at least in the academic literature.

\begin{itemize}
\item \textsuperscript{206} Julie O'Sullivan recently related how, as a former AUSA for the Southern District of New York working in the Little Rock, Arkansas, Office of the Independent Counsel, she was struck by how the regular Little Rock Assistants had a completely different way of doing cases. The agents came to them with completed cases ready to be indicted. They took the old model very seriously. The agents investigated, the prosecutors prosecuted. There were some exceptions, but overall that was definitely the model.

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

\item \textsuperscript{207} See Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts III & IV, 87 Colum. L. Rev. 920, 964 (1987) (contrasting "proactive" and "reactive" models of investigation).

\item \textsuperscript{208} See Hagan, supra note 22, at 123 (noting that “[p]roactive police work” by its very nature “involves a tightening of the coupling among the police, prosecutorial, and judicial subsystems”); see also Elizabeth Glazer, Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime, 26 Fordham Urb. L.J. 573, 577 (1999) [hereinafter Glazer, Thinking Strategically] (noting greater involvement of prosecutors in investigation of more complex cases).

\item \textsuperscript{209} When a supervisory FBI agent wrote in the FBI’s Law Enforcement Bulletin about how investigators could use “the enterprise theory of investigation” to help “dismantle entire criminal enterprises,” the role he envisioned for prosecutors was simply to advise investigators as to the elements of the offenses involved and whether they had been satisfied, and then to prosecute the completed case. Richard A. McFeely, Enterprise Theory of Investigation, FBI Law Enforcement Bull., May 2001, at 19, available at http://www.fbi.gov/publications/leb/2001/may01leb.pdf (on file with the Columbia Law Review); see also Little, Proportionality, supra note 75, at 734 (describing historical norm wherein agencies investigated and referred cases and prosecutors took cases to trial).
\end{itemize}
And the allocation of power that results from this dynamic will largely determine how enforcement discretion is exercised—against which targets and with what force.

II. Normative Models

As we have seen, the dynamics of prosecutor-agent interaction vary greatly across the country, and certain constituting elements of that interaction are deeply embedded in the way the federal criminal enforcement system has been structured. One is thus tempted to say either that the system cannot be fairly modeled, or, if it can, that it cannot be tinkered with. This Part nonetheless makes the normative move and asks what the relationship between federal prosecutors and agents ought to look like. For one thing, the answers we get can inform our assessment of the prevailing "prosecutorial-administrative system" that Jerry Lynch highlighted. But the project is prescriptive as well. Not every determinant of how authority is allocated between prosecutors and agencies is set in stone. Indeed, legislators and judges regularly change this allocation. But this policymaking has been largely by default—with changes in institutional design often the unforeseen consequence of decisions about what judicially enforced rights criminal defendants ought to have. The irony is that if we paid more attention to how power is allocated between agents and prosecutors, we might better protect criminal defendants' interests—and perhaps even their rights.

This Part starts by exploring the attractions of an organizational model that exalts prosecutors over agents. It then turns around to show why, at least in the context of a system with decentralized prosecutorial authority, one might not want to foster prosecutorial hierarchy. Having considered these two standard models, this Part suggests a third paradigm of agent-prosecutor interaction—a working group model that tries to capture the professional contributions of each side, and to promote mutual monitoring.

A. Toward a Prosecutorial Hierarchy?

Before modeling the optimal relationship between prosecutors and agencies, one first needs at least a rough sense of what one wants the federal enforcement system to do. One hopefully rather uncontroversial goal is that of prosecuting only guilty people, convicting them, and doing so in accordance with law (defined broadly). A second, hopefully only slightly less controversial, goal is that enforcement proceed with a degree of moderation. American criminal law is famous (or infamous) for its

210. Lynch, Our Administrative System, supra note 6, at 2145.
211. See infra Part III.
breadth and the discretion it gives enforcers.\textsuperscript{212} And perhaps because there is so little pressure on federal enforcers to act on legislative prohibitions, the federal criminal "code" may well be even broader than that of the states in the range of conduct it ostensibly covers.\textsuperscript{213} Reasonable minds can differ "over what business practices should be deemed fraud, even over whether perjury in a civil case should be pursued criminally,"\textsuperscript{214} but they are unlikely to differ over the need for institutionalized restraint in this area.

Why can't we start by reducing the need for executive restraint by demanding that Congress take more pains to specify what should really be a federal crime? We can, but I will not spend too much time on the point for three reasons: (1) It is too obviously right as a theoretical matter, the corollary of our allegiance "to the rule of law and democratic accountability";\textsuperscript{215} (2) many, from the Chief Justice of the United States on down, have already made the argument forcefully and well;\textsuperscript{216} and (3) it would be easier to get blood from a stone.\textsuperscript{217}

Restricting the focus to the executive branch, one can easily—although, as will be seen, not necessarily—push toward a normative model of prosecutorial-agency interaction that strives, within the limits of a fragmented organizational chart, to subordinate agents to prosecutorial judg-

\textsuperscript{212} See William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 512 (2001) ("Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over.").

\textsuperscript{213} See Lynch, Our Administrative System, supra note 6, at 2137 (contending that many federal criminal statutes "are ill-defined, overbroad, or insufficiently concerned with culpability"); Richman, Federal Criminal Law, supra note 33, at 760–61 ("[A]nyone with more than a passing familiarity with federal criminal law is struck by the extraordinary extent to which Congress has eschewed legislative specificity in this highly sensitive area."). The story of why there is no real "code" is well told in Charles R. Wise, The Dynamics of Legislation: Leadership and Policy Change in the Congressional Process (1991). See generally Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 Buff. Crim. L. Rev. 45 (1998) (reviewing historical efforts to revise the federal criminal code).

\textsuperscript{214} Richman, Project Exile, supra note 29, at 397.

\textsuperscript{215} See Kahan, supra note 162, at 397.


\textsuperscript{217} The extent to which the lack of legislative specificity reflects an unrestricted congressional grant of power is open to dispute. Compare Kahan, supra note 162 (focusing on breadth of substantive federal criminal law), with Richman, Federal Criminal Law, supra note 33 (exploring mechanisms other than substantive law through which Congress guides the exercise of enforcement discretion).
In this model, prosecutors, just like their corporate cousins (though perhaps for different reasons), are to be exalted in their gatekeeping role, celebrated for their ability to prevent agency misconduct or excessive zeal, and given every tool possible to enhance their capabilities to this end.

An effort to bolster prosecutorial authority need not rest on any claim of superior judgment. In their gatekeeping capacity, prosecutors merely supplement agency judgments about appropriate targets and tactics; they do not replace them. Even if they were somewhat less skilled or interested than agents, prosecutors could still promote legal and moderate enforcement by offering an additional level of review—as long as prosecutors were not so unskilled that agents relaxed their own efforts out of frustration. As has been noted in the separation of powers context, what matters in this extremely thin analysis is the number of components and their serial arrangement. And anything done to ensure that prosecuting offices have access to information about targets and tactics, and the ability to act on that information, will help reduce type I errors (of commission).

Claims of superior judgment can also be made. If the goal is to ensure that agents' investigative efforts do not violate constitutional or statutory strictures or the admonitions a court has made in its supervisory capacity, then who better to advise agencies prospectively and monitor

218. See Kent Greenawalt, Conflicts of Law and Morality 357 (1987) ("The police should . . . not take upon themselves the responsibility of resolving debatable and troublesome moral questions that might affect prosecution; those should be left to the prosecutors."). One can envision a hierarchical system in which prosecutors are subordinated to police, as prevailed in England and Wales prior to the creation of the Crown Prosecution Service. See Stuart P. Green, Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute, 97 Yale L.J. 488, 494 & n.38 (1988). But I will restrict myself to hierarchical arrangements that are remotely plausible in the U.S. federal context.

219. Cf. Kraakman, Corporate Liability Strategies, supra note 14, at 888–96 (exploring efficacy of gatekeeper liability for parties such as outside directors, accountants, lawyers, and underwriters in preventing corporate malfeasance); Kraakman, Gatekeepers, supra note 14, at 53 (examining economic costs of imposing liability on "private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers"). See generally Gilson, supra note 14 (examining devolution of legal counsel's traditional function as gatekeeper in preventing strategic litigation).


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

agency compliance retrospectively than prosecutors, whose current and future jobs place a premium on the knowledge (or prediction) and transmission of legal norms? And the more junctures at which prosecutorial advice is sought, and the information needed to give it is provided properly, the better. Similarly, prosecutors' familiarity with de jure and de facto standards of evidentiary sufficiency—what counts as "beyond a reasonable doubt" in court and what will actually persuade a jury in the district—make them valuable resources for the agents putting cases together, so long as the prosecutors know the true quality of the evidence.

Another, perhaps more tenuous, argument for maximal prosecutorial involvement in agency decisionmaking rests not on prosecutors' technical abilities, but on the sense of perspective and unique commitment to procedural justice that they are thought to bring to the enforcement bureaucracy. The idea of prosecutors as "magisterial" figures, bound by a special duty to "seek justice," probably would sound rather self-aggrandizing to the dedicated federal agent. After all, he too thinks of himself as pursuing justice, and if he is doing his job right, he too will keep a professional distance from his cases, tempering zeal with judgment and moderation. Underneath all the aspirational talk in law reviews, judicial opinions, and professional literature about prosecutors as "ministers of justice" lurk contestable assumptions about prosecutors' special fitness for that role, and the unsuitability of agents or police officers for it.

Having noted the occasionally grating triumphalism of the legal literature, however, one can still find some truth in assumptions about


225. See Candace McCoy, Police, Prosecutors, and Discretion in Investigation, in Handled with Discretion: Ethical Issues in Police Decisionmaking 159, 174 (John Kleinig ed., 1996) ("It seems that prosecutors are more likely to mitigate their adversarialness than police, because they do not have to cope with the daily suspiciousness and elements of danger, nor necessarily with the 'us versus them' mentality, as do police.").

prosecutorial tendencies to moderate agency judgments and tactics appropriately. In part, it is a matter of professional allegiances and associations. In his valuable study of a Canadian Crown Attorney’s Office, Brian Grosman found that while some prosecutors identify with the police and associate defense lawyers with their clients, others “identify with the values of the defense lawyers” and see themselves as part of “the general legal community”—a community that does not include cops and agents.\footnote{227} Given that their raison d’être and future livelihoods turn on the exaltation of procedural due process values, prosecutors might be expected to be more sensitive to such niceties than agents, whose success is more likely to be measured in terms of crime control.\footnote{228} That prosecutors are also subject to disciplinary rules formulated and enforced by their professional peers may increase their sensitivity yet further (even assuming the underenforcement of those rules).\footnote{229}

Going further out on a limb, one might also see federal prosecutors as better reflectors of community values than agents, and as better intermediaries between parochial agency interests and local needs. All enforcers work in the shadow of their jurisdictions’ juries, and neither agents nor prosecutors will gain much if they regularly pursue cases that jurors do not think should be pursued, or tactics that repulse local jurors and judges. Conviction-maximizing may not be their only goal, but it is a necessary one.\footnote{230} As the actors responsible for pitching cases to juries, and for negotiating dispositions with an eye to jury responses, however, prosecutors are more attuned to these matters and, indeed, as has been seen, are valued by agents for this very expertise.\footnote{231} The U.S. Attorney system, which places local lawyers in an office led by an official appointed (usually) with considerable input from local political figures, accentuates this comparative advantage, particularly with respect to strongly centralized agencies in which hierarchical controls are reinforced by geographi-

\footnote{227. Brian A. Grosman, The Prosecutor: An Inquiry into the Exercise of Discretion 68 (1969); see also Suzanne Weaver, Decision to Prosecute: Organization and Public Policy in the antitrust division 160–61 (1977) (noting that “close connections” that Antitrust Division lawyers “maintain with their colleagues in the private antitrust bar” are regarded by division lawyers as “a powerful constraint on their actions”); supra notes 175–177 and accompanying text (discussing prosecutors’ professional orientation).

\footnote{228. The crime control/due process dichotomy was, of course, first articulated by Herbert Packer. Herbert L. Packer, The Courts, the Police, and the Rest of Us, 57 J. Crim. L. Criminology & Police Sci. 238, 239 (1966).

\footnote{229. See Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 St. Thomas L. Rev. 69, 72–76 (1995) (arguing that “[c]riticism of formal disciplinary mechanisms overlooks the importance of informal judiciary controls, if not informal professional controls”); Horwitz, supra note 223, at 1377 (“The fact that a police prosecutor is not bound by an attorney’s code of ethics or answerable to the disciplinary process for attorneys is perhaps the most disturbing aspect of the practice of police prosecution.”).

\footnote{230. See Richman, Old Chief, supra note 7, at 967–68.

\footnote{231. See supra notes 150–152 and accompanying text.}
Moreover, at least in recent years, the natural tendency of U.S. Attorneys to respond to local political forces has been reinforced by the readiness of Main Justice to devolve power in this direction. As one former U.S. attorney put it:

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

All these premises argue for measures designed to increase the likelihood that the prosecutors can exercise independent judgment in their charging decisions. With their negotiating power thus increased, prosecutors would inevitably gain a greater say in investigative agency decisions about resource allocations and tactics. Measures could also be taken that more explicitly involve prosecutors in investigative decisionmaking, or at least confirm their existing control over particular investigative tactics.

B. Questioning Hierarchy?

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

To begin, one may not accept the assumption that prosecutors have superior judgment when it comes to targeting and tactics. There are three different, but related, elements to this challenge. The first, without denying prosecutors’ technical legal expertise, questions whether they really are forces of moderation. If one believes, like Dan Kahan, that ambitious U.S. Attorneys “consistently overreach in the hope of pleasing local interests who are in a position to confer future political rewards,” any move to increase prosecutorial control over agency decisionmaking is a step in the wrong direction. Kahan’s cure for this pathology is to shift

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234. Braniff, supra note 72, at 311.

235. Kahan, supra note 162, at 496.
more control over prosecutorial legal theories to Main Justice. But his diagnosis could also be addressed by measures that shore up agency control over investigations. It does not matter, in this analysis, whether agencies are seen as politically responsive to the president and the administration, or as semi-autonomous and relatively apolitical. And indeed one’s view on this score will vary with agency and with administration (and probably with one’s frame of reference). The important point is that, either way, so long as their agendas differ, relatively centralized enforcement agencies can be counterweights to prosecutorial overreaching of the type Kahan fears.236

The second element of this challenge to prosecutorial incursions into agency decisionmaking rests on a weaker form of Kahan’s diagnosis. U.S. Attorneys’ Offices do not necessarily “overreach,” this argument goes, but they are prone to reflect local enforcement preferences at the cost of national priorities.237 The point is only relative, since agency field offices also respond to local groups and authorities.238 But U.S. Attorneys—frequently members of the local elite, selected by local politicians—and their assistants—local lawyers whose chosen livelihood requires them to think constantly about local jury responses and local legal culture—are unlikely to have the same continuing interest in adhering to a national bureaucratic agenda as their agency counterparts.239

236. See H. Geoffrey Moulton & Daniel C. Richman, Of Prosecutors and Special Prosecutors: An Organizational Perspective, 5 Widener L. Symp. J. 79, 90 (2000) (noting how FBI acts as a “relatively apolitical watchdog over line prosecutors”); see also Heymann, supra note 36, at 100 (noting that “involvement of professional, career agents makes less credible charges of political bias in [the] Justice [Department]”).

237. Cf. Richman, Project Exile, supra note 29, at 405 (“Against sometimes parochial local needs, a U.S. Attorney must consider broader national priorities, usually conveyed by Main Justice or expressed by the referrals of highly centralized enforcement agencies . . . .”).

238. See Wilson, Investigators, supra note 57, at 202 (“[F]ield administrators are likely to have strong ties to local authorities including, possibly, governors, congressmen, and police chiefs, and these alliances are disrupted only at the [central agency] executive’s peril.”); see also Statement of Eleanor Hill, supra note 56, at 13 (former FBI headquarters official notes that the Bureau’s “culture often prevented headquarters from forcing field offices to take investigative action that they were unwilling to take”); John T. Scholz et al., Street-Level Political Controls over Federal Bureaucracy, 85 Am. Pol. Sci. Rev. 829, 831 (1991) (studying effects of local politics on enforcement activities of Occupational Safety and Health Administration field offices); Press Release, Senator Dianne Feinstein, Senator Feinstein Asks Attorney General Ashcroft to Officially Approve DEA Office in Redding (July 6, 2001), available at http://feinstein.senate.gov/releases01/r-redding.html (on file with the Columbia Law Review) (asking Attorney General for DEA office “[t]o combat the serious methamphetamine problem in Northern California”).

239. See CAFLE Hearings, supra note 44, Nov. 13, 1998, at 34–37 (author’s notes) (testimony of Chuck Wexler, Executive Director, Police Executive Research Forum) (noting how U.S. Attorney must play critical role in focusing attention of federal agencies on local problems); Rory K. Little, Good Enough for Government Work? The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty, 14 Fed. Sentencing Rep. 7, 9 (2001) (finding it unsurprising that “U.S. Attorneys within states that do not permit the death penalty do not prosecute capital cases as often,
junction between prosecutorial and agency priorities will be particularly great when the benefits of pursuing a case or class of cases will be felt only nationally and not locally. Tax prosecutions—or at least those brought to deter tax cheating—present just the most obvious example of this problem of the commons, and, not surprisingly, are often hard to sell to U.S. Attorneys' Offices.

Recognizing that all agendas are political (although one hopes not partisan), the question becomes: Whose politics determine the outcome? If one wants national priorities to dominate (or at least not to be given short shrift), one needs to avoid giving prosecutors, who already control the charging process, too many tools to impose their agendas on agents.

The third element has less to do with the politics of agenda setting and more to do with comparable knowledge and capacity. Decisions to pursue a defendant and the force with which he should be pursued are not just legal or even moral judgments, but inevitably involve a vision of how common the conduct is, how socially harmful it is, and how one offender stacks up against another. Even if prosecutors were able to gain full access to the information an agency has on a case it wants to pursue, they would still lack a systematic sense of all the other possible cases. Of course, federal agency knowledge may be spotty as well, outside of particular "beats," but it is supplemented by local enforcers (who thereby gain some hold over agencies that can undercut their centralization) and, at worst, it is still better than prosecutors' knowledge. Prosecutors regularly

or recommend them, as do U.S. Attorneys in states that vigorously pursue the death penalty); Rabin, supra note 12, at 1048 ("On the whole, the agencies keep much tighter rein on field personnel than does the Justice Department on U.S. Attorneys."). This is not to say that prosecutors have no interest in national priorities. See generally Andrew B. Whitford, Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys, 12 J. Pub. Admin. Res. & Theory 3 (2002) (exploring how U.S. Attorneys respond to national political control).


have to make the grossest "apples" vs. "oranges" sorts of comparisons—
e.g., one complicated tax case vs. three easy gun cases—and because of
their gatekeeping position and relative neutrality, they are better placed
than agencies for such judgments. And, as Elizabeth Glazer has demon-
strated, prosecutors may be well placed to alert one agency to the syn-
ergies of sharing information with another. But when it comes
to discriminating among the matters within their respective jurisdictions,
the agencies reign supreme (or at least they should). Moreover, prosecu-
tors' asserted competence to rise above agency turf concerns and look at
"the totality of threats" within their districts is a claim that rests more on
the blinders with which agencies see the world than on the keenness of
prosecutorial vision.

A second challenge to the hierarchical model does not dispute any
of its assumptions about the value of prosecutorial decisionmaking but
rather argues that prosecutorial contributions can best be made from a
perspective somewhat removed from the investigative context, and would
even be threatened if injected into that context. The problem finds
parallels in the debate over the advantages of inside, as opposed to
outside, counsel when it comes to promoting legal compliance by private
firms. Inside counsel, according to their champions, "can use the informa-
tion, organizational power, and trust they obtain from being part of
the client organization to participate in corporate planning, anticipating
legal problems and maintaining legal compliance." However, as Ron-
ad Gilson has written, "the risk is real that inside counsel may not share
outside counsel's preference for acting as a gatekeeper" and will turn to
"members of corporate management rather than other lawyers" as a "re-
ference group." The risk will be more pronounced if inside lawyers are

243. See Elizabeth Glazer, Thinking Strategically: How Federal Prosecutors Can
Reduce Violent Crime, 26 Fordham Urb. L.J. 573 (1999); Elizabeth Glazer, Harnessing

244. See also CAFLE Hearings, supra note 44, Dec. 2, 1998, pt. 1, at 148 (author's
notes) (testimony of Mark Calloway, U.S. Attorney, W.D.N.C.) (noting that U.S. Attorney's
Office is "unique" in being able to see cases of every agency and being able to tell where
there is an "overlap or where there's a need for cooperation").

245. See, e.g., New Zealand Law Commission, Rep. No. 66: Criminal Prosecution 3
file with the Columbia Law Review) ("Prosecution should be separated from investigation.
Separation of these two key functions ensures that there are checks and balances
incorporated into the system to protect the individual. It also promotes impartiality and
ultimately respect for the criminal justice system and the rule of law."); Landes, Comments,
supra note 66, at 227 ("[W]hen investigation and prosecution are combined we might
expect a greater use of settlements . . . that avoid the acknowledgement of error when it
appears that the evidence is insufficient to convict the defendant in a trial."); Craig
B1 (explaining his refusal to assign prosecutors to work in teams with police officers, state's
attorney cites "rules against prosecutors becoming directly involved in a police
investigation").

246. Rosen, supra note 152, at 487.

247. Gilson, supra note 14, at 915.
scattered within an organization, working alongside the people they counsel. As Chayes & Chayes noted,

The more decentralized the lawyers are, . . . the more likely it is that the preventive program will be fully integrated with general corporate operations. Lawyers who have daily contact with product, manufacturing, marketing, and sales personnel know the routines and practices and can correct them. Decentralization, however, means less expertise, and a risk of less professional objectivity.248

The analogy between prosecutors and corporate counsel has its limits,249 but the tension between engagement and informational access on the one hand, and professional judgment on the other, is equally present in the range of relationships that prosecutors can have with criminal investigations. Knowledge itself can influence perspective. The prosecutor who, while taking no part in the conduct of investigations, regularly learns from agents about their false starts and tactical gambles may find himself more sympathetic to agency travails than would a more removed official accustomed to hearing seamless narratives. This is not necessarily so, but the readiness of criminal justice officials to become inured to the inadequacies of police officers is a sad but familiar phenomenon and helps explain the allure for defendants of the more naive decisionmaking that juries offer.250

The risks to prosecutorial judgment are even greater when prosecutors become extensively involved in investigative decisionmaking: Just as corporate lawyers "cease to objectively evaluate transactions that are often their own creations,"251 prosecutors who have helped call the shots in an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter.252 This response is in part quite rational and appropriate, since they will have already passed judgment on the nature and extent of the resource commitments. But the response

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250. See David N. Dorfman, Proving the Lie: Litigating Police Credibility, 26 Am. J. Crim. L. 455, 476–77 (1999); see also United States v. Lawes, 292 F.3d 123, 129 (2d Cir. 2002) (rejecting claim that prospective jurors should have been voir dired about attitudes toward police, and noting that "juries in New York City show a healthy skepticism of prosecution cases built entirely on the credibility of police officers").
252. See Robert W. Gordon, Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair, 68 Fordham L. Rev. 639, 645 (1999) ("Procedures for checking over-zealousness should include assigning someone in the office, preferably the lead prosecutor himself, the role of skeptic—the lawyer who picks apart the case, puts the case for the defendant, demands to be told why it is worth prosecuting.").
can go beyond what is merely rational. A prosecutor may be loath to pull
the plug on an investigation in which she has invested time and profes-
sional prestige.253 She may be cognitively limited as well—too quick to
find that any new information merely confirms her original impressions
of a case or a target.254 And, unfortunately, these challenges to objectiv-
ity will be greatest in the “big case,” where the prosecutor’s professional
commitment is the largest, where her immersion in the investigation is
the longest, and where her close-knit relationships with the case agents
can come at the expense of her ties to the rest of her office.255 These
factors may be offset by the higher level of supervisory oversight (which
the line assistants are likely to see as “meddling”256) these cases are likely
to receive. But supervision of fact-intensive judgment calls is bound to be
difficult.

While one risk of too much prosecutorial involvement in investiga-
tive decisionmaking is that prosecutors’ ability to monitor agent conduct
is reduced, another risk is that such involvement will threaten the esprit
and effectiveness of investigative agencies. Even as we celebrate the giant
strides made in the professionalism of police agencies over the past cen-
tury and recognize the particular triumphs of federal units in this re-
gard,257 we ought not forget that professionalism cannot be fostered with-

253. Painter, Interdependence, supra note 251, at 545 (stating that one reason for
loss of objectivity is that “lawyers invest their time and professional prestige in transactions
they want to see completed”).

254. See Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry into
Lawyers’ Responsibility for Clients’ Fraud, 46 Vand. L. Rev. 75, 100–01 (1993) [hereinafter
Langevoort, Lawyers’ Responsibility] (Because “[t]he processing of new information and
the search of memory to aid in inference are biased, sometimes heavily, toward the
confirmation of existing schema,” even without “motivational factors, a lawyer is likely to
dismiss as unimportant or aberrational the first few negative bits of information that she
receives regarding a client or situation.”).

255. Striking aspects of the recent El Rukn debacle in Chicago (where members of
the prosecution team turned a blind eye to drug use and sexual misconduct by
incarcerated cooperating witnesses) and the revelations about the FBI’s relationship with
“Whitey” Bulger (a Boston gangster who used his service as an FBI informant to gain carte
blanche for his own racketeering activities) are the degree of closeness between the
prosecutor and the agents in each case and the degree of separation between these teams
and the rest of the U.S. Attorney’s Office. Cf. United States v. Griffin, 856 F. Supp. 1293,
aff’d, 55 F.3d 239 (7th Cir. 1995); Lehr & O’Neill, supra note 82, at 210–13; Jeffrey
Toobin, Capone’s Revenge, New Yorker, May 23, 1994, at 46 (discussing alleged
misconduct by prosecutor and agents in El Rukn cases). “War rooms”—where agents and
prosecutors cluster—are, of course, relatively common in very large cases, and they bring
important benefits in efficiency and esprit. But they have their risks as well.

256. Cf. Langevoort, Lawyers’ Responsibility, supra note 254, at 114 (“Each of these
bureaucratic interventions [by a law firm to protect its reputation against cognitive pitfalls
on part of its partners] comes at considerable cost . . . in terms of time and effort as well as
the more subtle interference with individual partner autonomy that otherwise
characterizes many highly successful firms.”).

257. See Samuel Walker, A Critical History of Police Reform: The Emergence of
Professionalism 159–66 (1977) (exploring role of FBI in fostering police professionalism);
out autonomy. And professional autonomy "involves the feeling that the practitioner ought to be able to make his own decisions without external pressures from clients, those who are not members of his profession, or from his employing organization."258 Of course, concern for agency esprit can occur even within the framework of a hierarchical relationship. "[A] boss frequently finds herself choosing not to overturn a subordinate's bad decision because doing so would reduce the subordinate's effort and enthusiasm in the future."259 But, given their likely career paths, many assistants might not take this long-term view.

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

The alternative normative model that emerges from these concerns does not exalt agents over prosecutors, but it counsels against exalting prosecutors over agents. Rejecting hierarchy, it would promote measures defining and distinguishing between the separate ambits of each group. As Fama and Jensen have explained, organizations "in which important decision agents do not bear a substantial share of the wealth effects of their decisions" can survive in part because the organizations have structures that "separate the ratification and monitoring of decisions from initiation and implementation of the decisions."260 It does not take a large leap in terminology to apply this model to law enforcement bureaucracies and to see it as supporting a system that keeps agents and prosecutors at arm's length.

As we have seen, coordinate separation has costs. Therein lies the attraction of the hierarchical model. But coordinate entities can check one another, particularly when institutional structures and cultural differ-

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259. George Baker et al., Informal Authority in Organizations, 15 J.L. Econ. & Org. 56, 57 (1999); see Paul A. Sabatier et al., Hierarchical Controls, Professional Norms, Local Constituencies, and Budget Maximization: An Analysis of U.S. Forest Service Planning Decisions, 39 Am. J. Pol. Sci. 204, 207 (1995) ("[T]op officials have less control over 'street-level bureaucrats' than the Progressives envisioned, particularly when field officials are professionals whose job commitment is contingent upon their ability to exercise substantial discretion." (citations omitted)).

ences deter co-optation. The question thus becomes whether this really is a zero-sum game. Perhaps there is a third way.

C. Toward a Theory of Working Groups and Mutual Monitoring

Even beyond our shores, the debate over the appropriate allocation of power within enforcement bureaucracies often seems to present a stark choice between integrated hierarchy and coordinate separation. Such was the dichotomy presented at a recent Council of Europe conference. While noting the similarities between his nation’s criminal justice system and Sweden’s, the Prosecutor General of Finland noted that “Finland did not wish to make the prosecutor head of the pre-trial investigation as is the case in Sweden. In Finland every effort was made to emphasize in particular a prosecutor’s objective neutrality.” But the Prosecutor General of Sweden explained:

"It has sometimes been argued that early assumption of responsibility dilutes the prosecutor’s functions of supervision and control. To that I would reply that it must be an advantage if the supervisory and controlling functions come into play at an early stage of the investigation, above all where serious crimes are concerned. And there are guarantees of legal security built into the system which offset the risks associated with early participation by the prosecutor..."262

The threat that integration poses to prosecutorial independence has been noted in Australia as well. There, when a proposal was made to give the Director of Public Prosecutions the power to intervene in investigations, one legislator condemned the “dangerous” idea as “absolutely opposed to common law principles.” He scathingly referred to the proposal as “the Hawaii Five-O amendment,” calling it an “attempt to turn (the DPP) into a Los Angeles type district attorney’s office.”263

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

The short answer is that we couldn’t even if we wanted to. In thinking about how the federal enforcement bureaucracy should be organized, one can no more choose between hierarchy and integration than one can choose between crime control and due process in structuring a criminal justice system.264 As was true with Herbert Packer’s models, each of these


262. Klas Bergenstrand, Role and Status of the Public Prosecution Crime Policy, in European Conference, supra note 261, at 89, 92.


264. Packer, supra note 228, at 239.
is not a goal that one strives for to the exclusion of the other. They are simply poles between which we must navigate. The question remains, though: In which direction should we be steering?

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

Setting an enforcement strategy is peculiarly challenging for federal agencies since it requires the identification of the (or an) optimal allocation of responsibility between federal, state, and local authorities. No unified theory provides the answer(s), and even if it did, any solution would be transitory. National needs, whether actual or perceived, change. And every new priority has institutional consequences that in turn shape the setting of priorities. It is noteworthy that the debate about the FBI's role in combating terrorism is now being played out primarily in terms of the locus of decisionmaking, with champions of centralization pointing to the nature of the mission—which requires a high degree of coordination with other agencies, both foreign and domestic, and puts a premium on centralized intelligence collection and dissemination—

265. See Frase, Decision, supra note 52, at 280–90 (noting challenges of coming up with an optimal federal prosecution strategy).

and its sensitivity, while champions of field office authority complain of a "lack of investigative zeal at headquarters."  

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

For help in conceptualizing the ideal interaction between prosecutors and agents, we need not look far. There are features of the dynamic that are unique to the law enforcement context. But, at heart, the productive institutional collaboration we seek is just a variant of the team-  

267. Some political considerations, necessarily within the purview of the headquarters in Washington, would be jeopardized by increased discretion at the field office level:  
One longtime FBI agent... recently questioned the new rules that have been established for agents in field offices to initiate counterterrorism investigations without first obtaining approval from headquarters. "I'm worried about six or seven years from now when there are five or six Arab-American members of Congress and they call me before some committee to grill me on my actions against their people," the agent said. Walter Pincus, Congress to Postpone Revamping of FBI, CIA, Wash. Post, July 2, 2002, at A1; Testimony of David Walker, supra note 266, at 17 (noting organizational benefits of "[n]ew provisions that provide more authority to FBI field offices to initiate and continue investigations").  


269. See John P. Heinz & Peter M. Manikas, Networks Among Elites in a Local Criminal Justice System, 26 Law & Soc'y Rev. 831, 832–33 (1992) ("A lack of system integration may, of course, produce coordination problems, unpredictable outcomes, inconsistent decisions, rule violations, or other pathologies... But loose coupling may also be functional."); id. ("The relative separation of the elements or subsystems permits each to maintain a measure of independence, which may make the system more flexible and less resistant to innovation.") (citation omitted)).  

work of diverse professionals championed both in an emerging body of theoretical literature and in a growing number of applied contexts. Part of the allure of collaborative teamwork between diverse professionals stems from the contribution that their interaction can make to the decisionmaking process itself. The risk of "polarization" that pushes a group to choose an extreme option is increased, Cass Sunstein has observed, when the group has "a degree of solidarity." And solidarity can be a function of organizational structure. As Mark Seidenfeld has noted, "polarization is likely to occur when groups are 'attitudinally homogeneous,' which, in turn, is more likely to be the case when members share similar professional and work backgrounds than when they pursue different disciplines and come from different offices within the agency."

In many organizational settings, the most effective way to promote healthy deliberation and moderation is to locate decisionmaking in "teams," each defined as a set of individuals (1) whose agencies' contributions are thought to be mutually complementary in their productive capacities and (2) whose individual characteristics—including such matters as their knowledge and skills, their access to resources and to status within their home agencies, their aspirations and beliefs, their personal strengths and weaknesses—are taken into account by those, including the team members themselves, who organize their respective activities.

The point is not simply one about fruitful discussions informed by diverse perspectives, however. The allure of team production, and the attention that it has received in the corporate and organizational theory literature, come from its promise in addressing the classic agency problem that arises when there is no principal (employer) able to monitor the


274. Seidenfeld, supra note 34, at 544.


contributions of its various employees. If properly structured, a team production process "can transcend the built-in limitations of hierarchical control by developing norms of reciprocated cooperation and effort."277

This paradigm can easily be transferred to the federal enforcement context. Here, there is no "mediating hierarch"278 able to monitor the respective outputs of agents and prosecutors. There is not even a "hierarch" willing and able to monitor their joint output. The breadth of its substantive legislation and the merely sporadic attention it gives to enforcement decisionmaking suggest Congress lacks the inclination. To be fair, though, the informational barriers to monitoring may explain why legislators have not invested much in this area. After all, how does one assess the quantity, let alone the quality, of "output" that can be measured only by looking at the cases and tactics not pursued and a universe of potential cases vaguely defined? And courts lack the tools (as well as the information), since their own potential points of intervention (already scant, given the discretionary power enforcers have been legally granted) are usually bargained away by defendants.279

To be sure, some may see it as perverse (or worse) to find virtue in a system where the only real control on the behavior of one executive agency comes from another executive agency. But in the second (or third) best world in which we find ourselves, we must find virtue where we can. In any event, necessity is not the only justification. By using the organizational literature to help reconcile ourselves to the doctrinal oddity of thinking in separation of powers terms within the executive branch, we can begin to see how the structured interaction of enforcers drawn from two relatively distinct cultures can promote depolarization and more thoughtful decisionmaking, even in the absence of legislative or judicial oversight.280

Moreover, this model of professional interaction between lawyer and non-lawyer may work better here than in the corporate setting, where institutional and market pressures can lead the inside (or even the

278. Margaret M. Blair & Lynn A. Stout, Director Accountability and the Mediating Role of the Corporate Board, 79 Wash. U. L.Q. 403, 421 (2001) (noting that team members can "solve the team production contracting problem and discourage mutual rent-seeking by agreeing to subject themselves to a mediating hierarch who will monitor their efforts and decide how to divide the spoils").
279. See supra notes 4–6 and accompanying text.
outside) counsel to subordinate his professional instincts or values to more entrepreneurial goals. At least in the federal context, the distinctive institutional homes for prosecutors and agents, and the distinctive aftermarkets they face, provide the best guarantee that the blurring of the line between investigatory and adjudicatory decisionmaking will not break down the diversity of their perspectives. The value of experience and specialized knowledge may limit the extent to which prosecutors and agents can be rotated from unit to unit, or from investigation to investigation. But so long as care is taken that an agent's primary orientation is to his agency, and an assistant's primary orientation is to his office, and for both cultural and materialist reasons, to his profession, the benefits of deliberation can best be captured in the context of teams, not arm's-length interagency negotiations.

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

But can one prove that all is not right? It is tempting to bracket difficult empirical questions and to rely on horizontal equity. Given that prosecutors play a larger role in the development of white collar cases than they do in, say, most drug cases, one might be troubled by the fact that white collar defendants receive special insulation from aggressive enforcement. One might therefore support measures that bring the moderating influence of prosecutors to bear on other sorts of investigations. There are some problems with this critique, though. To begin, it is not clear that it is the agents who need moderation in white collar cases.

281. See Seidenfeld, supra note 34, at 541. Seidenfeld notes that "groupthink" is especially likely to occur when a group's members are homogeneous in terms of social background and ideology, when the group leader and decisionmaking norms and processes tend to direct the group toward a preselected outcome, and when the group believes that it faces a crisis situation in which there is high stress and little opportunity for a decision that will improve the status quo.

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

283. See Sunstein, supra note 273, at 105-06.

284. See, e.g., Glidewell, supra note 280, at 128 (suggesting use of integrated "Criminal Justice Units" composed of police and Crown Prosecution Service personnel).

285. See Webster Report, supra note 99, at 16, 33 (describing efforts of U.S. Attorneys' Offices to bring CID agents in to handle complex financial cases); Burnham,
Agencies may articulate white collar enforcement agendas, but on the personnel side, it is the prosecutors, not the agents, who are most likely to be gung-ho in white collar cases, where aggressive investigative and trial tactics are most likely to be rewarded by the aftermarket. Moreover, even were one to conclude that the nature of the prosecutor-agent interaction in white collar cases somehow led to more “moderation,” one might still be untroubled by the comparison to narcotics cases. Perhaps white collar enforcement, by its very nature and because of the extraordinary breadth of statutes directed at white collar offenses, threatens to chill valuable economic and political activity in a way that narcotics enforcement does not. Perhaps white-collar criminal statutes are more “incomplete” (to use the term of Pistor and Xu), being particularly open-ended and ambiguous as to what legislators really consider harmful.

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

There are a number of arguments for plunging ahead. First, one can easily shift the burden of proof and find just as little evidence that teamwork between prosecutors and agents has flourished where it is most needed. Second, one can be agnostic and see the project not as calling for wholesale change but as devising a toolkit of measures that could promote the teamwork model. Finally, even were one to believe that the invisible hand was working overtime to ensure the appropriate equilibria across cases, agencies, and districts, one would still regularly have to confront decisional junctures, whether of legal rule or institutional design, when one’s choice inevitably affects the prosecutor-agent dynamic. Where a choice (made for reasons having nothing to do with coordination) makes coordination harder, it would be helpful to know how to compensate.

\[\text{supra note 100, at 15 (noting FBI’s “apparent lack of zeal in pursuing corporate and white-collar crime”).}\]


287. See, e.g., L. Gordon Crovitz, How the RICO Monster Mauled Wall Street, 65 Notre Dame L. Rev. 1050, 1050 (1990) (decrying prosecutorial overreaching and suggesting that “[n]o one can know whether” “Wall Street traders, bankers, analysts, accountants and others” “may inadvertently some day become defendants under the vague RICO predicates of mail fraud, wire fraud or securities fraud”).
III. Promoting Teamwork and Mutual Monitoring

The goal, then, is to promote teamwork between prosecutors and agents. So long as each player orients to his distinct institution and professional culture, interaction presents less a risk of capture than an opportunity for both productive collaboration and mutual monitoring. What measures might advance this model? Given that nearly every legal or institutional move one makes (or forgoes) can affect agent-prosecutor relations, the possibilities are endless. In part to show the breadth and variety of potential measures, and in part because they have particular salience to the agent-prosecutor dynamic, the focus here will be on three different areas: (A) information flow to prosecutors; (B) rules or institutions deterring agent-prosecutor interactions and/or facilitating the circumvention of these interactions by one side or the other; and (C) unilateral institutional measures.

A. Information Flow

Prosecutors are ill-equipped to second guess agency choices about tactics and targets when they lack sufficient information about the cases agencies decide to pursue and the universe of potential cases. Indeed, they labor under an informational disadvantage even in those systems where they formally have hierarchical power over police forces. Yet even within our coordinate system, much could be done to increase the flow of investigative information to prosecutors.

288. See M. Marc Robert, The Role and Status of Public Prosecution Services in Europe: Major Problems and the Council of Europe Draft Recommendation in European Conference, supra note 261, at 21, 35-36 (In those systems that “acknowledge the right of public prosecution services to supervise police forces or their activity,” there is often “a wide gap between the legal powers attributed to these services and the real-life, day-to-day exercise of these powers”; “the crucial issue . . . is that public prosecution services and also, in fact, judges are heavily dependent on police priorities in bringing offenders before the criminal justice system.”).

Professor de Doelder writes that in the Netherlands, where “[t]he police function under the command of the public prosecution service,”

a prosecutor finds himself in a highly police-dependent position because he has to rely heavily on information gathered by the police. Just as a judge is under negative control of the prosecutor service, a prosecutor is under negative control of the police. If the police do not start an investigation or do not share certain information, a prosecutor is left empty-handed.

Hans de Doelder, The Public Prosecution Service in the Netherlands, 8 Eur. J. Crime, Crim. L. & Crim. Just. 187, 187, 191 (2000) (footnote omitted); see also Fionda, Discretion, supra note 142, at 66, 81 (noting that in Scotland, where “police remain in law subordinate to the prosecutor [procurator fiscals] in the investigation of crime,” insiders say “reports are known to be stereotyped and often short of useful information, which tends to hinder well-informed decision-making at the prosecution stage”); Busch & Funk, supra note 169, at 55, 66 (“[E]ven in targeted crime investigations for which public prosecutors are definitely responsible, they often remain at a disadvantage. . . . By accepting the police argument that they have to protect their information sources and undercover operations, public prosecutors allow themselves to be transformed into the ‘dancing bears’ of the police.”).
1. Administrative Notifications. — If one wanted simply to give prosecutors a bigger role in investigative decisionmaking, one could expand the range of situations in which a prosecutor’s (or a court’s) approval were required. If, however, one wanted to promote collaborative decisionmaking without shifting the balance of power too far in the prosecutors’ direction, a softer alternative would be to impose notification requirements on agencies. This, at the very least, would give prosecutors an opportunity to start a conversation, even though the power they could deploy in such a conversation would derive from other sources.

The Attorney General’s recently released investigative guidelines for the FBI offer a good example of how such administrative notification requirements can be used. When an FBI supervisor opens a preliminary inquiry in a “sensitive criminal matter”—defined as one involving political corruption, “the activities of a foreign government, the activities of a religious organization or a primarily political organization or the related activities of any individual prominent in such an organization, or the activities of the news media”—he must notify the relevant U.S. Attorney “or an appropriate Department of Justice official . . . as soon as practicable . . . and the fact of notification shall be recorded in writing.” The FBI must also “notify the appropriate federal prosecutor of the termination of [a sensitive] investigation within 30 days of such termination.”

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

2. Mandated Consultations. — Notification measures provide a conversational opening, but more forceful administrative mechanisms for ensuring collaboration can easily be devised. One place where such a regime already exists, at least for certain cases, is in The Attorney General’s Guidelines on Federal Bureau of Investigation Undercover Operations. Any FBI field office seeking to engage in an “undercover operation” is required to:

290. Id. at 8–9.
291. Id. at 11.

293. The Guidelines define “Undercover Operation” as “any investigative activity involving a series of related undercover activities over a period of time by an undercover employee” and define “Undercover Employee” as any employee of the FBI, or employee of a Federal, state, or local law enforcement agency working under the direction and control of the FBI in a particular investigation, whose relationship with the FBI is concealed from third
volving any sensitive circumstance” must first apply to FBI headquarters for approval. The application must contain a “letter from the appropriate Federal prosecutor indicating that he or she has reviewed the proposed operation, including the sensitive circumstances reasonably expected to occur, agrees with the proposal and its legality, and will prosecute any meritorious case that has developed.” If favorably recommended by FBI headquarters, the proposal then goes to an “Undercover Review Committee,” comprised of FBI personnel designated by the Director and prosecutors designated by the Assistant Attorney General in charge of the Criminal Division. Prosecutors from the relevant U.S. Attorney’s Office and FBI agents from the field can attend the committee’s meeting and, in practice, line assistants are “encouraged” to discuss the proposal with committee members before the meeting. Decisions within this committee are to be by consensus. If one of the prosecutors declines to join a favorable recommendation “because of legal, ethical, prosecutive, or departmental policy considerations,” the Assistant Attorney General is consulted, and absent his approval or the approval of either the department’s top two officials—the Deputy Attorney General or Attorney General—the operation will not proceed.

The most salient operational feature of this administrative regime is the number of checkpoints it creates both at the local level and in Washington to ensure that as broad a variety of perspectives as the enforcement bureaucracy has to offer (which for some may not seem very broad) are brought to bear on those operations most likely to spark allegations of government overreaching and targeting. An important by-product, however, is the collaboration it promotes at the field level, as prosecutors and agents become co-presenters of a joint proposal that each must sell parties in the course of an investigative operation by the maintenance of a cover or alias identity.


294. Among those circumstances that the guidelines define as “sensitive” are criminal investigations of any public official or political candidate at all levels of government or of “any foreign official or government, religious organization, political organization, or the news media.” FBI U/C Guidelines, supra note 292, at 6.

295. Id. at 10.

296. Id. at 9.


298. FBI U/C Guidelines, supra note 292, at 8.

up through his respective Washington hierarchy. Such administrative measures will thus drive prosecutors and agents toward the team relationships we are trying to foster.

3. Brady Doctrine and Other Disclosure Rules. — Administrative rules and internal directives have their limits, however, both in the range of circumstances they cover and in the readiness of enforcers to comply with them. Recent debacles like the Whitey Bulger case in Boston (where FBI agents kept prosecutors in the dark about the nature of their relationship with top-echelon informants),300 and the Timothy McVeigh case (where the Oklahoma City bombing prosecutors were blindsided by the belated appearance of FBI field office files they had previously promised to disclose to defense counsel and that the FBI Director had himself ordered be given to prosecutors),301 though each unique and distinguishable in its own right, still suggest that we might not rely solely on administrative means of promoting the flow of information from agents to prosecutors.302

The inadequacy of administrative measures can be addressed—and to some extent has already been addressed—by constitutional or statutory rules that require prosecutors to disclose to defense counsel certain raw investigative data, like initial witness interview reports, documentary and physical evidence that points in directions other than that pursued by investigators, and so forth. These rules may not seem particularly helpful to prosecutors after they have obtained a conviction, or who find themselves the subject of stinging judicial criticism.303 Indeed, they regularly oppose reversal where evidence has emerged post-conviction that alleg-


303. See United States v. Diabate, 90 F. Supp. 2d 140, 143–44 (D. Mass. 2000) (discussing dismissal of indictment based on U.S. Attorney’s Office’s violation of local rule requiring it to instruct agencies, in this case U.S. Secret Service and Fall River police, to preserve notes that could have been used to impeach law enforcement witnesses). For a discussion of this local rule, available at http://www.bostonbar.org/dd/crimrules/
edly casts doubt on the validity of the government’s theory at trial. Even ex ante, the rabid or lazy prosecutor who just wants to convict the nearest available suspect will not have a brief for a broad discovery regime. Yet institutionally, prosecutors can profit from such rules in their dealings with agencies, particularly when the rules impose an indefeasible duty on prosecutors to disclose information from agency files, regardless of their own personal knowledge. Prosecutors are able to tell agents not just, “Please give me all the reports detailing your agency’s relationship with the informant so that I can assess how good a witness he’ll be,” but also, “If you don’t turn everything over to me, defense counsel and the judge will really stick it to us, and particularly me, if anything turns up post-conviction.” By ostensibly ignoring the gulf between prosecutorial and agency knowledge and putting what at first blush seems an “unrealistic” burden on prosecutors, the rules may actually reduce that gulf. Moreover, although in any one case the odds of a prosecutor’s finding out about evidence an agent should have told her about but did not are low, the iterated interaction between prosecutors and agents over a range of cases, and the consequences that discerned agent misbehavior will have on prosecutorial trust, will tend to promote agent compliance.

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

305. See Kyles v. Whitley, 514 U.S. 419, 421 (1995); United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989); Palmer v. City of Chicago, 755 F.2d 560, 578 (7th Cir. 1985); United States v. Lacy, 896 F. Supp. 982, 983 (N.D. Cal. 1995) (holding that AUSA cannot rely on agency to search personnel files for Brady material); Lis Wiehl, Keeping Files on the File Keepers: When Prosecutors Are Forced to Turn over the Personnel Files of Federal Agents to Defense Lawyers, 72 Wash. L. Rev. 73, 103 (1997); see also Kevin McMunigal, Disclosure and Accuracy in the Guilty Plea Process, 40 Hastings L.J. 957, 1002-04 (1989) (exploring how a mandatory disclosure regime affects police willingness to share exculpatory information with prosecutors).

306. Fisher, Lessons, supra note 302, at 1382 (“The Kyles court failed to acknowledge the distinction between holding prosecutors strictly responsible for the conduct of other prosecutors (in the same office), and for the conduct of the police, who are not normally employed by or directly accountable to the prosecutor.”).

307. Id. at 1383.

308. See Scott E. Sundby, Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland, 33 McGeorge L. Rev. 643, 659 (2002) (“Perhaps Brady’s most important pre-trial function is that it stresses the prosecutor’s responsibility for and the need to be aware of all evidence within the government’s possession.”). For limits, and a sense of the policymaking involved in the articulation of the Brady right, see United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (“[K]nowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor . . . .”); see also United States v. Locascio, 6 F.3d 924, 949 (2d Cir. 1993) (“We will not infer the prosecutor’s knowledge simply because some other government agents knew about [a particular piece of evidence].”). For an exploration of the special problems raised by the involvement of intelligence agencies in a criminal investigation, see Jonathan M. Fredman, Intelligence Agencies, Law Enforcement, and the Prosecution Team, 16 Yale L. & Pol’y Rev. 331, 335-39 (1998).
The lesson here is that we need not always choose between promoting legality and moderation through institutional mechanisms and promoting them through the creation of judicially enforceable rights. By giving defendants a right of access to information in the hands of investigative agencies, doctrines like that articulated in *Brady* and its progeny[^309] also help ensure that prosecutors have the tools to scrutinize agency decisionmaking effectively.[^310] An expansion of the *Brady* and non-constitutional[^311] pre-trial disclosure regime (in terms of the information covered, the timing of disclosure,[^312] and enforcement) would serve both purposes.[^313] And if we want to promote our working group model, efforts to limit those regimes should be resisted.[^314]

[^309]: Brady v. Maryland, 373 U.S. 83, 86 (1963) (holding that failure of prosecutor, upon request, to disclose evidence material to guilt or punishment violates due process, irrespective of good or bad faith); United States v. Bagley, 473 U.S. 667, 682 (1985) (creating single standard of materiality, regardless of whether defense request was made); see United States v. Agurs, 427 U.S. 97, 97 (1976) (concluding that prosecution's due process obligation to disclose material evidence is extended to cases where defendant made no request).

[^310]: As one organized crime prosecutor explained in a panel discussion on criminal discovery:

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


He later noted:

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

Id. at 808.


[^312]: See Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001) (explaining that, under *Brady* and progeny, "disclosure prior to trial is not mandated").


[^314]: One caveat here: The more agents see prosecutors as acting on behalf of defendants, the deeper the cultural gulf between prosecutors and agents becomes. "[L]egalistic mechanisms" like-expanded *Brady* rights can thus "backfire" by increasing the "sense of distance and difference" between organizational groups. Sim B. Sitkin & Darryl Stiebel, The Road to Hell: The Dynamics of Distrust in an Era of Quality, in Kramer & Tyler, supra note 185, at 196, 198. To the extent that investigators respond by
4. **Hearsay in the Grand Jury.** — If the goal is to ensure that prosecutorial gatekeeping reflects the true quality of investigative data and does not rely on burnished agency reports, we might want to go beyond requiring that prosecutors acquire such data, and force them to actually sift through it: interview first-hand witnesses, handle physical evidence, and speak with the relevant government experts. By the time a prosecutor comes onto the scene, the universe of potential evidence will inevitably reflect agency selection decisions and may also be tainted by agency handling. But the more contact the prosecutor has with the evidence at an early stage, the more informed her screening decisions will be.315

If every case went to trial, the hearsay rule and the demands of advocacy would force prosecutors to do all this. The combination of professional self-interest and easy monitoring (because poor trial preparation shows) would be potent. But diminishingly few cases go to trial. Moreover, even for cases going to trial, prosecutors will not have a strong incentive to scrutinize first-hand witness accounts until the eve of trial, after plea negotiations have broken down. To do so would be inefficient in a plea-driven system.316 This means that scrutiny often will not occur until after indictment, when the prosecutor is subject to the bias flowing from such a public commitment.317 While institutionally prosecutors might benefit from a more careful scrutiny of witnesses at an early stage, they thus are under pressure to rely on agency reports.

One way to counteract these pressures would be to reconsider the well-established rule that lets federal prosecutors rely (exclusively if they choose) on hearsay presentations in the grand jury.318 Federal prosecutors may (for a variety of tactical reasons) call first-hand witnesses, but they frequently do not because they lack any incentive to do so.319 The standard critique of the prosecutorial license to introduce hearsay in the grand jury is that the practice diminishes the grand jury's ability to per-

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315. Ron Wright and Marc Miller make a similar point, in the course of arguing for more rigorous prosecutorial screening as a way to minimize plea bargaining. Wright & Miller, supra note 118, at 104–05.

316. See supra notes 117–118 and accompanying text.

317. See Langevoort, supra note 254, at 103 ("[O]nce commitment has occurred, and especially if it is publicly expressed and repeated, what might be an obvious red flag to a disinterested observer may not appear such to the actor."); see also Donald C. Langevoort, Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms), in Behavioral Law & Economics 144, 151 (Cass R. Sunstein ed., 2000) ("Once a person voluntarily commits to an idea or course of action, there is a strong motivation to resist evidence that it was ill-chosen.").


form its screening role. Yet, in a world where (for better or worse) prosecutors are de facto judges and jurors, the primary effect of the license and its use may be on the care with which prosecutors perform their gatekeeping function.

It may be that things are just right, and that federal investigators do not require the monitoring that many of their state counterparts get. Perhaps state systems, like New York's, that do bar hearsay presentations in the grand jury, need a rule forcing prosecutors to deal with all significant fact witnesses at an early stage because their police forces are less careful, or because a great many state cases involve eyewitness or accomplice claims about single-transaction crimes. In the absence of such features, the argument might go, it makes sense for the federal system to leave agencies responsible for dealing with witnesses pre-indictment.

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

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323. See Yaroshefsky, supra note 202, at 962 (discussing "the extent to which the role of cooperators and the cooperation process under the Sentencing Guidelines have created or exacerbated problems regarding the reliability of cooperator testimony").

324. See Richman, Changing Boundaries, supra note 59, at 93-96. A magistrate judge in Atlanta recently noted:

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

Criminal Discovery in Practice, supra note 310, at 794 (quoting Magistrate Judge Gerrilyn G. Brill).
greater dialogue with investigative agencies about tactics as well as targets. 325

B. Mechanisms That Directly Promote or Deter Mutual Gatekeeping

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

I. Application of the No-Contact Rule. — One area where recent legislation has threatened to undermine prosecutorial involvement in investigative decisionmaking involves pre-indictment contacts with represented targets. In the absence of any general constitutional or statutory bar on such contacts, those seeking to restrain enforcers turned to the legal ethics rules, which, in one form or another, prohibit an attorney from communicating "with a party he knows to be represented by a lawyer in that matter" absent that lawyer's permission. 326 Their victory came in the McDade Amendment, 327 which mandated that federal prosecutors face the same ethical restrictions as do their private counterparts. Justice Department regulations have since made clear that prosecutors "shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations" under the provision. 328 But a significant regulatory gap has now

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


been created between prosecutors and agents, as agents, not bound by the ethics rules, remain free to contact represented targets overtly and covertly, so long as they do not involve prosecutors in such endeavors.\textsuperscript{329} The gap may even get bigger, now that at least one state court has held that prosecutors are also precluded from engaging in deceit or dishonesty of the sort necessary in undercover and "sting" operations.\textsuperscript{330} To the extent one's goal is to ensure prosecutorial involvement in investigative decisionmaking,\textsuperscript{331} the McDade Amendment and the unreflective application of ethical rules governing investigations to prosecutors generally are thus large steps in the wrong direction (and unlikely to prove effective in restraining investigative contacts with represented parties).  

2. \textit{FISA and the USA PATRIOT Act.} — The recent Wen Ho Lee case\textsuperscript{332} provides another example (albeit a limited and provocative one) of a leg-

\textsuperscript{329} See Caroline Heck Miller, Knowing the Dancer from the Dance: When the Prosecutor is Punished for the Government's Conduct, 29 Stetson L. Rev. 69, 83–84 (1999) (noting that agents are free to use investigative tactics barred under legal ethics rules, but not by Constitution "until the moment they consulted a government attorney for legal counsel; having done so, they may be directed to desist"); see also The Effect of State Ethics Rules on Federal Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary, 106thCong. 63 (1999) (statement of AUSA Richard L. Delonis, president of Nat'l Ass'n of AUSAs) ("Knowing that their closer relation to the prosecutor serves to circumscribe their investigative efforts, agents may well be motivated to separate themselves from prosecutorial oversight and act more independently.").


\textsuperscript{331} Increasing prosecutorial control was one of the rationales the Department of Justice cited when it tried unsuccessfully (so far) to make repeal of the McDade Amendment part of its anti-terrorism program. See Beverley Lumpkin, You Know What They Say About Sausage: Halls of Justice: A Weekly Look Inside the Justice Department, Oct. 5, 2001, at http://abcnews.go.com/sections/us/HallofJustice/hallofJustice96.html (on file with the \textit{Columbia Law Review}) (measure hailed by Criminal Division official who "said [that] for the bureau to fight bin Laden and his like effectively, it needs confidential informants to infiltrate, and prosecutors need to oversee their use and to counsel the agents"). The measure passed the Senate, but did not make it into the final USA PATRIOT Act. Broad Anti-Terrorism Package Passed by Congress, Signed by President, 70 Crim. L. Rep. (BNA) 93, 96 (2001).

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

\textsuperscript{332} For background on the case, see generally the \textit{Washington Post}’s archive at http://www.washingtonpost.com/wp-dyn/nation/specials/nationalsecurity/chineseespionage/ (last visited Apr. 22, 2003) (on file with the \textit{Columbia Law Review}).
islative provision that effectively deterred agents from collaborating with prosecutors at an early stage. Prior to its amendment by a provision of the USA PATRIOT Act, the Foreign Intelligence Surveillance Act (FISA) was understood to establish a regime under which the government could conduct electronic surveillance and physical searches under terms more permissive than those governing criminal investigations only so long as "the primary purpose" of those searches was to obtain foreign intelligence information. As Eleanor Hill recently explained in the Joint Intelligence Committee hearings on the intelligence community's response to the September 11 attacks: "In order to avoid courts ruling that FISA surveillances were illegal because foreign intelligence was not their 'primary purpose,' DOJ lawyers began to limit contacts between FBI personnel involved in these activities and FBI and DOJ personnel involved in criminal investigations."

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

333. See infra note 338.
336. Bellows Report, supra note 334, at 704. The report's primary author was an AUSA, Randy L. Bellows.
337. Id. at 744.
Whether the Wen Ho Lee investigation would have ended differently had it been better coordinated is hard to determine. The government's decision to let Mr. Lee plead guilty to a single count of mishandling classified information is certainly consistent with Mr. Lee's claims that he was a victim of an unjustified witch hunt. Yet it could also reflect the government's recognition that it had bungled the case beyond repair. The important point for our purposes is the way in which the investigation's missteps highlight the sometimes perverse relationship between institutional dynamics and legal doctrine. Although some complain that the USA PATRIOT Act's relaxation of the FISA barriers between intelligence activity and criminal investigations—requiring only that intelligence gathering be "a significant purpose" and not necessarily the only or even chief purpose of FISA searches and interceptions—to-threatens civil liberties, there may be countervailing benefits from relaxation of strictures (self-imposed or otherwise) against early prosecutorial involvement. A large part of the Wen Ho Lee investigation story is about the costs of institutional separation.

Obviously, each of the legal regimes discussed here has advantages or disadvantages that have nothing to do with the balance of power between prosecutors and agents. Disclosure rules serve the goal of adversarial fairness and may even promote more accurate factfinding. Eliminating the use of hearsay in grand jury presentations might lead to more rigorous screening by grand jurors who would gain a better understanding of the witnesses relied upon by the government. Reliance on ethical rules to regulate prosecutorial contacts with represented targets may be necessary because suppression is a poor deterrent and administrative controls are insufficient to deter prosecutors who can escape administrative sanctions by resigning, and who upon resigning might find their aggressiveness rewarded by the private market. The risk of government abuses in the intelligence-gathering area may exceed the gains from increased prosecutorial involvement. One can imagine many other arguments. The point here is not to fully assess the costs and benefits of any of these measures, but rather to show how, even within the essentially coordinate structure of the federal enforcement bureaucracy, one could


340. See Richman, Cooperating Clients, supra note 326, at 144-48.

productively tinker with the system if one's goal were to increase the quality of the interaction between prosecutors and enforcement agencies.\textsuperscript{342}

3. \textit{U.S. Attorney's Office Investigative Units.} — Removing actual or perceived barriers to agent-prosecutor collaboration may not be enough, absent a commitment to productive interaction. Should we be concerned about that commitment, we might also target procedural or institutional mechanisms that allow one side to circumvent or mitigate the influence of the other.

One such target might be investigative units within U.S. Attorneys' Offices. There are only a few such units,\textsuperscript{343} but they still raise important questions about whether we want to give prosecutors the capability to pursue cases on their own.\textsuperscript{344} From a prosecutor's perspective, control of an investigative unit would be a godsend.\textsuperscript{345} In cases involving corruption or criminal conduct within an enforcement agency,\textsuperscript{346} an office might worry about conflicts of interest. It might also want the capability quickly to address shortfalls between the evidence a prosecutor wants for trial and the evidence an agency is willing to provide.\textsuperscript{347} If we want both to check prosecutors and to ensure that they maintain a distinct perspective on investigative decisionmaking, however, we might see the loss of these capabilities as a price worth paying and look askance at the idea of a U.S. Attorney's Office handling some of its most sensitive cases on its own.

\textsuperscript{342} See also Richard S. Frase, Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care, 78 Cal. L. Rev. 539, 558-59 (1990) (noting that among the changes along French lines that might promote "a more integrated, efficient, and responsible police function" are: "requiring the police to notify the prosecutor at an early stage of the investigation and, whenever possible, prior to arrest; giving the prosecutor ... explicit authority to direct or order specific police investigatory acts"; and giving the chief prosecutor "some police administrative or disciplinary powers").

\textsuperscript{343} See CAFLE Hearings, supra note 44, Apr. 13, 1999, at 8-9 (author's notes) (investigator from Eastern District of New York U.S. Attorney's office, serving as president of Federal Criminal Investigators Association, notes that only three districts have their own investigative units).

\textsuperscript{344} Id. at 29 (noting that a separate investigative unit allows a U.S. Attorney to "get thing[s] done" "if there's a problem between the U.S. Attorney and a SAC [special agent in charge] of a particular agency"). But see id., Nov. 12, 1998, at 136 (former deputy director of FBI, Floyd Clark, complaining that some U.S. Attorney's offices have created "their own investigative bodies that go out and conduct investigations many times not even being coordinated with the agencies that have direct responsibility").

\textsuperscript{345} On a personal note, I have to say that the USAO investigators I dealt with when I was an assistant were some of the most capable, decent, and savvy professionals I've ever met.

\textsuperscript{346} See CAFLE Hearings, supra note 44, Apr. 13, 1999, at 14 (author's notes) (on file with the \textit{Columbia Law Review} (testimony of J. Michael Daly, president of Federal Criminal Investigators Association) (noting use of investigators in political corruption cases).

\textsuperscript{347} While the evidentiary shortfall may not be worth addressing over the long term, see supra notes 116-120 and accompanying text, it still can be cause for concern in particular cases.
By comparison, the price seems unacceptably high in local systems—or in a federal context analogous to local systems. An interesting case study can be found in the request in 2000 made by the Justice Department for funding for 43 investigators within the District of Columbia U.S. Attorney’s Office. Explaining the request, a departmental spokesperson noted:

The concept of assigning investigators to a prosecutor’s office is not unique. According to the National Association of Investigators and Adjusters (NAIA), a majority of local prosecutors’ offices have in-house investigators. For example, the Manhattan, New York District Attorney’s office has more than 100 investigators and the District Attorneys’ offices in Dallas, Texas and Miami, Florida have their own investigative staffs. These offices are comparable to the District of Columbia United States Attorney’s office in their primary mission of prosecution of violent crimes in their communities.

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

For our purposes, if we accept the department’s claim of need as valid and presume that it would make similar requests if prosecutors faced similar evidentiary gaps elsewhere in the federal system, we can ask some interesting questions: Is there something about violent crime that leads police forces to focus on the apprehension of perpetrators and not to recognize a duty to stay with cases until conviction, or to be derelict in


that duty? If so, what is that something? Is it the simple press of business that leaves police forces with a readily monitorable responsibility (something that federal agencies generally lack) and insufficient resources both to keep the peace and prepare for trial? Are the career incentives in police forces so different from those in federal agencies? Moreover, is there even a “problem” here? Are local systems actually working extremely well, with police forces allocating their resources most efficiently, and the evidentiary gap between arrest and conviction so small that a relative handful of investigators can bridge it? Or is there some sort of obstacle to efficient allocation, arising out of the fact that prosecutors and police officers generally do not share the same political chain of command?

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

4. Presentation of Information to Sentencing Judges. — While the foregoing discussion presented investigative agencies as moderating influences on prosecutors, agency monitoring can also promote prosecutorial zeal. One way this could be done is through the rules and practices relating to the presentation of sentencing information to judges.

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

352. See Standen, supra note 3, at 1475-76.
353. For reports of prosecutorial manipulation of sentencing facts, see David Yellen, Probation Officers Look at Plea Bargaining, and Do Not Like What They See, 8 Fed. Sentencing Rep. 339, 339 (1996) ("[A]pproximately forty percent of probation officers believe that guideline calculations set forth in plea agreements in a majority of cases are not ‘supported by offense facts that accurately and completely reflect all aspects of the 2003"]
In his valuable study of U.S. Attorneys' Offices, written before the advent of the Guidelines, James Eisenstein noted:

[F]ederal investigative agents handle fewer cases and more often become personally involved in the outcome of their cases than do local police. As a result, they possess both the incentive and information needed to monitor plea bargaining practices. It is not clear how successful agency attempts to shape bargains are . . . . But prosecutor anticipations of agency reactions to overly lenient bargains undoubtedly contribute to existing stringent practices.\footnote{354}

Since then, the Federal Sentencing Guidelines have given agents a better-marked avenue for their contributions. As Stith and Cabranes have noted, the "independent" investigation that probation officers are required to do under the Guidelines "provides an opportunity for the police or law-enforcement agents to assert their version of what happened, and their views on an appropriate sentence, directly to the court, by-passing the prosecutor's censorship," and consequently undermining prosecutors' ability to make commitments during plea negotiations.\footnote{355}

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

At the normative level, however, we should embrace agency contributions as a monitoring tool, or at least a spur to closer collaboration between agents and prosecutors. Measures that encourage agency input would likely be institutionalized in greater prosecutorial consultation with agents about plea dispositions and apparent unanimity within the government camp at sentencing. And if this did not happen, agency contributions would at least provide a helpful check on undue prosecutorial leniency (though one can imagine situations in which agency information would mitigate sentences).

\footnote{354. Eisenstein, supra note 17, at 181.}
What of the defendant, whose guilty plea was based on an understanding about an appropriate guideline sentencing range? If an agency submission leads the court to impose a harsher sentence, the defendant can fairly complain that he was blindsided.\textsuperscript{356} But the solution here ought to be rules ensuring that he can withdraw his plea, not ones that silence agencies.\textsuperscript{357} This would protect a defendant's legitimate expectation interests, while promoting agent-prosecutor collaboration. Increased agency contributions would also promote the sentencing goals of horizontal equity, by making judges better equipped to determine whether offenses that prosecutors have presented as factually similar really are.\textsuperscript{358} Moreover, while, as we have seen, prosecutorial discretion might be fatally undermined were agencies able to grant defendants immunity without prosecutorial participation,\textsuperscript{359} the cost to prosecutorial power here would be more limited, going only to the magnitude of sentencing concessions—a cost justified by the gains in collaboration, judicial authority, and transparency.

Giving the defendant the ability to claim breach and withdraw his plea is a spur to agent-prosecutor collaboration, in addition to a matter of simple fairness. When, as in a number of states,\textsuperscript{360} defendants are given no relief when police departments effectively undercut prosecutorial sentencing concessions, prosecutors have less reason to reach a consensus with the police up front. A few savvy defendants might decline to enter plea agreements under these conditions, or demand police participation, but the more likely result in this regime is blindsided defendants and apathetic prosecutors. Those states that treat police and prosecutors as independent actors in the plea agreement context would do well to reconsider a framework that seems blind to the virtues of coordination within the enforcement bureaucracy. Here again, as we saw in the \textit{Brady}

\begin{itemize}
  \item \textsuperscript{356} A defendant may lack such a claim where the plea agreement leaves the government free to add to the record "at all times concerning the facts and circumstances of [a defendant's] offenses," as was the case in \textit{United States v. Pollard}. 959 F.2d 1011, 1026–27 (D.C. Cir. 1992); see also \textit{United States v. Prince}, 204 F.3d 1021, 1025 (10th Cir. 2000) (holding plea agreement not violated when prosecutors gave probation department FBI reports of defendant's post-plea agreement criminal conduct).
  \item \textsuperscript{357} Ordinarily, the selection of a remedy (rescission or specific performance) for a breached plea agreement is left to judicial discretion. See \textit{United States v. Carmichael}, 216 F.3d 224, 227 (2d Cir. 2000); \textit{United States v. Day}, 969 F.2d 39, 47 (3d Cir. 1992).
  \item \textsuperscript{358} See Alschuler, supra note 3, at 915–24.
  \item \textsuperscript{359} See supra notes 138–143 and accompanying text.
  \item \textsuperscript{360} Compare \textit{State v. Sanchez}, 46 P.3d 774, 780 (Wash. 2002) (holding that independent statement by investigating officer at sentencing hearing did not violate prosecution's commitment not to recommend a sentence because officer deemed not a party to plea agreement), \textit{State v. Rogel}, 568 P.2d 421, 423 (Ariz. 1977) (suggesting that law enforcement officers are not agents of the state and thus not bound by a plea agreement), and \textit{State v. Thurston}, 781 P.2d 1296, 1299–1300 (Utah Ct. App. 1989) (finding police department not bound by plea bargain), with \textit{Lee v. State}, 501 So. 2d 591, 593 (Fla. 1987) (concluding that prosecutor's plea bargain binds all state agents, including state law enforcement officers).
\end{itemize}
context, treating the "government" as a single unit when it comes to defendants' rights makes it more likely that enforcers will productively collaborate.

C. Unilateral Organizational Measures

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

One area for consideration is the degree to which an office is organized vertically (leaving assistants responsible for cases from start to finish) or horizontally (assigning assistants to just one stage of case development). The goal of promoting the involvement of prosecutors in investigative decisionmaking would of course be furthered by any measures that put prosecutors in the thick of investigative calls. Having a different set of prosecutors do gatekeeping at the charging stage would preserve some magisterial perspective. But if the goals are to ensure that a gatekeeping prosecutor's priorities are considered as evidence is developed, that she has a textured understanding of the evidence when making her gatekeeping decision, and that her office can fully leverage its gatekeeping power over charging into the investigative stage, then vertical organization will be preferable, at least where nonroutine cases dominate an office's or a unit's caseload.361

Another unilateral measure could be to pay more attention to the extent to which individual prosecutors work with a particular group of agents or kind of case. Perhaps there is some optimal period of service, sufficient for the prosecutor to develop the specialized knowledge and agent trust that would facilitate productive exchanges, but not so long as to foster a subculture divorced from the professional mainstream of the office.362

One might also target hiring and retention patterns for assistants. But though this would surely have significant effects, what those effects would be is hard to determine. As Jerry Lynch recently noted: "We have little real notion of what mix of backgrounds, credentials, 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."363 How, for example, does prior criminal work on

361. See generally H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit, 68 Fordham L. Rev. 1695 (2000) (suggesting that this investigative oversight and gatekeeping would best be done by mature prosecutors able to summon up a degree of dispassion).
362. See supra note 255.
363. Lynch, Our Administrative System, supra note 6, at 2150.
the defense side affect prosecutorial behavior? One might theorize that, having had this experience, a prosecutor is more likely to maintain an arm's-length relationship with agents, having been trained to focus on their excesses and weaknesses. Moreover, just as "greater investment in occupation-specific," as opposed to "firm-specific" human capital, will make a lawyer more committed to the profession as a whole, so might a career path that orients to the adjudicative process generally, not a particular side of it. On the other hand, defense lawyers trying to reconcile their duties to court and client understandably tend to develop just the agnostic deference to the adversary system that could promote a laissez-faire attitude toward investigative processes. As for retention policies: Limitations on assistant tenure could foster greater orientation to the outside legal community and promote a professional solidarity in contradiction to agency culture. But shorter tenures could also limit prosecutorial experience, leading assistants to rely more upon agents' enforcement expertise, and therefore to become more deferential. These avenues for inquiry ought to be pursued.

CONCLUSION

This is very much a work in progress. Part of the challenge comes from the very nature of the model of decisionmaking this article embraces. The "Governmental (or Bureaucratic) Politics Model" of decisionmaking described by Graham Allison in his masterful study of the Cuban Missile Crisis seems particularly apt for understanding the federal enforcement bureaucracy because of its studied refusal to see policy as the product of a unitary actor. But this model can make one too open to nuance. As Allison noted, it "tells a fascinating story, but it is enormously complex. The information requirements are often overwhelming, and many of the details of the bargaining may be superfluous." Another part of the challenge comes with the period of flux in which this Article has been written. It is too soon to say how much enforcement agencies have changed their priorities since September 11, but they have

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

365. See Barbara Allen Babcock, Defending the Guilty, 32 Clev. St. L. Rev. 175, 182 (1983–1984); Abbe Smith, Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things, 28 Hofstra L. Rev. 925, 954 (2000) ("It is the prosecutor's responsibility to anticipate and counter defense strategies—even those that play into juror prejudice. If they fail to do so, why blame the defense?"). The allure of this "epistemological demurrer" can be felt by lawyers outside the criminal defense bar as well. See Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 618 (1985).

366. Allison, supra note 270, at 144.

367. Id. at 274.
changed. If investigative agencies focus more on prevention,\textsuperscript{368} and presumably less on pursuing cases in court, agency dependence on prosecutors will be reduced.

So let us conclude by following Heraclitus of Ephesus\textsuperscript{369} as well as Graham Allison. All is indeed in flux within the federal enforcement bureaucracy, but it has always been so, with the balance between agents and prosecutors a changing function of exogenous enforcement priorities, institutional structures, and procedural rules. In the large space of indeterminacy created by substantive and constitutional law, however, this balance—and not that between citizen and the state—needs far more attention. For in our second-best world, it may be the citizen’s primary source of protection.


\textsuperscript{369} See Anthony Gottlieb, The Dream of Reason: A History of Western Philosophy from the Greeks to the Renaissance 44 (2000) (discussing idea of Heraclitus (c. 540–c. 480 BC) “that beneath the apparent harmony and stability of things, everything is in a state of flux, a battleground of conflicting opposites”).