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Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law

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INSTITUTIONAL DESIGN AND THE POLICING OF PROSECUTORS: LESSONS
FROM ADMINISTRATIVE LAW

Rachel E. Barkow

Federal prosecutors wield enormous power. They have the authority to make charging decisions, enter cooperation agreements, accept pleas, and often dictate sentences or sentencing ranges. There are currently no effective legal checks in place to police the manner in which prosecutors exercise their authority. As a result, in the current era dominated by pleas instead of trials, federal prosecutors are not merely law enforcers. They are the final adjudicators in the 95% of cases that are not tried before a federal judge or jury. In a government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception. They have the authority to take away liberty and even life, yet they are often the final judges in their own cases. One need not be an expert in separation of powers theory to know that combining these powers in a single actor can lead to gross abuses. Indeed, the combination of law enforcement and adjudicative power in a single prosecutor is the most significant design flaw in the federal criminal system. Although scholars have made persuasive cases for greater external controls on prosecutors, these calls for reform are unrealistic in the current political climate. The solution must be sought elsewhere.

This Article looks within the prosecutor's office itself to identify a viable corrective on prosecutorial overreaching. In particular, by heeding lessons of institutional design from administrative law, this Article considers how federal prosecutors' offices could be designed to curb abuses of power through separation of functions requirements and greater attention to supervision. The problems posed by federal prosecutors' combination of adjudicative and enforcement functions are the very same issues raised by the administrative state – and the solutions fit equally well in both settings. In both instances, individuals who make investigative decisions should be separated from those who make adjudicative decisions, the latter of which should be defined to include some of the most important prosecutorial decisions today, including charging, the acceptance of pleas, and the decision whether or not to file substantial assistance motions. Using this model from administrative law would not only be effective, it would also be more politically viable than the leading alternative proposals for curbing prosecutorial discretion.

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INSTITUTIONAL DESIGN AND THE POLICING OF PROSECUTORS: LESSONS
FROM ADMINISTRATIVE LAW

*Rachel E. Barkow**

INTRODUCTION

It is hard to overstate the power of federal prosecutors. The number of federal criminal laws has increased 33 percent in the last decade,¹ and the punishments attached to those laws have increased markedly.² There are now approximately 200,000 federal prisoners,³ making the federal prison system the largest in the country, eclipsing each and every state.⁴

Federal prosecutors control the terms of confinement in this vast penal system because they have the authority to make charging decisions, enter cooperation agreements, accept pleas, and recommend sentences. In the current era dominated by pleas instead of trials, federal prosecutors are not merely law enforcers. They are the final adjudicators in the vast majority of cases.⁵ It is only in the rare 5% of cases that go to trial that an

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¹ Of all federal criminal laws enacted since the Civil War, over 40% were created since 1970. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, *The Federalization of Criminal Law* 5-6 (1998).

² Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 165 (2005) ("Despite the modest retreat in mean sentence length ... the mean sentence of imprisonment in 2002 remained more than double what it had been in 1984."); Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW & SOC. INQUIRY 823, 832 (1998) ("Average sentence length for federal crimes grew from 24 months in July 1984 to 46 months in June 1990."). I wasn't finding anything at all from 40-50 years ago.

³ Office of Justice Programs, Dept. of Justice, *Largest Increase in Prison and Jail Inmate Populations Since Midyear 2000* 1 (2007) (noting there were 191,080 prisoners at midyear 2006), available at <http://www.ojp.usdoj.gov/newsroom/2007/BJS07033.htm>.

⁴ BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISON & JAIL INMATES, Midyear 2006, at 14 App. tbl 2 (June 2007) (listing prisoners under the jurisdiction of state and federal correctional authorities as of June 30, 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>.

⁵ Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2150 (1998) ("[P]rosecutors, in their discretionary charging and plea bargaining decisions, are acting largely as administrative, quasi-judicial decision-makers.").

independent actor reviews prosecutorial decisions.⁶ In the 95% of cases that are not tried before a federal judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate pleas, or to set their office policies.⁷ In a government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception.⁸ They have the authority to take away liberty and even life, yet they are often the final judges in their own cases.⁹

One need not be an expert in separation of powers theory to know that combining these powers in a single actor can lead to gross abuses. Indeed, the combination of law enforcement and adjudicative power in a single prosecutor is the most significant design flaw in the federal criminal system. Standard judicial and legislative oversight has failed to correct this power grab by prosecutors. Despite the arguments of scholars for greater judicial supervision,¹⁰ federal judges continue to rubber stamp cooperation, charging, and plea decisions.¹¹ Similarly, although commentators have called on Congress to reign in prosecutorial discretion with federal criminal code reform¹² and the repeal of mandatory minimum sentences,¹³ members

⁶ BJS Criminal Case Processing Statistics, Summary Findings, available <http://www.ojp.usdoj.gov/bjs/cases.htm>. Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1034 (2006).

⁷ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024-1028 (2006) (explaining the lack of oversight on prosecutorial decisionmaking).

⁸ See *id.* at 1049 (“A system where upwards of ninety-five percent of all convictions result from pleas and where prosecutors make all the key judgments does not fit comfortably with the separation of powers.”).

⁹ Given the broad wording of many federal criminal laws, one could argue that prosecutors possess legislative power as well. Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 49 (1998) (“Congress won’t make law with sufficient specificity to resolve important issues of policy, and judges can’t (or at least perceive that they can’t) remedy this inattention with lawmaking of their own. This lawmaking gap is eventually filled by individual U.S. Attorneys who do effectively make law by adapting vaguely worded statutes to advance their own political interests.”); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486-87 (1996) (describing “the prosecutor’s contribution to delegated criminal lawmaking”).

¹⁰ See TAN __-__.

¹¹ *Wade v. United States*, 504 U.S. 181, 181-87 (1992) (holding that a prosecutor’s discretion over substantial-assistance motions is similar to that over other decisions, and are only reviewable in very limited circumstances such as racial or religious bias); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (referring to the prosecutor’s decision not to indict as “the special province of the Executive Branch”); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

¹² See, e.g., Robert Weisberg, *Excerpts from “The Future of American Sentencing: A National Roundtable on Blakely*, 2 OHIO ST. J. CRIM. L. 619, 634 (2005) (“The Federal Criminal Code is a hodgepodge of statutes, which frankly needs some type of comprehensive reform if it is to properly

of Congress lack the incentives to enact these reforms as long as they reap political rewards for looking tough on crime.¹⁴ Although scholars have made persuasive cases for these reforms, they are simply unrealistic in the current political climate. The solution must be sought elsewhere.

identify aggravating factors that are going to bring about [the] certainty and severity, not to mention proportionality, that Congress will require.”); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 *BUFF. CRIM. L. REV.* 45, 45-65 (1998) (arguing for reform of the federal criminal code, and stating that “the existing morass of statutory provisions ... is so complex, and so confusing to law enforcement officials as well as to the public, that it could scarcely have been designed to be less efficient”).

¹³ Opponents of mandatory minimum sentences include leading criminal justice organizations such as the Sentencing Commission, the Judicial Conference, and the American Bar Association. *See, e.g.*, U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991), available at http://www.ussc.gov/r_congress/MANMIN.PDF; Hearing on Mandatory Minimum Sentencing Laws – The Issues Before the House Subcomm. on Crime, Terrorism, and Homeland Security, 110th Cong. (2007) (statement of Paul Cassell, Chair, Criminal Law Committee of the Judicial Conference), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/statement_of_honorable_paul_cassell.pdf; Letter from Karen J. Mathis, President, Am. Bar Ass’n, to Bobby Scott, Chair, House Subcomm. on Crime, Terrorism and Homeland Security, available at http://www.abanet.org/poladv/letters/crimlaw/2007jul03_minimumsenth_1.pdf.

Judges of all political stripes have also condemned mandatory minimum sentences. Chief Justice Rehnquist observed that “one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences.” Hearing Before the House Reform Subcomm. on Criminal Justice, Drug Policy and Human Res., 106th Cong. (2000) (statement of John R. Steer, Member and Vice-Chair of the U.S. Sentencing Comm.) (internal quotation marks omitted) (quoting Remarks of Chief Justice, Nat’l Symposium on Drugs and Violence in Amer., June 18, 1993). Justice Kennedy has stated that he “can accept neither the necessity nor the wisdom of federal mandatory minimum sentences.” Speech of Justice Anthony Kennedy, Address to the American Bar Association (Aug. 9, 2003), available at <http://www.supremecourtus.gov/publicinfo/speeches/sp-08-09-03.html>. Justice Breyer, the architect of the Sentencing Guidelines, has noted that “[m]andatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.” *Harris v. United States*, 536 U.S. 545, 570 (2002).

Even some politicians – including conservatives -- have come out against mandatory minimums. Senator Orrin Hatch has expressed doubts that mandatory minimum sentences can be reconciled with the philosophy of the sentencing guidelines. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 *WAKE FOREST L. REV.* 185, 194-95 (1993).

¹⁴ Politicians view being tough on crime as a badge of honor that wins points with voters. *See, e.g.*, 153 *CONG. REC.* S6499-02, S6517 (2007) (Sen. Jeff Bingaman, D-NM, quoting and endorsing a statement by Chief Justice Rehnquist that “mandatory minimums are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’”); 151 *CONG. REC.* H3120-01, H3132 (2005) (Rep. Phil Gingrey, R-GA, in debate regarding the Gang Deterrence and Community Protection Act of 2005, arguing for a mandatory minimum bill and stating that “[m]andatory minimum sentencing ... works to deter crime. Getting tough on crime requires tough and uniform enforcement.”); 145 *CONG. REC.* S5507-06, S5516 (1999) (Sen. Chuck Schumer, D-NY, stating that “I have been tough on crime – for mandatory minimum sentences, and for incarceration – my entire career.”); 140 *CONG. REC.* S13563-01, S13564 (1994) (Sen. Chuck Grassley, R-IA, arguing that “we ... need to be tough by restoring tough Senate crime provisions ... We should include mandatory minimum sentences for those who sell illegal drugs to minors or who use minors in drug trafficking activities.”).

This Article looks within the prosecutor's office itself to identify a viable corrective on prosecutorial overreaching. In particular, by heeding lessons of institutional design from administrative law, this Article considers how federal prosecutors' offices could be designed to curb abuses of power through separation of functions requirements and greater attention to supervision. The problems posed by federal prosecutors' combination of adjudicative and enforcement functions are the very same issues raised by the administrative state – and the solutions fit equally well in both settings. In both instances, individuals who make investigative decisions should be separated from those who make adjudicative decisions, the latter of which should be defined to include some of the most important prosecutorial decisions today, including charging, the acceptance of pleas, and the decision whether or not to file substantial assistance motions. Using this model from administrative law is not only sensible, it is more politically viable than the leading alternative proposals for curbing prosecutorial discretion.

Part I begins by describing the combined law enforcement and adjudicative powers of federal prosecutors, thereby laying the groundwork for why an institutional check on prosecutorial power is needed. Part II explains that the dangers posed by the combination of law enforcement and adjudicative power are hardly new to the federal system; rather, as Part II describes, the very same risks are posed by traditional administrative agencies. A central mission of administrative law is to design checks on agency overreaching in light of these combined powers. Part III then explores how the traditional regulatory agency model of internal separation could be effectively and feasibly applied to the prosecutor's office. Part IV considers the administrative and political viability of using institutional design to check prosecutors and explains the advantages of using functional separation within the office over other means of checking prosecutorial power that have been the subject of scholarly attention.

I. THE PROSECUTOR AS LEVIATHAN

Numerous scholars have chronicled and critiqued the expansion of federal criminal law.¹⁵ Federal criminal laws govern a huge sweep of

¹⁵ Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 761-65 (1996) (providing an overview of the debate and endorsing limiting scope of certain federal criminal laws); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 979-990 (1995) (arguing against expansion of federal criminal law, based on capacity of federal courts and the proper balance of federal and state responsibility); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1136 (1995) (arguing against federalization of crime, based in part on Chief Justice Rehnquist's warning of the potentially overwhelming effect on federal courts); Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1247-1250 (1995) (describing federalizing of criminal law as "subvert[ing] the values of a federal system"); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal*

conduct,¹⁶ and the punishments are often severe.¹⁷ In theory, federal prosecutors stand as the gatekeepers to ensure that these laws are properly applied and are used judiciously. That is, prosecutors working in United States Attorneys Offices should ensure that no matter how broadly a criminal statute is worded, it is not applied except in those instances where a defendant is actually blameworthy. These prosecutors should also make sure that a law is not applied to a given case if the punishment dictated by the law would be excessive.¹⁸ Federal prosecutors have an additional responsibility to ensure that federal involvement is the proper course and that a matter should not be pursued by state prosecutors instead.¹⁹

Unfortunately, as Part A explains, there is currently little to no oversight over federal prosecutors to ensure that these considerations are taken seriously. Part B takes up the question of why supervisory mechanisms have not been put in place.

Judiciary from the Federalization of State Crime, 43 U. KAN. L. REV. 503, 516 (1995) (articulating the benefits of reserving criminal prosecution for state and local governments, specifically that they “are better able to focus on the unique impact that a problem may have on a relatively discrete geographical or socioeconomic region,” they “can frequently provide opportunities for the expression of different social and cultural values,” and that they may “try novel social and economic experiments without risk to the rest of the country”).

¹⁶See, e.g., Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 628-30 (2005) (noting the breadth of federal laws criminalizing fraud, false statements, extortion, and money laundering); Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 663 (1987) (describing the Racketeer-Influenced and Corrupt Organizations Act as a “weapon that could be used against virtually any kind of criminal behavior”).

¹⁷For example, the average prison sentence for drug trafficking in 2005 was 79.3 months. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Fiscal Year 2005 §3, tbl. 7 (2006), available at <http://www.ussc.gov/JUDPACK/2005/lc05.pdf>. The average length of imprisonment for RICO was 86.2 months in 2005. Andrew Weissman & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286, 286 n. 7 (2007). A first-time offender possessing 5 or more grams of crack cocaine faces a mandatory minimum of five years in prison. 21 U.S.C. §844.

¹⁸U.S. ATTORNEY’S MANUAL, PRINCIPLES OF FEDERAL PROSECUTION §9-27.300, available online at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrim.htm#9-27.200 (noting that prosecutors can “select[] charges or enter[] into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime. Thus, for example, in determining “the most serious offense that is consistent with the nature of the defendant’s conduct that is likely to result in a sustainable conviction,” it is appropriate that the attorney for the government consider, inter alia, such factors as the Sentencing Guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation”). See also AMERICAN BAR ASSN. STANDARDS: THE PROSECUTION FUNCTION §3.-3.9(b) (3d ed. 1993).

¹⁹U.S. ATTORNEY’S MANUAL, PRINCIPLES OF FEDERAL PROSECUTION §9-27.230, available online at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrim.htm#9-27.200.

A. *The Danger*

Federal prosecutors are the prototypical executive official.²⁰ There are 93 United States Attorneys, who are appointed by the President with confirmation by the Senate,²¹ and they work with Assistant United States Attorneys, who are hired without Senate confirmation.²² Each of these prosecutors is charged with investigating and enforcing federal criminal laws. Because there is discretion about whether and which charges to bring in a given case,²³ this law enforcement function carries enormous power over individuals' lives.²⁴

If prosecutors exercised only this executive power, their authority would be broad, but, from a constitutional and governance perspective, unremarkable. Today, however, federal prosecutors' power goes far beyond law enforcement. At the federal level, just as in the states, most criminal cases are resolved without ever going to trial.²⁵ Plea bargaining or charge bargaining is the norm.²⁶ This means that a prosecutor's decision about

²⁰ *Morrison v. Olson*, 487 U.S. 654 (1989).

²¹ 28 U.S.C. § 541(a).

²² 28 U.S.C. § 542(a).

²³ See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (recognizing the prosecutors' power to decide what charges to bring).

²⁴ Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion."); James Vorenberg, Comment, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1524-37 (1981) (describing prosecutorial discretion and its scope); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L. J. 651, 678 (arguing that the charging decision is the "broadest discretionary power in criminal administration"). As Justice Jackson observed more than half a century ago – before plea bargaining was as prevalent as it is now, which has increased prosecutorial power still further – the prosecutor has "more control over life, liberty, and reputation than other person in America." As Justice Jackson observed more than half a century ago – before plea bargaining was as prevalent as it is now, which has increased prosecutorial power still further – the prosecutor has "more control over life, liberty, and reputation than other person in America." Robert H. Jackson, *The Federal Prosecutor*, 24 J. OF AMERICAN JUDICATURE SOCIETY 18, 18 (1940).

²⁵ See *supra* note _____. "The proportion of guilty pleas has been moving steadily upward for over thirty years, and has seen a dramatic increase of over eleven percentage points" in the ten year period from 1991 to 2001, when the rate of guilty pleas went from 85.4% to 96.6%. Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003).

²⁶ Although the Department of Justice attempts to control plea bargaining by prohibiting fact bargaining, and insisting that line assistants "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case." Memorandum from Attorney General John Ashcroft on Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals (July 28, 2003), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm, in reality, federal prosecutors engage in such bargaining. See, e.g., *United States v. Kandirakis*, Aug. 1, 2006 (stating that those who deny the "sweeping . . . plea bargaining culture today" are sophists); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1312 (1997) (finding circumvention of the

what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases. Because numerous federal laws govern similar behavior and are written broadly,²⁷ prosecutors often have a choice of charges, which often, in turn, means a choice of sentence as well.²⁸ With the prevalence of mandatory minimum laws, a prosecutor's decision to bring or not bring charges can dictate whether a defendant receives a mandatory five, ten, or twenty year term, or whether he or she is sentenced far below that floor.²⁹ In addition, although recent Supreme Court decisions have revamped federal sentencing law to relax the effect of the United States Sentencing Guidelines,³⁰ in the vast majority of cases judges continue to sentence according to the Guidelines or depart only with a government motion.³¹ Even after *Booker*, providing substantial assistance is the most common ground on which federal judges depart from the recommended Sentencing Guidelines range,³² and it is the only way for most defendants to

Guidelines through bargaining); Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal Forum 149, 193 (indicating that there are reasons to believe "the Justice Dept cannot meaningfully restrain local United States Attorney's Offices from adopting locally convenient plea bargaining practices").

²⁷ Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 795 (2003) (noting that "the federal criminal 'code' may well be even broader than the states in the range of conduct it ostensibly covers").

²⁸ Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 629-30 (2005) (describing how the broad nature of federal crimes "amounts to an invitation to federal agents and prosecutors to look on federal crimes and sentences not as laws that define criminal conduct and its consequences but as a menu that defines prosecutors' options"); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 742 (1996) ("[C]urrent criminal codes contain so many overlapping provisions that the choice of how to characterize conduct as criminal has passed to the prosecutor."). This is a long-time feature of criminal law. As Justice Jackson noted in his classic speech on the power of federal prosecutors, "With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." Robert Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.

²⁹ For a review of empirical scholarship showing that prosecutors gain sentencing power after mandatory minimum sentencing laws are passed by choosing to charge or not charge conduct under such laws, see David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & ECON. 591, 593-595 (Oct. 2005).

³⁰ *Gall v. United States*, 128 S.Ct. 586 (2007); *Kimbrough v. United States*, 128 S.Ct. 558 (2007); *Rita v. United States*, 127 S.Ct. 2456 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

³¹ SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note __, at tbl. N (citing statistics from fiscal year 2007 that federal judges sentence within the Guideline range 60.8% of the time and that in an additional 25.6% of the cases, the departure is because of a government-sponsored motion). Thus, in over 85% of all cases, the defendant receives a Guideline sentence or a departure because of a government motion.

³² See UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Fig. G (2007) (noting that the number one basis for departure is substantial assistance, both before and after the Supreme Court's decision in *Booker*), available at <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm>.

avoid a mandatory minimum statutory term.³³ Both types of substantial assistance departure require a motion from the prosecutor.³⁴ The prosecutor thereby makes the relevant factual findings, applies the law to the facts, and selects the sentence or at least the sentencing range. In other words, the prosecutor becomes the adjudicator in the overwhelming majority of cases.³⁵

If a defendant could costlessly take his or her case to trial, the prosecutor's role in charging and accepting pleas would be less remarkable. After all, if a defendant could exercise his or her jury trial rights, then all the charging and bargaining would take place in the shadow of that trial regime, and presumably the prosecutor's freedom would be bounded by the expected outcome at trial. Put another way, the prosecutor could not demand more than what the defendant would expect to receive at trial, so the real adjudicative power would remain with a court and with a jury.

But going to trial is far from costless for defendants. As an initial matter, defendants face stiffer sentences – often significantly stiffer sentences – if they opt to go to trial instead of pleading guilty. In *Bordenkircher v. Hayes*,³⁶ the Supreme Court held that the Constitution does not prohibit prosecutors from threatening defendants with more serious charges if they exercise their trial rights. In that case, for example, the Court upheld a prosecutor's decision to offer to recommend a five-year sentence to the judge if the defendant pleaded guilty but to bring charges subjecting the defendant to a mandatory life sentence if the defendant opted for trial.³⁷ Although this kind of threat would otherwise seem to impose an

³³ There is a limited safety valve available only to offenders who are the least culpable participants in drug trafficking offenses and who do not have more than one criminal history point, which basically means either no criminal history or at most a conviction for a petty misdemeanor with a sentence of less than 60 days. 18 U.S.C. §3553(f). Because this covers such a narrow class of defendants, all others must rely upon 18 U.S.C. §3553(e), which allows but does not require a judge to depart from a statutory minimum sentence on the motion of the government that the defendant provided substantial assistance.

³⁴ See, e.g., *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (holding that, even after *Booker*, a district judge could not depart downward from the advisory guidelines range on the basis of substantial assistance in the absence of a government motion); *United States v. Robinson*, 404 F.3d 850, 862 (4th Cir. 2005) (“*Booker* did nothing to alter the rule that judges cannot depart below a statutorily provided minimum sentence” in the absence of a motion from the government that the defendant provided substantial assistance.”). There is significant variation among the United States Attorneys Offices in terms of how they define substantial assistance and the size of their recommended departures. Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 *SYMBOLIC INTERACTION* 255, 263, 264 & tbl. 1, 273 (2005) (finding variation in the four districts under study).

³⁵ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 509 (2001) (“As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.”).

³⁶ 434 U.S. 357 (1978).

³⁷ *Id.* at 358.

unconstitutional condition on the exercise of a defendant's jury trial rights,³⁸ the Court accepted this coercive power because it believed that plea bargaining was an entrenched practice that was necessary to keep the courts from being overwhelmed with criminal cases.³⁹ The practical effect of the Court's decision was to give prosecutors the ability to exact a heavy price on defendants who opt to take a case to trial in order to get them to plead guilty to the charge the prosecutor believes is the appropriate one. After *Bordenkircher*, "[p]rosecutors have a strong incentive to threaten charges that are excessive, even by the prosecutors' own lights."⁴⁰ And prosecutors have taken advantage of the opportunity.⁴¹

Congress, in turn, now legislates with precisely this framework of prosecutorial power over pleas in mind. Representatives from the Department of Justice and the various United States Attorney's Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas and to obtain cooperation from defendants.⁴² Congress continues to pass mandatory minimum sentencing laws even though there is uniform agreement by experts – including the United States Sentencing Commission – that these laws are unwise and lead to greater disparity in practice because of the power they

³⁸ See Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 804-45 (2003) (arguing that the Court's approach to unconstitutional conditions in criminal cases is inconsistent with its treatment of unconstitutional conditions in other contexts); Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 776-94, 829-32 (1988) (explaining that plea bargaining is in tension with the Court's treatment of compelled confessions and the imposition of conditions on other constitutional rights);

³⁹ See *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities" and as a result, plea bargaining was to be "encouraged").

⁴⁰ William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 26, available at <http://ssrn.com/abstract=854284>; see also Ma, *supra* note __, at 26 ("[P]rosecutors may deliberately file charges that are not supported by probable cause as a bargaining strategy"). This was true even before *Bordenkircher*. Al Alschuler, for example, found that evidence of prosecutorial overcharging in the late 1960s. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968).

⁴¹ Davis, *supra* note __, at 413 (noting that "prosecutors frequently charge more and greater offenses than they can prove beyond a reasonable doubt" because "[t]his tactic offers the prosecutor more leverage during plea negotiations")

⁴² See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005) (citing examples of prosecutors' requests before Congress to have tougher sentencing laws so that those laws could be used to provide an incentive for defendants to cooperate). Stephen Schulhofer and Ilene Nagel found that charge bargaining occurs most frequently in the federal system when prosecutors have the option of charging a defendant under a statute with a mandatory minimum. Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1285, 1293 (1997).

vest in prosecutors.⁴³ Members of Congress agree to these laws because they do not want to be viewed as soft on crime or resistant to prosecution demands.

Congress therefore routinely passes laws with punishments greater than the facts of the offense would demand to allow prosecutors to use the excessive punishments as bargaining chips and to obtain what prosecutors and Congress would view as the more appropriate sentence via a plea instead of a trial.⁴⁴ Pleas and cooperation with the government are the preferred norm, not the exception. For example, although the criminal code has a range of mandatory minimum offenses, as noted,⁴⁵ it also has a provision that allows prosecutors – and prosecutors alone – to exempt defendants from those mandatory punishments if the prosecutor concludes that the defendant has offered the government substantial assistance.⁴⁶ No one expects the maximum punishment established by statute to be imposed in the ordinary case, and even mandatory minimums can be altered by prosecutors through bargaining. As the leading casebook on criminal law has observed, “criminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case” such that “[I]nienicy’ has therefore become not merely common but a systemic imperative.”⁴⁷

The result of the Court’s rulings and Congress’s response is that prosecutors can exact such a high price on defendants who pursue their trial rights that the trial right becomes too costly to exercise. At the federal level, defendants who waive their right to a jury trial receive an average sentence reduction of 300 percent.⁴⁸ When prosecutors have this kind of leverage, considerable adjudicative power inevitably transfers from judges and juries to the prosecutors.

An additional factor further erodes the ability of defendants to take cases to trial. Defendants and their lawyers often have divergent interests when it comes to bargaining with prosecutors. The vast majority of federal

⁴³ See *supra* note ____.

⁴⁴ See Stuntz, *Bordenkircher*, *supra* note ___, at 32-33 (describing legislative incentives after *Bordenkircher* and using Congress’s enactment of legislation creating the large sentencing disparity between crack and powder cocaine as an example of Congress passing a law with an excessive sentence on the view that most of these cases would not go to trial).

⁴⁵ See *supra* TAN __- __.

⁴⁶ 18 U.S.C. §3553(e).

⁴⁷ KADISH, SCHULHOFER, & STEIKER, *CRIMINAL LAW AND ITS PROCESSES* 1006 (8th ed 2007).

⁴⁸ Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 348 (2005).

criminal cases involve indigent defendants⁴⁹ with appointed counsel who are paid either “a flat fee per case, or a low hourly rate coupled with a ceiling on total compensation payable.”⁵⁰ Because the court-appointed lawyers are typically paid below-market rates for their services,⁵¹ any time spent on an indigent’s defendant’s case is less financially rewarding than time spent on the cases of paying clients. For lawyers with other client options, then, the faster the case proceeds, the better off these lawyers are, so trials are not in their economic interest and there is a greater incentive to plead. For lawyers that rely on CJA wages because they have few or no other clients, they may have an incentive to prolong cases to increase their fees, so they may be more willing to go to trial, though the results they receive for their clients may be less favorable.⁵² The incentives between clients and their lawyers match more closely with public defenders, but even they are not perfectly aligned. Public defender offices are woefully underfunded and understaffed,⁵³ so there is a limit on how many cases they can credibly threaten to take to trial. Finally, even when a defendant can afford to retain counsel, in most cases the lawyer is paid a flat fee in advance.⁵⁴ These lawyers therefore have an incentive to resolve the case as quickly as possible to maximize the financial return on their time, which may lead them to pursue a plea.

⁴⁹ 75 percent of criminal defendants in federal cases are indigent. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 879 (1995).

⁵⁰ Schulhofer, *supra* note __, at 1988.

⁵¹ Bruce Moyer, *FBA Urges Congress To Increase CJA Panel Attorney Rates*, 54 *FEDERAL LAWYER* 10 (May 2007) (noting that court-appointed lawyers under the Criminal Justice Act receive a rate of \$92 per hour for noncapital cases, which “typically fail[s] to provide even enough to offset overhead costs” and has led the federal judiciary’s Judicial Conference to request an increase from Congress).

⁵² Those lawyers who might prefer the additional hourly earnings of a trial, even at below-market rates, often have that preference because they are not marketable to clients outside the CJA list because of their inexperience or relative lack of qualifications. A recent study found that defendants represented by CJA lawyers were more likely to be found guilty and received longer sentences than defendants represented by public defenders. See Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 28 (June 2007) (finding that federal public defenders obtain better results – measured by both conviction rates and sentence lengths -- for their clients than private attorneys who are compensated on an hourly basis), available at http://graphics8.nytimes.com/packages/pdf/national/20070712_indigent_defense.pdf.

⁵³ ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 7-10 (2004), available at <http://www.abanet.org/legalser-vices/sclaid/defender/brokenpromise/fullreport.pdf>; Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 *CORNELL L. REV.* 679, 687-88 (2007) (noting that public defenders in some jurisdictions are responsible for well over one thousand cases per year).

⁵⁴ Steven Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979, 1988 (1992).

As a result of these pressures and costs of exercising trial rights, the prosecutor becomes the de facto adjudicator in almost all federal criminal cases because of the push toward pleas. A federal prosecutor therefore consolidates an enormous range of power. With his or her power to choose from a range of federal criminal laws, to exercise significant leverage over defendants to obtain pleas and cooperation, and to control the sentence or sentencing range through charging decisions, the prosecutor combines enforcement and adjudicative power.

This combination of power in one actor is troubling because it puts prosecutors in a position to judge their own cause – the classic threat to the rule of law. John Locke put it best: when people act as judges in their own case, they tend to be “partial to themselves and their friends” and to allow “ill-nature, passion and revenge [to] carry them too far in punishing others.”⁵⁵

Prosecutors who investigate a case are poorly positioned to make a final assessment of guilt because they cannot view the facts impartially. After investing time and effort in pursuing a particular defendant, the prosecutor cannot view the facts as a neutral party. Indeed, to admit that the defendant is not culpable is to admit that all of the prosecutor’s efforts were wasteful. Moreover, prosecutors may feel the need to be able to point to a record of convictions and long sentences if they want to be promoted or to land high-powered jobs outside the government.⁵⁶

The consolidation of adjudicative and enforcement power in a single prosecutor is also troubling because it creates an opportunity for that actor’s prejudices and biases to dictate outcomes.⁵⁷ It is hard to ignore the racially skewed composition of the federal prison population. More than 40 percent of the federal prison population is black and almost a third is Hispanic.⁵⁸ One in every nine black males between the ages of 20 and 34 is

⁵⁵ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 12 (C.B. Macpherson ed., 1980) (1690)

⁵⁶ See Humbert, *supra* note __, at 140 (noting that U.S. Attorneys “are often fired with zeal to make a record by numerous convictions in order to secure further promotion” and observing that “[t]heir ardor may bring about a great number of convictions, some of which were unwarranted”).

⁵⁷ “The possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored.” *United States v. Armstrong*, 517 U.S. 456, 476 (1996) (Stevens, J., dissenting). See also Davis, *supra* note __, at 22 (expressing concern with discrimination by prosecutors); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); Richard H. McAdams, Race and Selective Prosecution: Discovering the Pitfalls of *Armstrong*, 73 CHI.-KENT L. REV. 605 (1998); Vorenberg, *supra* note __, at 1555 (noting that standardless prosecutorial discretion raises the prospect that it will be exercised most harshly against “the least favored members of the community – racial and ethnic minorities, social outcasts, the poor”).

⁵⁸ As of February 23, 2008, of the 200,663 people incarcerated in federal prisons, 80,461 individuals (40.1% of the total) were black and 62,903 (31.3 %) were Hispanic. Federal Bureau of Prisons, Inmate Population, available at <http://www.bop.gov/news/quick.jsp#1>.

incarcerated.⁵⁹ While a variety of factors likely have contributed to the disproportionate percentage of black men in federal prison, it is certainly possible that unchecked prosecutorial discretion over enforcement and adjudication could be a contributing cause. Indeed, researchers have found that, even after controlling for legally relevant factors, race and gender affect charging and sentencing decisions.⁶⁰

B. *The Path to Unchecked Power*

Federal prosecutors have not always possessed such sweeping powers. As an initial matter, federal criminal law itself was a limited category for much of the Nation's history. Federal criminal law barely existed prior to 1896. Indeed, there was no federal penitentiary before that date.⁶¹ In the early years of federal criminal law, it was therefore reasonable to expect most cases to go to trial because that would not tax the system.⁶² For many years, then, the criminal trial served as the vehicle for overseeing prosecutorial power, with independent life tenured judges presiding and jurors drawn from the community rendering verdicts.

Over time, however, federal criminal law expanded. After the Civil War, Congress passed criminal laws prohibiting mail fraud and other crimes involving interstate commerce.⁶³ A much bigger increase in federal criminal jurisdiction occurred with the passage of the Eighteenth Amendment and Prohibition.⁶⁴ In 1929, the director of the Bureau of Prisons highlighted the "great increase in Federal crime" and "a transference of many offenses from the states to the Federal government."⁶⁵ The New Deal-era saw another crop of newly enacted federal criminal laws, including the provision of criminal punishment for regulatory violations.⁶⁶

⁵⁹ THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 34 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

⁶⁰ Ulmer, *supra* note __, at 272 (finding "consistent and meaningful gender effects on imprisonment and length" and finding in one district that "Hispanics have more than twice the imprisonment odds of whites . . . and receive sentences that are nearly six months longer as well"); Meares, *supra* note __, at 888-89 (noting empirical studies finding that the race of the defendant and victim affect charging decisions).

⁶¹ W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 111 (1941).

⁶² Ronald Wright and Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 40 (2002) ("In early America, plea bargains were virtually unknown.").

⁶³ Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL'Y. & SOC. SCI. 39, 41 (1996).

⁶⁴ *Id.*

⁶⁵ Humbert, *supra* note __, at 113 (citing REPORT OF THE SUPERINTENDENT OF PRISONS, SANFORD BATES, REPORT OF THE ATTORNEY GENERAL, 1929, p. 76).

⁶⁶ *Id.* at 41-42.

The largest boom in federal criminal law is the most recent. Since the 1970s, federal criminal law has exploded. “More than 40% of the federal [criminal] provisions enacted since the Civil War have been enacted since 1970,” and “more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within a sixteen year period since 1980.”⁶⁷

As federal criminal laws increased, so did the number of cases.⁶⁸ This put pressure on federal resources and led to cases being disposed of by pleas instead of trials.⁶⁹ Prohibition provides an obvious example. As Dan Richman has observed, it forced U.S. Attorneys “to scale up their operations” and “compromise[] cases at fire-sale prices.”⁷⁰

As trials yielded to pleas in the face of resource pressures, some experts called attention to the power that vested in prosecutors. The Prohibition-era, post-World War I expansion, for instance, prompted some commentators to point out the changing role of prosecutors.⁷¹ Thus in 1931, a report by the National Commission on Law Observance and Enforcement observed that “In every case the Prosecutor has more power over the administration of justice than judges, with much less public appreciation of his power. We have been . . . careless of the continual growth of the power of the prosecuting attorney.”⁷² Thurman Arnold similarly argued that “the idea that a prosecuting attorney should be permitted to use his discretion concerning the laws which he will enforce and those which he will disregard appears to the ordinary citizen to border on anarchy.”⁷³ The Wickersham Commission, created by the federal government to study

⁶⁷ TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, *THE FEDERALIZATION OF CRIMINAL LAW* 7 & n.9 (1998).

⁶⁸ See Barkow, *supra* note __, at 1018-1019 (describing the increase in federal cases with each expansion of federal criminal jurisdiction).

⁶⁹ Wright & Miller, *supra* note __, at 40 (describing caseload pressures as the “primary engine behind the shift from trials to plea bargaining”).

⁷⁰ Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds – The Center Doesn’t*, 117 *YALE L.J.* __ (forthcoming).

⁷¹ Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 *J. CRIM. L. & CRIMINOLOGY* 717, 730 (1996).

⁷² NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON PROSECUTION* 15-16 (1931) (observing that there were insufficient checks on the discretion of prosecutors, creating a situation that was “ideally adapted to misgovernment”).

⁷³ Thurman Arnold, *Law Enforcement: An Attempt at Social Discretion* 42 *YALE L.J.* 1, 7 (1932).

criminal justice in the United States, likewise criticized the lack of meaningful checks on prosecutorial power and discretion.⁷⁴

Despite these calls for reform, nothing was done to check this power either in Congress or on the Supreme Court. On the contrary, subsequent years “witnessed a dramatic expansion of the power and prestige of prosecutors,”⁷⁵ without any corresponding checks. Congress, as noted, expanded prosecutorial discretion by passing additional criminal laws and enacting mandatory minimum penalties and the Sentencing Guidelines.⁷⁶

Perhaps more surprising, though, was the Supreme Court’s reaction to the changing role of the prosecutor. As plea bargaining began to take over the federal criminal justice system, the Supreme Court all but ignored abuses associated with plea bargaining and focused instead on ensuring protections in trials. While the Warren and Burger Courts recognized expansive Fourth and Fifth Amendment rights,⁷⁷ they failed to establish protections for defendants who pleaded instead of taking a case to trial. *Santobello*⁷⁸ explicitly endorsed plea bargaining as a matter of administrative convenience.⁷⁹ Indeed, the Court believed plea bargaining should be “encouraged” as “an essential component of the administration of justice.”⁸⁰ That “encouragement” included the Court in *Bordenkircher* giving permission to prosecutors to threaten punishments orders of magnitude longer if a defendant exercised his or her trial rights.⁸¹ Later, in

⁷⁴ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION (1931). Most academic commentators, though, did not turn their attention to plea bargaining until the late 1960s. Wright & Miller, *supra* note __, at n.14.

⁷⁵ Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT’L CRIM. J. REV. 22, 23 (2002).

⁷⁶ For a discussion of how the Sentencing Guidelines increased prosecutorial power, see Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PENN. L. REV. 33, 96-100 (2003). See also Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011-12 & n.5 (2005) (explaining that sentencing law is one mechanism that has increased the discretion of prosecutors and citing sources).

⁷⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (mandating that police officers warn suspects in custody of their right to an attorney and their right to remain silent); *Mapp v. Ohio*, 367 U.S. 634 (1961) (holding that evidence obtained in violation of the Fourth Amendment must be excluded in state criminal proceedings).

⁷⁸ *Santobello v. New York*, 404 U.S. 257 (1971).

⁷⁹ Barkow, *supra* note __, at 1045

⁸⁰ *Santobello*, 404 U.S. at 260.

⁸¹ *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

Armstrong, the Court emboldened prosecutors still further by making claims of selective or discriminatory prosecution almost impossible to bring.⁸²

The Supreme Court's criminal procedure revolution, then, fell far short when it came to addressing the criminal justice system that had emerged by the 1960s and 1970s. The Court chose not to oversee coercive plea bargaining tactics that made the defendant's decision to exercise his or her trial right so costly that adjudication effectively moved from the federal courthouse to the US Attorney's office.⁸³

As a result, federal prosecutors now do not merely enforce the law, they make key adjudicative decisions as well. As Judge Gerard Lynch has observed, "[t]he substantive evaluation of the evidence and assessment of the defendant's responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor."⁸⁴ Indeed, Ronald Wright and Marc Miller have pointed out that "[w]e now have not only an administrative criminal justice system, but one so dominant that trials take place in the shadow of guilty pleas."⁸⁵

II. THE ADMINISTRATIVE LAW MODEL

Contrast the largely stealth accumulation of adjudicative and executive powers in the prosecutor's office with the outward and obsessive concern about the consolidation of power in administrative agencies. Because the problem of combined powers was obvious from the birth of modern administrative agencies, administrative law devotes significant attention to the dangers of combining prosecutorial and adjudicative power. Although administrative law scholars tend to be preoccupied with judicial review as the governing check on agency behavior,⁸⁶ administrative

⁸² *United States v. Armstrong*, 517 U.S. 456, 463-64 (1996) (preventing discovery on discrimination claims unless a defendant can show that the government failed to prosecute similarly situated defendants and noting that there is a "'background presumption' that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims").

⁸³ James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981) ("[T]he existence of trials cannot check prosecutorial powers not dependent on trials" including "the prosecutor's wide discretion in making decisions about charging, plea bargaining, and allocating investigative resources.").

⁸⁴ Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998). See also Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003) ("Most plea negotiations, in fact, are primarily discussions of the merits of the case, in which defense attorneys point out legal, evidentiary, or practical weaknesses in the prosecutor's case, or mitigating circumstances that merit mercy . . . [presented] to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty.").

⁸⁵ Wright & Miller, *supra* note __, at 1415.

⁸⁶ Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations: 1787-1801*, 115 YALE L.J. 1256, 1258 (2006) (noting that "[t]he conventional conception of administrative law in

agencies actually face a complex of additional checks on their behavior including institutional checks from within.

This Part describes how those checks prevent biased decisionmaking from the accumulation of adjudicative and prosecutorial powers in a single individual to prevent biased decisionmaking. It begins by discussing the separation of functions requirement in the Administrative Procedure Act (APA). Although this requirement does not apply to all agency actions, it is predominant in agency actions imposing penalties, with many agencies adopting separation even when the APA has not required it.⁸⁷ Moreover, in those pockets of decisionmaking where separation does not exist, an alternative scheme aims to prevent biased decisionmaking.

A. *Internal Separation*

One of the most important checks on combined prosecutorial and adjudicative power comes from the institutional design of the agency itself. The APA prohibits, in all cases of formal adjudication, “[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency” from “participat[ing] or advis[ing] in the decisions, recommended decision, or agency review . . . except as witness or counsel in public proceedings.”⁸⁸ In other words, the APA sets up a bar between prosecutors and adjudicators. As Rebecca Brown has observed, this separation “compensate[s] for departures from the structural constitutional norms” that agencies present by otherwise combining executive and adjudicative power under one roof.⁸⁹

This provision grew out of a decade-long debate between those, like the American Bar Association, who advocated for a separate entity of independent judges to preside over agency adjudications, and committed New Deal advocates who wanted investigation and adjudication to take place within the same agency to allow investigators to advise adjudicators so that the agency could set policies efficiently and with access to all the expertise within the agency.⁹⁰ But even the strongest New Deal supporters

the United States has long suffered from” the “misconception . . . that administrative law is the law of judicial review of administrative action”).

⁸⁷ See *infra* TAN __-__.

⁸⁸ 5 U.S.C. §554 (d).

⁸⁹ Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1557 (1991).

⁹⁰ William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 998 (1978); Harvey J. Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 NOTRE DAME L. REV. 351, 355-56 (1981). See also Mintz, *supra* note __, at 912 (noting that “agency efficiency depends in no small measure on the existence of a single policy-making authority, within the agency, and on the availability of the expertise and experience of the entire agency, to agency decision makers.”).

of agency flexibility conceded that an independent decisionmaker was critical in cases involving the accusation and penalizing of wrongdoers. They simply disagreed that such enforcement proceedings would make up a large measure of agency work.⁹¹

The Attorney General's Committee on Administrative Procedure, which was charged in 1939 with investigating existing agency procedures and suggesting reforms, came up with a compromise position.⁹² The Committee was "in full agreement with the position that the same person should not be prosecutor and judge."⁹³ Although a minority of the Committee would have addressed that problem by having separate agencies for investigation and adjudication, a majority of the Committee agreed to combine functions within a single agency but proposed the internal division of labor model that ultimately won adoption in the APA.

The Committee gave two reasons why separation was needed. First, "investigators, if allowed to participate would be likely to interpolate facts and information discovered by them *ex parte* and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal."⁹⁴ Second, "a man who has buried himself on one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."⁹⁵ The Committee believed that internal separation of functions addressed both of these dangers and there would be "substantially complete protection against the danger that impartiality of decision will be impaired by the personal precommitments of the investigator and the advocate."⁹⁶

That compromise position won wide support. It was easy to find common ground in this debate because both sides conceded that impartial decisionmakers were needed "when connotations of legal wrongdoing are present."⁹⁷ The drafters and supporters of this provision shared the concern that those individuals involved in investigating and prosecuting a case would have a "will to win" that would make them inappropriately partial in

⁹¹ Pedersen, *supra* note __, at 998.

⁹² Shulman, *supra* note __ at 355 n.14.

⁹³ House Hearings at 71 (citing Report of Attorney General's Committee on Administrative Procedure).

⁹⁴ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941).

⁹⁵ *Id.*

⁹⁶ S. Doc. No. 77-8, at 59-60.

⁹⁷ Pedersen, *supra* note __, at 999.

making a decision on the merits of a case.⁹⁸ As one participant in the House hearings put it, “[t]his provision about the separation of functions simply restates the law which the courts have been following for 1,000 years.”⁹⁹ The drafters believed “that those people who ascertain the facts ought to make the reports and ought to make reports that are matters of record and those reports ought not to be made at the suggestion, directly or indirectly, to any degree of those who finally have to sit in judgment to determine what ought to be done under the report.”¹⁰⁰

The importance of a neutral decisionmaker, so central to the courts and notions of due process,¹⁰¹ was therefore thought to be equally important in the context of agencies.¹⁰² The APA set out to devise a structural separation within the agency that would protect against bias while at the same time maintaining the efficiency and expertise advantages of having the agency engaged in adjudication instead of involving a court. The resulting separation of functions language in §554 was the compromise designed to “achieve impartiality without incurring the costs of complete separation.”¹⁰³

The drafters of the APA expected this provision to cover those instances where an agency sought to impose a penalty or withdraw benefits because an individual violated a statute or regulation.¹⁰⁴ The concern was that those individuals at the agency conducting the investigation and

⁹⁸ See *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980) (observing that Congress’ desire to “preclude[e] from adjudicative functions those who have developed a “will to win,” is evident in the legislative history of the APA” and citing the Senate Judiciary Committee concern with the “man who has buried himself in one side of an issue”) (citing Senate Judiciary Committee Print, 79th Cong., 1st Sess. 15 (1945), reprinted in *Administrative Procedure Act-Legislative History*, 79th Congress 1944-46, at 25 (1946)); see also Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 772 (1981) (noting that the “primary purpose” of the separation of functions was “to exclude staff members whose will to win makes them unsuitable to participate in decisionmaking”).

⁹⁹ House Hearings, *supra* note __, at 101-102.

¹⁰⁰ House Hearings, *supra* note __ at 103.

¹⁰¹ The Constitution recognizes the importance of this as well in its treatment of impeachment proceedings. The power to prosecute is placed in the House, U.S. Const. art. I, §2, cl. 5, whereas the Senate is vested with the sole power to try impeachments, *id.* art. I, §3, cl. 6.

¹⁰² See Gifford, *The Morgan Cases: A Retrospective View*, 30 AD. L. REV. 237, 249-56, 270-76 (1978); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

¹⁰³ Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761 (1981). See also William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 997 (1978) (describing separation of functions as a compromise that “seeks to restrict the influence of those whose quasi-prosecutorial stance may have biased their impressions of the case without simultaneously constraining the decisionmakers’ ability to tap the knowledge and expertise of others within the agency in analyzing what may be a complex and technical record”).

¹⁰⁴ Shulman, *supra* note __, at 364-65.

bringing the prosecution would have a tendency to “develop the zeal of advocates” and lack “the proper state of mind for providing neutral and dispassionate advice to decisionmakers.”¹⁰⁵ The concern was heightened in accusatory proceedings where “there is a greater feeling of right and wrong, of a desire to punish a particular person and of doing justice.”¹⁰⁶

The APA therefore aimed to cast a wide net in terms of which individuals were covered by the separation requirement, and courts have interpreted §554(d) accordingly. For example, the Ninth Circuit has noted that Congress “intended to preclude from decisionmaking in a particular case not only individuals with the title of “investigator” or “prosecutor,” but all persons who had, in that or a factually related case, been involved with *ex parte* information or who had developed, by prior involvement with the case, a ‘will to win.’”¹⁰⁷ Courts have held that this includes supervisors,¹⁰⁸ as well as individuals who initiate investigations and recommend filing charges; all of these individuals are engaged in investigation and prosecution for purposes of the statute.¹⁰⁹ The Third Circuit concluded that an adjudicator could not sit in judgment of a case where he had previously read investigative reports and recommended prosecution.¹¹⁰ Agency heads are the only employees exempted from the isolation requirement,¹¹¹ and this is to allow agency heads to ensure unified agency policy making.¹¹²

Although §554 governs formal adjudications and not informal ones, most agencies follow this framework of separation whenever they seek to impose punishment for violation of agency rules.¹¹³ For example, the

¹⁰⁵ Shulman, *supra* note __, at 358.

¹⁰⁶ Shulman, *supra* note __, at 397.

¹⁰⁷ *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980)

¹⁰⁸ *Columbia Research Corp. v. Schaffer*, 256 F.2d 677 (2nd Cir. 1958); *Oil Shale Corp. v. Morton*, 370 F. Supp. 108 (D. Col. 1973).

¹⁰⁹ *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962).

¹¹⁰ *Twigger v. Schultz*, 484 F.2d 856 (3d Cir. 1973).

¹¹¹ 5 U.S.C. §554(d)(2)(C).

¹¹² Mintz, *supra* note __, at 913 (“The APA structural model gives primary emphasis to the need for unified agency policy making by assigning to the highest agency official authority to make the policy decisions involved in both prosecution and adjudication, and by limiting the separation of functions requirements to individuals in the agency staff.”).

¹¹³ Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 759, 804-814 App. (1981); William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 1003 (1978) (“[I]n the years since passage of the APA, agencies gradually have adopted rules to bar those who take part in the hearing from playing any role in the preparation of the resulting decision, even when the APA would permit their involvement.”); Shulman, *supra* note __, at 364-65 (noting that the “typical adjudication envisioned by the drafters of the APA separation of functions scheme involved an agency’s accusing a party of

Nuclear Regulatory Commission separates functions in enforcement actions, as does the Civil Aeronautics Board in its accusatory, enforcement, or discipline cases.¹¹⁴ The Federal Trade Commission prohibits communication between investigators and prosecutors and decisionmakers once a complaint issues.¹¹⁵ The Food and Drug Administration likewise separates functions when it seeks to revoke clinical investigators' rights to perform studies.¹¹⁶ The Attorney General's Manual on the APA¹¹⁷ similarly emphasizes the importance of separation in cases where an individual is accused of wrongdoing.¹¹⁸ Some agencies, moreover, are subject to even greater structural separation requirements than those set out in the APA, with separation occurring at an institutional level.¹¹⁹

Supreme Court due process cases similarly emphasize the importance of separation in agencies when significant consequences are at stake. In *Morrissey v. Brewer*,¹²⁰ the Court concluded that a parole officer who often makes a recommendation to have a parolee arrested and detained could not also be the person who makes the decision of whether "there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of probation conditions."¹²¹

violating a statute or regulation . . . culminating in the imposition of a penalty or a withdrawal of benefits").

¹¹⁴ Asimow, *supra* note __, at 804, 814.

¹¹⁵ Asimow, *supra* note __, at 812.

¹¹⁶ Asimow, *supra* note __, at 808.

¹¹⁷ The Supreme Court has given deference to the Attorney General's Manual on the APA as a guide to interpreting the APA itself. *See, e.g.,* *Darby v. Cisneros*, 509 U.S. 137, 148, n. 10, 113 S.Ct. 2539, 125 L.Ed.2d 113 (1993) (noting that the Court has "given some deference" to the Manual); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n.31, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979) ("In prior cases we have given some weight to the Attorney General's Manual on the Administrative Procedure Act (1947), since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946."); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (noting that the Manual has been given some deference by the Court "because of the role played by the Department of Justice" in drafting the APA).

¹¹⁸ ATTORNEY GENERAL'S MANUAL ON THE APA 51 (1947) (contrasting licensing, where separation is not required, with actions involving "accusatory and disciplinary factors" that do merit separation); *see also* Shulman, *supra* note __, at 357-358 (explaining that Congress imposed separation for adjudication and not rulemaking because of "the accusatory nature of many adjudications and the customary dispute over evidentiary facts").

¹¹⁹ For a discussion of such separation requirements, see Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U. L. REV. 877, 908-912 (1998) (describing separation of adjudication and prosecution in various contexts including OSHA, the federal mine safety and health program, and federal air safety); George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315, 317-23 (1987).

¹²⁰ *Morrissey v. Brewer*, 408 U.S. 471 (1972).

¹²¹ *Id.* at 485.

Instead, that decision had to be “made by someone not directly involved in the case” because “[t]he officer directly involved making recommendations cannot always have complete objectivity in evaluating them.”¹²² Another parole officer who was not involved in the case could perform this function, but not the same one who was involved in reporting the parole violations or recommending revocation.¹²³ In other words, the parole office had to split responsibility between those involved in the accusatory and investigative tasks and those who would make the adjudicative decision about whether probable cause existed that the conditions of parole had been violated.¹²⁴

There is, then a consensus view among agencies and the Supreme Court that separation of functions is critical when an agency seeks to inflict a punishment on someone. The APA mandates this separation in the case of formal adjudications, the Due Process Clause requires it in some instances, and agencies voluntarily pursue this path as a matter of good government even when the law does not insist upon it.¹²⁵

B. *Other Checks on Agency Power*

Although separation is the dominant practice when agencies impose punishment and is required in the case of formal adjudications,¹²⁶ even where it is absent, there are alternative checks designed, in part, to serve some of the same purposes.¹²⁷ All agency actions are subject to judicial review under an arbitrary and capricious standard pursuant to the APA.¹²⁸ This review forces agencies to articulate legally acceptable reasons for their decisions, and agencies must explain any departure from past practice.¹²⁹ “Courts have forced agencies to take a ‘hard look’ at the questions presented on the merits and have scrutinized decisions closely for evidence

¹²² *Id.* at 485-86. *See also id.* at 497-98 (Douglas, J., dissenting in part) (“The hearing should not be before the parole officer, as he is the one who is making the charge and ‘there is inherent danger in combing the functions of judge and advocate.’”) (quoting *Jones v. Rivers*, 338 F.2d 862, 877 (4th Cir. 1964) (Sobeloff, J., concurring)).

¹²³ *Id.* at 486.

¹²⁴ Although the Court has allowed agency heads to exercise both investigative and adjudicative functions, it recognized even in that context that “the combination of investigative and adjudicative functions necessarily created unconstitutional risk of bias.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

¹²⁵ Private industry has used a similar corrective. The banking industry, for example, uses “separate workout groups – groups whose members were not personally responsible for the initial decisions” as a “standard mechanism for dealing with nonperforming assets.” Ross, *supra* note __, at 343.

¹²⁶ 5 U.S.C. §554(d).

¹²⁷ Shulman, *supra* note __, at 388-89 (noting there are alternative safeguards).

¹²⁸ 5 U.S.C. §706(2)(A).

¹²⁹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

of improper motives.”¹³⁰ This review therefore acts as a powerful check on biased and improper decisionmaking.

Other laws impose similar checks against improper decisionmaking and bias. The Freedom of Information Act (FOIA)¹³¹ and the Federal Advisory Committee Act (FACA)¹³² “grant the public additional access to information about the agency decisionmaking process, which provides further protection against arbitrary agency action or agency decisions based on improper influences.”¹³³ Private individuals, the media, and political actors can use these open government laws to search for evidence of biased decisionmaking and bring those problems to the surface.

In formal proceedings, separation of functions is not the only check against a “will to win” and the importation of improper factors into the decisionmaking. The APA requires that these formal proceedings be “conducted in an impartial manner” and provides means by which presiding officials or employees can be disqualified.¹³⁴ The APA specifically prohibits anyone involved in the decisionmaking process at the agency from having an “ex parte communications relevant to the merits of the proceeding” with anyone outside the agency.¹³⁵ And the agency must make its decision on the record and give the parties the opportunity to address the evidence upon which the agency relies.¹³⁶

The perceived need for separation therefore may be diminished somewhat where agency processes have become more open, where agencies have allowed greater participation by interested parties to give their views on the record, and where judicial review of the record and agency decisions has expanded.¹³⁷

¹³⁰ Pedersen, *supra* note __, at 1031.

¹³¹ 5 U.S.C. §552 (2006).

¹³² 5 U.S.C. app. §2.

¹³³ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1023 (2006).

¹³⁴ 5 U.S.C. § 556(b)(3) (noting that “a presiding or participating employee may at any time disqualify himself” and that “[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matters as part of the record and decision in the case”).

¹³⁵ 5 U.S.C. §557(d)(1).

¹³⁶ 5 U.S.C. §§ 556 (d), (e), 557(c).

¹³⁷ Pedersen, *supra* note __, at 1031 (explaining that more aggressive judicial review and the growth in openness and outside participation have alleviated the need to split up the agency internally to reduce bias).

Although these alternative mechanisms police agency bias just as structural protections do, they are not foolproof. Consider, for example, the Federal Trade Commission (FTC). The FTC is subject to the traditional means of judicial and political oversight. But, unlike almost every other agency, its commissioners play a role in both prosecution decisions and adjudicative decisions. The commissions vote on whether the FTC should issue a complaint (ie, commence what is in effect a prosecution).¹³⁸ The case then proceeds before an administrative law judge (ALJ), but the ALJ's decision is typically appealed to the FTC, giving the commissioners the opportunity to vote on the merits of the same case in which they made a decision to prosecute.¹³⁹ Richard Posner and others had long hypothesized that the commissioners were likely to be biased in favor of the FTC in cases in which they voted to prosecute because of this dual role.¹⁴⁰ Recent empirical research now confirms this view.¹⁴¹ The alternative mechanisms of oversight have not, in other words, fully checked the operation of bias that results when one actor has both prosecutorial and adjudicatory functions.

The preferred mechanism for checking the bias that comes from combining adjudicative and enforcement powers is therefore the separation of functions, particular in cases where punishment is imposed. These other mechanisms are a second best alternative. And certainly having no check in place is the worst alternative of all.

Prosecutors' offices fall outside both of these models. There is no separation requirement, nor are there alternative administrative law checks. While we have long recognized that prosecutors are exercising executive powers,¹⁴² we have not confronted what should be done now that they exercise adjudicative powers as well. As a result, there are neither

¹³⁸ Malcolm B. Coate & Andrew N. Kleit, *Does it Matter that the Prosecutor is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission*, 19 *MANAGERIAL AND DECISION ECONOMICS* 2 (February 1998).

¹³⁹ *Id.*

¹⁴⁰ RICHARD POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 53 (1976); P. Elman, *Administrative Reform of the Federal Trade Commission*, 59 *GEO. L. J.* 777, 810 (1971).

¹⁴¹ Malcolm B. Coate & Andrew N. Kleit, *Does it Matter that the Prosecutor is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission*, 19 *MANAGERIAL AND DECISION ECONOMICS* 6 (February 1998) ("commissions are more likely to vote for administrative complaints if they were members of the commission that chose to prosecute those cases. Thus it appears to matter if Commissions act as both prosecutors and judges.").

¹⁴² "Governmental investigation and prosecution of crimes is a quintessentially executive function." *Morrison v. Olson*, 487 U.S. 707, 706 (1988) (Scalia, J., dissenting) (citing cases).

separation requirements nor any of the alternative mechanisms to control their consolidation of power.¹⁴³

III. REDESIGNING THE PROSECUTOR'S OFFICE

Although prosecutors' offices are not typically viewed through the lens of administrative law, mechanisms used to check agencies that accumulate executive and adjudicative power under one roof apply would translate well to federal prosecutors who share the same set of powers. In both situations, the threat is the same: having the same actor charged with investigating and enforcing the law also responsible for making a final determination on the merits. Whether an individual is bringing a prosecution under a regulatory statute or a criminal provision, that "prosecutor may perceive the issues through a lens that distorts his perception in the state's favor" because he has "committed himself intellectually and psychologically, as well as having committed institutional resources to the prosecution."¹⁴⁴ Management theorists have also long recognized the danger of having individuals who were personally responsible for a failing course of action then make additional decisions about that action; they have repeatedly found that these individuals are often unable to admit their errors and continue to invest in failing projects.¹⁴⁵ These insights apply to prosecutors. Thus, as Dan Richman has observed, "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."¹⁴⁶ The prosecutor who has already invested himself or herself in a case might reach a biased and erroneous conclusion, which both undermines the agency's function and subjects individuals to decisions that do not adhere to the rule of law.

In the case of agencies, the law mandates structural separation within the agency itself or aggressive judicial review of the record provides an alternative means of protection. In the case of US Attorney's Offices, no check has yet been put in place. But a corrective modeled along the lines of the APA's separation requirement would be feasible and desirable in the case of federal prosecutors' offices. Separation is the preferred alternative because prosecutors are imposing punishment, and, as noted above,

¹⁴³ See Barkow, *supra* note __, at 1024, 1027 (noting that these protections are absent in the case of criminal prosecutors).

¹⁴⁴ Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 789 (1981).

¹⁴⁵ Jerry Ross, *Avoiding Captain Ahab: Lessons from the Office of the Independent Counsel*, 35 Admin. & Soc'y 334, 337-38 (2003).

¹⁴⁶ Richman, *supra* note __, at 803.

separation is the structural solution when agencies take punitive action. Moreover, as discussed in greater detail in Part IV, this solution, unlike aggressive judicial review, is politically viable.

The key reform for checking the consolidation of enforcement and adjudicative power in the same actor is to split those powers among two or more individuals just as the APA splits prosecutors and investigators from adjudicators. Just as a neutral decisionmaker is critical in the agency context when it imposes punishment, so, too, it is necessary in the criminal context. Indeed, it is even more important to have an unbiased decisionmaker in criminal cases.¹⁴⁷ The stakes are higher, and because of the individualized nature of the inquiry, it is even easier for bias to infect the decision.¹⁴⁸ The nature of a criminal investigation is such that a prosecutor might devote a great deal of time and energy pursuing a particular defendant. Moreover, in the course of that investigation, prosecutors may readily learn facts about defendants that are irrelevant to the legal standard at issue, such as details about a defendant's past or character that have nothing to do with the suspected crime and would be inadmissible in the adjudication.¹⁴⁹ Once a prosecutor makes those efforts to investigate a case and/or learns about such facts, it is difficult for the prosecutor to remain objective about the defendant's guilt or the sentence he or she deserves because he or she is likely to have the "will to win" that so concerned the drafters of the APA.

The question becomes how to implement structural separation in a prosecutor's office. Because everything a prosecutor does is traditionally seen as prosecutorial, the first step is to redefine those tasks that occur in a prosecutor's office that should be labeled investigative or prosecutorial and those that should be labeled adjudicative given the reality that most cases never go to trial. The fundamental aim is to prevent people who will develop a will to win or who will be exposed to legally irrelevant

¹⁴⁷ Even critics of the separation of functions requirement at the agency level admit that there is a greater need for separation in accusatory proceedings. See William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 991-92 (1978) (arguing that separation "can hinder efficient agency operation and lower the quality of final administrative decisions" and advocating the elimination of separation-of-functions requirements in all nonaccusatory agency proceedings but acknowledging that "a separation-of-functions rule has its place in an 'accusatory' proceeding").

¹⁴⁸ See Asimow, *supra* note __, at 792 ("Since specific, individualized facts must usually be found [in accusatory cases], it may be peculiarly difficult for a decisionmaker to discount advice to take account of the adviser's bias."); ATTORNEY GENERAL'S REPORT, *supra* note __, at 56 (noting that investigators would be prone to use facts they discovered on their own).

¹⁴⁹ See Asimow, *supra* note __, at 789-90 (noting that judges in criminal matters are not permitted to consider inappropriate criteria of which prosecutors might be aware).

information about a defendant from making key determinations about the defendant's guilt and what punishment he or she deserves.

In labeling investigative and prosecutorial tasks, then, the key is to decide when a prosecutor is likely to feel invested in a case such that an objective observer could reasonably doubt that the prosecutor is neutral about how the defendant should be treated. Using that benchmark, prosecutors who are involved with the investigation of a case – including involvement in any decision about a case that is made pre-indictment, such as decisions to seek warrants or to bring someone before a grand jury – should be prevented from making adjudicative decisions.¹⁵⁰ Similarly, if a prosecutor obtains information about the defendant in a proffer or some other setting (such as a conversation with an investigative agent) that is irrelevant to the legal merits of the defendant's case, that prosecutor should be prevented from making adjudicative decisions about that defendant.

The next question is what counts as an adjudicative decision for these purposes. Here the key is to capture those decisions that effectively amount to a decision on the merits about a defendant's guilt and what punishment he or she deserves. Using that benchmark, adjudicative decisions should include decisions whether to offer or accept a deal if a defendant pleads guilty because these decisions amount to a final resolution for the defendants who plead guilty and certainly reflect the prosecutor's view of the merits of the case.

Charging decisions, either the initial decision or later decisions to supersede or dismiss an indictment, should similarly be treated as adjudicative. Deciding what charges to bring is traditionally viewed as the core task of a prosecutor. But this traditional view ignores the importance of making a charging decision in a world where more than 95% of cases never go to trial. In a world of guilty pleas, the charging instrument is more than a charge; it is a verdict. Like the decision to accept or offer a plea deal, it similarly reflects the prosecutor's decision about the defendant's conduct and the merits of the case. Treating the charging decision functionally, it becomes clear that it should be treated as adjudicative for purposes of separating functions in the office.

The toughest decisions to categorize are whether to sign up a defendant as a cooperator and the related question of whether to file a substantial assistance motion. There is a strong argument that the decision to offer the defendant a deal for cooperating – either immunity, reduced charges, or a substantial assistance motion – should be couched as

¹⁵⁰ For a description of some of a prosecutor's investigative tasks, see Richman, *supra* note __, at 779-780.

investigative because the value of the defendant to the case or a related case is a core prosecutorial decision. On the other hand, in the federal system at least, the decision to sign up a defendant as a cooperator is often a de facto adjudication in the same way charging and plea decisions are: it will dictate a defendant's sentence. The only difference is that it is not a decision that goes to the merits of the charged conduct; instead, it goes to the value of a defendant in an investigation.

Although cooperation decisions could be characterized either way for these reasons, one approach that balances both aspects of cooperation decisions would be to treat the initial decision to enlist the defendant as a cooperator as investigative and to characterize the decision of whether the defendant has fulfilled his or her obligations as a cooperator and the benefit he or she should receive for performing those functions as adjudicative. This balance recognizes that the initial decision to use the defendant as a cooperator goes to the core of the prosecutor's investigation functions while at the same time recognizing that the benefit a defendant receives for cooperating falls on the adjudication side of the line because it is a determination about what a defendant deserves for such behavior and whether the defendant met his or her end of the deal, decisions which effectively decide a defendant's sentence.

Decisions to offer defendants plea deals, immunity, or substantial assistance motions for cooperating would therefore all be treated as adjudicative. The plea deals and charging decisions fall within those decisions already identified as adjudicative, but substantial assistance motions should be treated this way as well. As noted,¹⁵¹ substantial assistance motions are the number one basis for a downward departure from a Guidelines sentence¹⁵² and they are one of only two bases for avoiding the consequences of a statutory mandatory minimum.¹⁵³ The prosecutor's decision to file such a motion constitutes a "unilateral government decision"

¹⁵¹ See *supra* TAN __-__.

¹⁵² The amount of the departure can be quite significant, particularly when the defendant is facing a long sentence. For example, the mean substantial assistance departure for a defendant facing a drug trafficking charge was more than five years. Maxfield & Kramer, *supra* note __, at 18, 33 Exh. 11. And the mean substantial assistance departure for all offenses was 50.8 months. *Id.* at 33 Exh. 11.

¹⁵³ The second mechanism, 18 U.S.C. §3553(f), is a limited safety valve available only to offenders who are the least culpable participants in drug trafficking offenses and does not have more than one criminal history point, which basically means either no criminal history or at most a conviction for a petty misdemeanor with a sentence of less than 60 days.

that “is not subject to challenge by the defense and is not reviewable by the court (unless constitutional grounds are cited).”¹⁵⁴

Even if a defendant provides substantial assistance, there is a risk that a biased prosecutor might withhold the motions so that a defendant receives a longer sentence. The empirical evidence on the filing of these motions lends credibility to this concern. Offices differ in their standards for giving these motions,¹⁵⁵ and the motion is often withheld even when there is evidence that a defendant has provided assistance.¹⁵⁶ Indeed, 14.3 percent of individuals who testify do not receive a substantial assistance motion, and one-third of those who “provided tangible evidence” also did not receive a departure.¹⁵⁷ To be sure, these numbers alone do not provide an answer about whether biased decisionmaking is occurring because the decisions not to file the motion could be based on reasonable factors, such as finding that the defendant was untruthful or not completely forthcoming. But additional evidence casts doubt on the notion that all the withheld motions are being denied defendants for objectively reasonable reasons. First, there is empirical evidence that “personal characteristics” including race and gender “remained significant predictors of who received substantial assistance departures.”¹⁵⁸ Second, a survey of judges and probation officers found that the vast majority – 59 percent of judges and 55 percent of probation officers – stated that “they personally had cases in which they believed that the defendant had provided ‘substantial assistance’ but the prosecutor did not make a §5K1.1 motion.”¹⁵⁹ This additional evidence provides a reason to doubt that every instance where a motion is denied is for objective and legally appropriate reasons. In light of this risk and the importance of the decision, it should also be classified as an

¹⁵⁴ Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 3 (Jan. 1998). See also *id.* at 5 n.11 (“While the court does not have to grant a §5K1.1 motion filed by the prosecution, information obtained by the Commission indicates that the vast majority of motions are granted as a matter of course.”).

¹⁵⁵ Maxfield & Kramer, *supra* note ___, at 5, 8 (noting “inconsistencies in how substantial assistance departures were being applied nationally” and that “districts frequently diverged from their stated policy”); Frank O. Bowman, III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline*, 29 *Stetson L. Rev.* 7, 58 (1999) (noting that one office filed such motions for 47.5% of all defendants, whereas other offices filed those motions on behalf of less than 8% of defendants).

¹⁵⁶ One study found that, although roughly two-thirds of defendants provided “some form of assistance,” only 38.6% of defendants received the departure. Maxfield & Kramer, *supra* note ___, at 9-10.

¹⁵⁷ Maxfield & Kramer, *supra* note ___, at 10.

¹⁵⁸ *Id.* at 13-14 and 31 Exh. 9. It should be noted that legally irrelevant factors such as race and gender also play a role in the judicial decision of how much to depart on the basis of substantial assistance. *Id.* at 19 and 34, Exh. 12.

¹⁵⁹ Maxfield & Kramer, *supra* note ___, at 15.

adjudicative determination for the separation requirement while treating the initial decision to sign up cooperators as investigative.

With these various functions defined, it is possible to state the principle of separation that should apply to prosecutor's offices to avoid the danger of bias and to keep the focus on legally relevant information: Neither the Assistant United States Attorney responsible for investigating or overseeing the investigation of a case nor any individual who has directly supervised the AUSA in the investigation should be the same individual who makes the final determination of what charges to bring, what plea to accept, or whether an individual has cooperated sufficiently to merit a lesser sentence on the basis of giving substantial assistance to the government.¹⁶⁰ Rather, a different prosecutor or panel of prosecutors who were not involved in the investigation (as either a line attorney or a supervisor) should make these adjudicative decisions. A panel is preferred because it has the benefit of bringing a range of viewpoints, but resource constraints in smaller offices might dictate that a single attorney make the adjudicative decision.

The basic model of having at least a single attorney who was not involved in the investigation of the case or who otherwise developed a will to win make adjudicative decisions is feasible with the personnel in all U.S. Attorney Offices. Even the smallest Office – with 11 AUSAs – has enough people to arrange the office in this manner.¹⁶¹ Moreover, every office has experienced attorneys to perform the adjudicative task. The average length of service for an AUSA in every district but four is over 10 years, and even in the four that fall below this amount, the lowest average length of service is seven years.¹⁶² In addition, every office already has enough supervisors to separate those responsible for investigations from those who make adjudicative decisions because there are at least two high-level supervisors in every office and typically more.¹⁶³ To be sure, the mere presence of these

¹⁶⁰ The APA's separation of functions requirement similarly covers supervisors who are involved in decisions about litigating a case. Asimow, *supra* note ___, at 774; Attorney General's Manual, *supra* note ___, at 58 (explaining when supervisors are covered).

¹⁶¹ Letter from Marie A. O'Rourke, Assistant Director, Executive Office for United States Attorneys, to Rachel Barkow, Mar. 4, 2005 (stating in response to a Freedom of Information Act request the number of AUSAs in each office) (on file with author).

¹⁶² *Id.* (listing the Central District of California, the District of New Jersey, the Eastern District of New York, and the Southern District of New York as the offices with AUSAs serving an average term of less than 10 years). Because these four districts are among the largest Offices, there are undoubtedly plenty of experienced AUSAs in the Office who can perform the adjudicative task.

¹⁶³ Almost all U.S. Attorney's Offices have a First U.S. Attorney or Deputy U.S. Attorney as well a Criminal Chief. In the offices that do not have both a First U.S. Attorney and a Criminal Chief, there is at least one or the other plus an additional unit chief who serves in a supervisory role in every office except for Guam and Wyoming.

supervisors might overstate the available hours they have to engage in this oversight if offices are otherwise understaffed for the workload. And there may be occasional periods when this decisionmaking structure is not possible in the smallest offices because of leaves of absence. But in the vast run of cases in all United States Attorney Offices, this model should be workable by using experienced attorneys or supervisors to make final adjudicative functions and relying on the assistants in the office, as now, to perform all other tasks.

The United States Attorney's role would remain the same as it is now, so he or she could be involved in both investigative and adjudicative decisions. This parallels the APA, which exempts agency heads from the separation of functions requirement,¹⁶⁴ and it rests on the same rationale. Just as the "agency heads exception" assures that agency heads can supervise policymaking decisions wherever they occur (i.e., in investigations or adjudications or rulemakings),¹⁶⁵ the U.S. Attorney exception would allow him or her to do the same. The U.S. Attorney is the political appointee who is accountable to the President and therefore most accountable to the public, and he or she is charged with ensuring that decisions within his or her district reflect the law enforcement objectives of the Administration. He or she therefore must be permitted to participate at all stages of a case without limit because important policymaking decisions may be implicated at all stages. As a practical matter, however, in most cases, the U.S. Attorney will not be involved at either stage, and supervisors or line attorneys will be the ones to make the critical decisions.¹⁶⁶

There are limits with this model of split authority. First, not every case in a prosecutor's office involves a prosecutor conducting an investigation or supervising an agent in an investigation.¹⁶⁷ Some cases are purely reactive: An arrest has already been made by law enforcement officers, and the only decision for the United States Attorney's office is whether and what to charge and if the defendant will be signed up as a

¹⁶⁴ §554(d). *See also* *Withrow v. Larkin*, 421 U.S. 35 (1975) (permitting a state medical licensing agency to investigate misconduct and adjudicate license revocations); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Hortonville Joint School District v. Hortonville Educational Ass'n*, 426 U.S. 482, 489-491 (1976) (distinguishing the case before it involving the agency heads from *Morrissey v. Brewer*, 408 U.S. 471 (1972), in which the Court required separation of officials involved in investigating and deciding parole revocations).

¹⁶⁵ Asimow, *supra* note __, at 766. *See also* Mintz, *supra* note __, at 913 ("In order to assure that the Agency head would ultimately be responsible for all critical policymaking, it was therefore necessary to maintain the unitary model, with the Agency head the ultimate adjudicative decision maker.").

¹⁶⁶ In my interviews with former AUSAs, it was clear that the U.S. Attorney did not get involved in the overwhelming majority of cases unless they were high profile and raised a policy issue.

¹⁶⁷ For a description of how prosecutor's control investigations, *see* Richman, *supra* note __, at 779-786.

cooperator. In those cases, there might not be an opportunity for separating functions because there is no prosecutor with a will to win or bias to separate from the adjudicating prosecutor.¹⁶⁸ But if the prosecutor has obtained information about a defendant that has nothing to do with the case but could bias his or her decision about how to resolve the merits of the case, that prosecutor should not be the one to make a final decision about how to charge the case.

A second limit is more fundamental. There is no guarantee that this model will prevent biased decisionmaking because the adjudication will still be conducted by a prosecutor, albeit one who has not worked on the particular case to that point.¹⁶⁹ In an ideal scenario, the attorneys selected to make final decisions about the charges to bring should be people who are not prone to biased judgments regardless of their position as a prosecutor. The question is how to select those individuals. One possible check would be to have individuals who have worked for a long time in the office make the decision. Longevity of service is valuable because it makes it less likely – though does not completely eliminate the risk – that the attorney’s decision will be colored by how the decision will look to prospective future employers. If an attorney is hoping to obtain a political appointment, for example, he or she may have a greater incentive to appear tough on crime.¹⁷⁰ The longer an attorney has served in an office, the less important any given decision is to his or her overall record. Moreover, those who have been in the office for longer periods of time are more likely to be influenced by what some commentators have called “career prosecutorial

¹⁶⁸ To be sure, one could argue that the attorney making a decision about how to charge the case could and should clear that decision with a supervisor to improve decisionmaking, on the theory that two sets of eyes are better than one in making these crucial decisions. But whether that scheme is a wise one is beyond the scope of this Article, which is addressing the more fundamental separation of powers problem.

¹⁶⁹ One bias that should be controlled is the bias to go to trial to get the experience that the private bar finds valuable. Because the adjudicator will not be the same person who has to try the case, he or she should not have an incentive to offer less favorable plea deals for the sake of trial experience. See Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys’ Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 273-274 (2002) (summarizing research that assistants “took complex, high-profile cases that they felt would assist their future careers in private practice” and might have an incentive to prosecute high-status individuals because of what it would mean to a future private sector career). Another bias that is checked by having a separate adjudicator make a decision about the disposition of the case is the incentive of attorneys who do not plan on leaving the office to avoid trials. *Id.* at 285-87 (observing that “careerists” are often sent as “deadwood” because they resist complicated cases and seek to avoid time-consuming trials). By vesting that decision with someone who does not need to conduct the trial, that bias is also checked.

¹⁷⁰ Some empirical research bears this out. Using a sample of United States Attorneys from 1969 to 2000, Richard Boylan found that the length of prison sentences obtained under that US Attorney was positively related to subsequent favorable career outcomes such as becoming a federal judge or obtaining a partnership in a large law firm. Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AMERICAN L. AND ECON. R. 379, 389-90(2005).

culture,”¹⁷¹ where winning cases is not the singular goal but a desire “to do the right thing” is.¹⁷² In most cases, supervisors will have this length of service because those selected for these positions tend to have served for longer periods of time.

Admittedly, longer service can have problems of its own, but requiring that the adjudication be performed by at least one person in a supervisory position can help to check those problems. Specifically, some researchers have found that career prosecutors develop a preference for avoiding complex cases and that some careerists resist following changes in office policies because of a view that they “know better” than the U.S. Attorney what their prosecutorial priorities should be.¹⁷³ But the requirement that the individual in the office making the adjudicative decision is a supervisor can check both of these concerns. The decision to promote an individual to a supervisor position is for the United States Attorney to make, and presumably the U.S. Attorney will choose individuals who will adhere to the policies of the U.S. Attorney and who are hard-working.

Even a long-serving supervisor may have biases, however. Indeed, it is possible that individuals with a great deal of experience may be biased precisely because their time in the office has colored their judgment.¹⁷⁴ They may develop views about particular cases or defendants that are based on generalizations without a sufficiently open mind about the case at hand. It is for this reason that a panel of final decisionmakers is preferred. Insisting on majority approval from a panel of 3 or 5 attorneys would help check against individual biases. But the more individuals required for the adjudication, the less feasible the model becomes, at least in the smallest offices.¹⁷⁵

Moreover, whether a panel is used or a single adjudicator, the risk of bias will still not disappear with this model, for at least two reasons. First, the investigating prosecutor will be the main source of information for the prosecutor or panel of prosecutors making the decision. Although tough questioning by the deciding prosecutors might reveal weaknesses in the case

¹⁷¹ Brown & Bunnell, *supra* note __, at 1079.

¹⁷² *Id.* at 1080.

¹⁷³ Lochner, *supra* note __, at 282, 286-87.

¹⁷⁴ As G.K. Chesterton once noted, the danger of serving in this position for too long is that prosecutors may lose sight of the importance of what is at stake for the defendant because they “have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.” G.K. CHESTERTON, *TREMENDOUS TRIFLES* 67-68 (Methuen & Co. Ltd., London 1909).

¹⁷⁵ See *supra* TAN __-__.

not brought forth by the investigators, there is a risk that these decisionmakers will simply defer to the judgment of the investigators because they are supplying all the important facts. Second, there is the risk that prosecutors will defer to one another because of office cohesion. Because the American system is an adversarial one, prosecutors may view themselves on one side and on the same team, and they may not be prone to the kind of self-criticism that would be necessary for errors in the government's case to be discovered.

Without minimizing the risk that some bias will remain, however, it is important to note that this measure would go some distance to checking that. As an initial matter, the exercise of presenting a case to another attorney may have a disciplining effect. Prosecutors may resist presenting facts that are legally irrelevant or inflammatory and could not be presented to a jury because the adjudicating prosecutors would not find those facts to be relevant to the merits.¹⁷⁶ Moreover, it is possible and perhaps even likely that, over time, the “adjudicating” prosecutors will develop a culture of taking their task seriously. As Judge Lynch has posited, “[j]ustice is much better served when prosecutors determining whether to indict or making plea offers see themselves as quasi-judicial decisionmakers, obligated to reach the fairest possible results, rather than as partisan negotiators.”¹⁷⁷ The best way to facilitate that mindset is to create a separate group of adjudicators. Indeed, in the San Diego United States Attorney's Office, there is a review mechanism of indictments similar to what is being advocated here, and that review is substantive and not merely cursory rubber-stamping of the line assistant.¹⁷⁸

If the doubts of bias remain sufficiently grave, it is possible that in some offices, additional measures of protection could be put in place. One possible check on this risk is to adopt a structural reform along the lines of the administrative-law inspired proposal of Judge Gerard Lynch that would give defense lawyers an opportunity to be heard before prosecutorial decisions are made.¹⁷⁹ The investigators and the defense lawyer could each present their view of the case to the attorney or attorneys in the office

¹⁷⁶ For example, a former criminal division chief in the Northern District of Illinois criticized the report of Independent Counsel Kenneth Starr, noting that, “If I had received a prosecution memorandum like this, with details about the guy's marriage and all, I probably would have sent it back to the assistant who wrote it and said, ‘What are you doing?’” See John Gibeaut, *In Whitewater's Wake: Lurid Details Aside, Is it a Crime?*, 848 A.B.A. J. 41 (Nov. 1998).

¹⁷⁷ Lynch, *supra* note __, at 2136.

¹⁷⁸ See *infra* TAN __-__ (describing the review in the San Diego United States Attorney's Office).

¹⁷⁹ Lynch, *supra* note __, at 2147. James Vorenberg called for a similar reform when he advocated “screening conferences” in which prosecutors and defense lawyers could discuss the charging decision. Vorenberg, *supra* note __, at 1565.

responsible for making the final decision. To avoid having the defense tailor witnesses or testimony, this should probably be done in a context where the defendant presents his or her version of the case, but is not present when the line assistant presents his or her arguments. This allows the line assistant's wealth of information to get a full airing without fear of jeopardizing the case should it go to trial, while at the same time giving the defense lawyer an opportunity to present his or her client's case to someone in the US Attorney's Office who has not yet made up his or her mind about the case should be resolved. By allowing both sides to present their case before a neutral arbitrator, this structure would mimic the general adversarial system that takes place at trial, which aims to expose falsehoods by subjecting claims of either party to criticism and refutation.¹⁸⁰

This measure has the additional benefit of allowing defense lawyers to learn more about what arguments are most persuasive to decisionmakers in the office. These lawyers, in turn, can make it known to the public and political overseers how the offices make decisions. With a trial model, this function is performed by the fact that trials are open.¹⁸¹ But in a system dominated by pleas that takes place behind the closed doors of the prosecutor's office, a new mechanism is necessary, and this may well fit the bill.¹⁸²

Whether or not a defense lawyer is given a role in the adjudicative process that takes place in the prosecutor's office, office relationships and allegiances will prevent the lawyer or lawyers making the final decision from being completely neutral.¹⁸³ But in the absence of a neutral decisionmaker outside the office, this might provide the most realistic solution.

¹⁸⁰ Asimow, *supra* note __, at 790-91.

¹⁸¹ *Gannett Co. v. DePasquale*, 443 U.S. 368, 428 (1979) ("Open trials also enable the public to scrutinize the performance of police and prosecutors in the conduct of public judicial business.").

¹⁸² "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933); Cass Sunstein, *Informational Regulation*, 147 U. PA. L. REV. 613, 622-626 (1999) (describing how information disclosure serves as a regulatory tool). Currently, many if not most defense lawyers are unable to assess the strength of the prosecutor's case against their clients because prosecutors do not have an obligation to reveal their evidence. *Ma, supra* note __, at __. The downside to this additional suggestion is discussed in Part IV, *infra*, because this check is less politically palatable.

¹⁸³ In his definitive study of separation of functions in the agency context, Michael Asimow has observed this danger in explaining why all prosecutors in agencies should be removed from the decisionmaking process: "An uninvolved prosecutor who furnishes advice favorable to the defendant might undermine the esprit de corps of the office, might feel uncomfortable in socializing with the active prosecutor, or might fear that the active prosecutor would retaliate in future cases." Asimow, *supra* note __, at n.150.

Like employing a panel of adjudicators instead of a single adjudicator or a supervisor instead of a senior line assistant, however, the cost of this additional structural check is that it will use up more office resources, which may make it less likely to be adopted. The simplest model of a single adjudicator with a number of years of experience may not be the most protective, but it may be the most feasible. And that feasibility is no small matter. Any proposal for checking prosecutors must be measured against its likelihood for implementation because there have been decades of calls for reform with no action. The next Part considers whether this proposal is different. In all of its forms, it is.

IV. THE POLITICS OF REFORM

Reforming the structural design of a prosecutor's office is not, of course, the only mechanism that could check the dangers posed by the combined executive and adjudicative powers of prosecutors. There are numerous other possibilities for achieving the same result, some of which in theory provide a more robust check on prosecutorial bias. This Part briefly sketches the main alternatives presented in the literature and then explains why a change in institutional design is the most politically viable option.

A. *Other Mechanisms for Checking Prosecutorial Power*

The problem of expansive prosecutorial power could be addressed by a number of means. This section describes the major approaches advanced in the literature and explains why these protections, while strong in theory, fall short in reality.

1. *Judicial Oversight.* Perhaps the most common suggestion for controlling prosecutorial abuses is to have greater federal court oversight over plea bargaining, charging, and cooperation decisions.¹⁸⁴ This has been the administrative law model that has most interested commentators, and it could be done in a variety of ways. Some experts and scholars have argued that prosecutors, like agencies, should state reasons for their decisions to bring or not bring charges and courts should review them to ensure they are not arbitrary and capricious.¹⁸⁵ Other scholars have pressed more moderate

¹⁸⁴ See, e.g., Stuntz, *Bordenkircher*, *supra* note __, at 27; KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 203-205 (1971); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA L. REV. 1309, 1325-26 (1997); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

¹⁸⁵ For a classic statement of this argument, see, e.g., KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 203-205 (advocating that the Antitrust Division should adopt a general practice of "accompany[ing] all significant decisions of substantive policy with statements of findings and reasoned opinions"). See Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 312 & n. 5 (1978) (citing scholars and commissions in favor of this view).

means of judicial review. Professor William Stuntz, for example, argues that in reviewing pleas, courts could require the government “to point to some reasonable number of factually similar cases in which the threatened sentence had actually been imposed, not just threatened.”¹⁸⁶ Alternatively, the court could review the sentence the prosecutor threatened to induce the plea to make sure that it “was fair and proportionate given the defendant’s criminal conduct.”¹⁸⁷

In theory, greater judicial involvement would be the ideal corrective because it would interject a truly independent actor – an Article III judge – to curb the abuses outlined above. Judges are certainly less biased than a fellow prosecutor, so they are a better fit for the bill of a neutral decisionmaker. As Kenneth Culp Davis pointed out in his classic statement advocating for more judicial review of prosecutors, “[t]he reasons for a judicial check of prosecutors’ discretion are stronger than for such a check of other administrative discretion that is now traditionally reviewable” because the stakes are high, abuses are common, and “much injustice could be corrected.”¹⁸⁸ Thus, in theory, the case for controlling prosecutorial discretion through a judicial check is even stronger than the case for controlling agency discretion through a judicial check.

The problem with this type of reform is that it is not viable. Professor Davis called for these reforms in 1971, and many similarly illustrious academicians have followed with like arguments. But just as suggestions in the middle of the century for the development of independent adjudicative bodies separate from administrative agencies were rejected, so, too, were these calls for judicial oversight of pleas and cooperation and decisions not to bring charges.¹⁸⁹ And the reasons are similar. In both cases, the reform is too costly, too inefficient, and not sufficiently deferential to what are perceived to be experts in the field.

Consider the arguments about cost and efficiency. Criminal cases make up 21 percent of the crowded federal docket,¹⁹⁰ and scrutinizing each

¹⁸⁶ Stuntz, *Bordenkircher*, *supra* note __, at 27. James Vorenberg argued for capping plea discounts at 10 to twenty percent. Vorenberg, *supra* note __, at 1561.

¹⁸⁷ *Id.* at 28.

¹⁸⁸ Davis, *supra* note __, at 211-212.

¹⁸⁹ Misner, *supra* note __, at 736 (noting that “attempts to impose any sort of judicial or administrative review on the great majority of the decisions of” prosecutors “have been grandly unsuccessful”).

¹⁹⁰ As of September 30, 2007, there were 265,082 civil cases and 72,478 criminal cases pending in the U.S. district courts. See ADMIN. OFF. OF THE U.S. CTS., 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 13 (2008), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>.

criminal plea and cooperation agreement would place an enormous strain on already thin resources. Indeed, it is precisely because of a heavy workload that judges have been complicit in the development of plea bargaining in the first place.¹⁹¹

Resistance is also based on a concern about the judiciary's role in law enforcement. As the Court noted in *Armstrong*, "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."¹⁹² Even Professor Davis who generally dismissed the rationale that the judiciary is unsuited to the task of reviewing criminal prosecutorial decisions as inconsistent with review of the administrative state,¹⁹³ conceded that "many considerations that enter into a decision to prosecute or not to prosecute may properly be kept secret."¹⁹⁴ He acknowledged, for example, that if the prosecutor has an enforcement strategy that will play out in multiple steps, the prosecutor should not have to make that strategy known.¹⁹⁵ Similarly, if the prosecutor declines to bring a case because the evidence is too expensive or because a witness is recalcitrant, secrecy might be appropriate in that instance as well.¹⁹⁶ Once exceptions for these reasons are accepted, though, it becomes difficult to justify judicial review. For in almost every case, a prosecutor can root his or her decisions in reasons of strategy or budget limitations. Thus, it may well be the rare case that is based on – or acknowledged to be based on – a "determination[] of substantive law or policy"¹⁹⁷ as opposed to these strategic and pragmatic factors, and if that is true, then the Supreme Court's general hands-off policy begins to make sense. Certainly the prospects for overriding this hands-off view of the courts appear slim.

2. *Limit Plea Bargaining or Charging Discretion.* Another option for correcting prosecutorial abuse would be to prohibit prosecutors from adjudicating disputes. The most commonly targeted adjudication for attack is the decision to plea bargain, with many scholars advocating the elimination or curtailment of plea bargaining. These proposals take many

¹⁹¹ GEORGE FISHER, PLEA BARGAINING'S TRIUMPH.

¹⁹² *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

¹⁹³ Davis, *supra* note __, at 210 ("I could cite a hundred Supreme Court decisions stating that it is the function of the judiciary to review the exercise of executive discretion...").

¹⁹⁴ Davis, *supra* note __, at 204.

¹⁹⁵ Davis, *supra* note __, at 204.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

forms, from outright elimination of plea bargaining¹⁹⁸ to streamlined trials to discourage bargaining.¹⁹⁹

These proposals suffer from two flaws that make their implementation either unlikely or unsuccessful in curbing the goal of limiting prosecutorial abuses. First, many of these arguments simply move prosecutorial adjudication to a different point in the process. For example, if plea bargaining were abolished or discouraged, the bargaining would simply move to an earlier stage in the process, giving prosecutors the same leverage.²⁰⁰ As long as prosecutors retain the discretion over the initial decision to bring charges, this reform would do little to cabin prosecutorial abuse. If charging discretion exists, so, too does the power to adjudicate.²⁰¹

Second, to the extent these proposals rely on streamlining trials, they face either constitutional or political impediments. Many of the reasons trials are costly and therefore avoided are embedded in the Constitution. The right to a jury and the many evidentiary rules that have developed alongside it slow down the processing of a criminal case. While defendants could be asked to waive their rights in favor of a more streamlined process, that is, in effect, what plea bargaining does. A jurisdiction would therefore need to be convinced that it should offer

¹⁹⁸ See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992) (“Plea bargaining is a disaster [that] can be, and should be, abolished.”); U.S. NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, Standard 3.1, at 46 (1973) (proposing the abolition of plea negotiations).

¹⁹⁹ See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 969 (1983); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV L. REV. 1037 (1984).

²⁰⁰ Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 302 (1980) (“[P]rosecutors can avoid plea bargaining restrictions in a number of ways: defendants thought likely to demand trial can be charged with more serious or more numerous offenses; prosecutors can substitute ‘pretrial diversion bargaining,’ at least in cases suitable for probation sentences; and ‘uncooperative’ defendants (and their attorneys) who insist on trials can receive less favorable treatment in subsequent cases, or on other pending charges”).

²⁰¹ One possible check on this dynamic is offered by Ronald Wright and Marc Miller, who contend that plea bargaining could be limited without increasing charge bargaining if jurisdictions were to employ more aggressive screening of cases in the first instance, to limit bargaining before charges were brought, and to discourage changes in charging decisions after the initial charges were filed. But it is unclear whether this could translate to the federal system or other systems where charge bargaining is not limited by the absence of a defense lawyer before charges are brought as it is in New Orleans. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002). In fact, Wright and Miller find that, despite aggressive screening in the federal system, there is abundant pre-charge bargaining. *Id.* at 78. Moreover, Professors Wright and Miller also note that, even in New Orleans, prosecutors retain similar power through their ability to decide unilaterally whether to file for enhanced sentences under the state’s multiple bill law. As they acknowledge, “[t]he unilateral feature of multiple bill negotiation makes it just as potent and dangerous as charge bargaining.” *Id.* at 82. To the extent prosecutorial adjudication is taking place at any of these points, then, it is valuable to consider a structural reform along the lines proposed here.

defendants more process than they currently do in the world of abundant plea bargaining.

In this political climate, that is a tough sell. Jurisdictions rarely vest defendants with greater procedural protections that cost more unless the Court forces their hands through constitutional rulings. This brute political fact explains why so few jurisdictions have followed the streamlined trial model that Steve Schulhofer described in Philadelphia that allowed for such a dramatic reduction in plea bargaining there.²⁰² Unless and until the political climate undergoes a significant change, it is unlikely that a jurisdiction would opt to spend more money on process as long as plea bargaining is accepted by the courts. And, as noted above, the courts appear to be willing participants in the world of plea bargaining.

3. *Greater Legislative or Public Oversight.* A third option for checking the combined adjudicative/investigative power of prosecutors would be to place greater oversight responsibility with legislators or the public. This, too, could take many forms. Although Congress cannot oversee prosecutorial conduct in each individual case, it could hold hearings on prosecutorial practices and/or pass legislation that cabins prosecutorial discretion, perhaps through code reform. Or, legislators could place oversight in other bodies. For example, Professor Angela Davis has proposed the use of prosecution review boards, which would review complaints brought by the public and also conduct random reviews of routine prosecution decisions.²⁰³

Again, while options along these lines sound promising on paper, they cannot serve as a realistic check in today's political climate. The political process overwhelmingly favors prosecutors.²⁰⁴ Any oversight by Congress would serve largely to make sure that prosecutors are being sufficiently tough. It is unlikely that congressional oversight would check systematic biases that might prompt innocent defendants to plead guilty or that lead defendants to plead guilty to more serious charges than the ones they have actually committed. Prosecutors would likely resist any attempt at a civilian or agency review board, and politicians in Congress have no incentive to battle prosecutors on this point unless there is sufficient mobilization for greater control. While Congress might be willing to subject prosecutors to greater oversight by victims,²⁰⁵ it is hard to imagine a

²⁰² Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1062-1086 (1984) (describing the Philadelphia system and pointing out its viability as an alternative to plea bargaining).

²⁰³ Davis, *supra* note __, at 463.

²⁰⁴ See Stuntz, *Pathological Politics*, *supra* note __, at 546-57.

²⁰⁵ See, e.g., Crime Victims' Rights Act (CVRA), 18 U.S.C.A. § 3771 (West 2008).

scenario where Congress would put in place an oversight scheme that would offer greater protection for defendants. And because protections for defendants are the most pressing problem with prosecutorial discretion, this oversight would do little to get to the heart of the issue raised by prosecutorial power.

4. *Prosecutorial Guidelines or Open Processes.* Some advocates for prosecutorial reform have suggested that published prosecutorial guidelines should be adopted to control the exercise of prosecutorial discretion.²⁰⁶ While this suggestion, like the others, is promising in theory, in reality, a requirement such as this could prove to be more worrisome than the problem it is trying to solve.

As an initial matter, publishing detailed guidelines could undermine law enforcement goals. If prosecutors announce, for example, enforcement thresholds, deterrence could be compromised.²⁰⁷ There is also a concern that detailed guidelines could prompt litigation challenging prosecutorial decisions that do not comport with them, which leads to the problems associated with judicial review discussed above. For these reasons,²⁰⁸ the law enforcement community has generally not embraced guidelines voluntarily, and if they have, they have opted for voluntary guidelines that are relatively short on details. If broader guidelines are adopted, there is a risk that they will be so broad as to be meaningless checks on the exercise of discretion.²⁰⁹ Thus, feasibility is again a concern.

But even if guidelines were adopted, there is an additional substantive concern from the standpoint of defendants. If the politics of

²⁰⁶ See, e.g., Davis, *supra* note __, at 15-21; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 134 (1967); Abrams, *supra* note __, at 1-25; David C. James, *The Prosecutor's Discretionary Screening and Charging Authority*, 29 APR PROSECUTOR 22, 23 (1995) (arguing in favor of guidelines); Vorenberg, *supra* note __, at 1562-64 (same); Beck, *supra* note __, at 375-376 (advocating that the Department of Justice should issue policy statements on its enforcement priorities and make those positions known to Congress); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1013 (2005) (arguing that "[p]rosecutorial guidelines can produce more visible and consistent decisions within offices"); Misner, *supra* note __, at 767-69.

²⁰⁷ Frase, *supra* note __, at 297 ("publication would reduce the legitimate deterrent and moralizing effects of the criminal law").

²⁰⁸ There are additional reasons as well. See Wright, *supra* note __, at 1019-1022 (giving overview of other reasons why prosecutorial guidelines have not been adopted).

²⁰⁹ For a discussion of these issues in the context of Washington's prosecutorial guidelines, see Wright, *supra* note __, at 1023-1027. Although, as Ronald Wright has pointed out, New Jersey has had some success with prosecutorial guidelines, it is unclear whether the circumstances there would translate to the federal system because New Jersey's guidelines were mandated by a state court decision that found restrictions on judicial sentencing coupled with prosecutorial discretion created a separation of powers violation under state law. *Id.* at 1030-31. There is nothing in the federal case law to indicate a similar ruling by the federal judiciary on the horizon.

crime were rational, transparency would be nothing to fear. But, the political process suffers from numerous cognitive shortcomings when it comes to crime. Thus, the problem with making prosecutorial decisions more transparent is that the politics of crime might push those guidelines in a decidedly anti-defendant direction. Indeed, Ronald Wright, one of the advocates for greater transparency, concedes that “consistent rules for prosecutors might only give us more equal injustice for all, hamstringing prosecutors who might occasionally offer more favorable terms to some defendants.”²¹⁰

* * *

All of these mechanisms, then, fall short at addressing the problem of biased prosecutorial adjudication that compromises the interests of the defendant facing criminal charges. It is not because they lack theoretical bite. They are important theories and perhaps under other political circumstances, they hold promise. But in today’s tough-on-crime political climate and with criminal cases at record highs, they are unlikely to succeed.²¹¹

A more viable alternative for change, as Professors Ronald Wright and Marc Miller have emphasized in their work on reforming prosecutorial screening decisions, is to consider how the prosecutor’s office could be reformed from within.²¹²

B. *The Benefits of Using Internal Separation*

What makes institutional reform – and more particularly, the structural separation solution offered here – more viable in today’s political climate? Although the lobbying strength of prosecutors makes this a difficult area for reform in general, this is comparatively speaking the most promising avenue for correcting the current lack of oversight for two reasons. The first relates to Congress’s incentives to encourage prosecutors’ offices to engage in this kind of structural reform, and the second focuses on incentives within the Department of Justice.

²¹⁰ Wright, *supra* note __, at 1013.

²¹¹ Ronald Wright and Marc Miller have summed it up best: “Experience here is telling: It has proven almost impossible to convince judges or legislatures to create meaningful limits” on prosecutorial discretion. Wright & Miller, *supra* note __, at 53.

²¹² Wright & Miller, *supra* note __ at 55; *see also id.* at 117 (“Scholars should see that internal executive branch rules and policies are genuine parts of the legal system, and far more important to daily practice and decisionmaking, than the abstract and rarely applied constraints of federal and state constitutions.”). Professors Wright and Miller offer two reasons for scholars’ failure to consider internal design changes as a solution to prosecutorial abuses. First, they note that scholars are predisposed to constitutional and judge-based solutions. Second, getting information on the actual workings of a prosecutor’s office is difficult. *Id.* at 55.

1. *Congress's Incentives.* Although Congress's incentives to regulate prosecutors will always be muted, this proposal has several advantages to overcome congressional resistance to curb prosecutorial power. As an initial matter, William Stuntz's work on accountable policing suggests that legislatures are more likely to pass laws relating to criminal procedure in areas in which the courts have not already staked out legal rules²¹³ – and this is an area where courts have done nothing. As Professor Stuntz explains, when the courts stay out of regulating a field of criminal procedure, it leaves legislators ample opportunity to make a big impact with relatively inexpensive regulations because any regulation of this area would be a vast improvement over the status quo.²¹⁴ Controlling prosecutorial discretion is a wide open for legislative oversight because the courts have hardly preempted the field. On the contrary, thus far, they have blatantly ceded authority. This leaves Congress with room to make relatively big improvements at little cost.

Perhaps even more enticing for legislative regulation at this point is the fact that Court's unwillingness to do anything in this area might not last indefinitely. The Supreme Court in recent years has signaled that the modern administrative system of plea bargaining sits uneasily beside the Framers' design. Its blockbuster decision in 2000 in *Apprendi*²¹⁵ and the equally important sentencing cases that followed²¹⁶ indicate that the Court will not always allow efficiency arguments to trump what it sees as valuable criminal procedure protections, including the jury trial right. The Court in these cases limited the legislature's ability to transfer authority from juries to judges. Although no fundamental checks on plea bargaining are likely to come anytime soon for the reasons discussed above, it is possible that the Court will become more active in other ways, particularly as the carceral state and its inequities grow. It is unclear what direction the Court might take, and as a result the time seems ripe for Congress to step in with a model for controlling prosecutors before the courts decide to regulate some other aspect of sentencing or prosecutorial practices.²¹⁷

²¹³ See William J. Stuntz, *Accountable Policing* at 34, Harvard Public Law Working Paper No. 120, available at <http://ssrn.com/abstract=886170> ("It seems the surest way to promote legislative action is for the Supreme Court to deem legal protection unnecessary.")

²¹⁴ *Id.* Professor Stuntz gives as an example the fact that "a number of different legal rules aimed at stopping coercive police interrogation," from Miranda-style warnings to videotaping could help curb the practice. *Id.* But once one rule is in place, "the benefit of adding another is bound to shrink." *Id.*

²¹⁵ *United States v. Apprendi*, 530 U.S. 466 (2000).

²¹⁶ *Gall v. United States*, 128 S.Ct. 586 (2007); *Kimbrough v. United States*, 128 S.Ct. 558 (2007); *Rita v. United States*, 127 S.Ct. 2456 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

²¹⁷ Indeed, it is possible that these reforms could ultimately be adopted because the federal courts decide to encourage something along these lines. Although it is unlikely courts would be willing to take

That does not answer, of course, what Congress would do to fill the void. This proposal has a shot because it fits in well with the current political climate for criminal justice reform. The number of individuals facing federal criminal charges in the past few decades has grown dramatically.²¹⁸ And although the list is dominated by poor people who are disadvantaged in the political process, it also includes plenty of powerful members of society, including corporate titans.²¹⁹

The experience of these high-profile and high-status offenders with prosecutors' offices has drawn attention to some of the troublesome practices in these offices and has even led to reforms. Take, for example, the so-called Thompson Memo,²²⁰ which set out the Department's guidelines for prosecuting corporate criminal offenders. Corporations cannot commit crimes without individuals acting unlawfully, so the Thompson Memo required corporations seeking to avoid prosecution to identify individual wrongdoers within the company and created powerful incentives for corporations to cease paying the attorneys' fees of those wrongdoers. The memo, which was implemented in 2003, also provided incentives to companies to waive their attorney-client privilege at the government's request so that culpable individuals could be identified. The government adopted these positions in response to gross corporate frauds like Enron. The approach drew criticized from the white collar defense bar and at least one federal judge because they viewed it as unduly coercive.²²¹

on the monumental task of closely scrutinizing all pleas and cooperation agreements, it is more likely that they would be willing to take a closer look at these decisions in the absence of the structural protection described here in order to incentivize offices to adopt these protections. That is, a court could decide that, if an office has sufficient internal control mechanisms in place, the current regime of deference stays in place. This would be comparable to the corporate compliance context where institutional reforms mean prosecutors are less likely to go after companies. On the other hand, where the office lacks protections, the court might be willing to give closer scrutiny to pleas or substantial assistance motions or cooperation agreements. In other words, judicial review could be used to encourage these kinds of reforms.

²¹⁸ See Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1040 (2006) (“[T]he number of federal criminal cases has exploded, from approximately 38,000 in 1995 to nearly 70,000 [in 2006.]”).

²¹⁹ Federal defendants in general are more likely than state defendants to be “white, married, richer, better educated, more likely to hire an attorney, less likely to break the rules, and less likely to have prior offenses.” Edward L. Glaeser et al., 2 AMERICAN LAW AND ECONOMICS REV. 259, 273 (Fall 2000). A look at major white collar cases over the past few years should prove the point. From Martha Stuart to William Lerach to Bernie Ebbers, corporate leaders have found themselves ensnared in the criminal justice system. See *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005); Michael Parrish, *Leading Class-Action Lawyer Pleads Guilty to Conspiracy*, N.Y. TIMES, Oct. 30, 2007, at C9.

²²⁰ Memorandum from Deputy Attorney General Larry D. Thompson on Principles of Federal Prosecution of Business Organizations (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

²²¹ *United States v. Stein*, 485 F. Supp.2d. 390 (S.D.N.Y 2007); John J. Falvey, Jr. & Janet E. Taylor, *Federal Prosecutors and Advancement of Legal Defense Fees: Don't Ask, Don't Tell*, 52 Boston

It just took a few weeks of orchestrated campaigning by big business interests to change the Department's position. In early September 2006, former high-level government officials – who are now in private practice representing companies and white-collar defendants – asked the Department to modify its practices.²²² Just two months later, the Justice Department succumbed to the lobbying effort and issued a new memo that now allows corporations to bankroll the attorneys' fees of top executives except in "extremely rare cases" that are to be defined by political appointees in Washington.²²³ The new Justice policy requires approval from these same DC-based political appointees before federal prosecutors can seek a waiver of the attorney-client privilege from corporations, and the memo now prohibits federal prosecutors from considering a company's refusal to agree to a waiver of privilege in deciding whether to indict the corporation, effectively eliminating any negative pressure on corporations to waive the privilege.

These same high-status defendants may ultimately support permanent structural reforms along these lines recommended here.²²⁴ It is noteworthy in this respect that the protections for separated functions in the APA – which ultimately benefit all individuals facing formal adjudications by agencies – were spearheaded by the powerful regulated entities.²²⁵ As federal corporate criminal law expands, these same groups may see the need

Bar J. 14, (Jan/Feb 2008) (discussing the "outcry by bar groups and private industry against the Thompson Memorandum").

²²² Letter from Griffin B. Bell, Att'y Gen. (1977-79), et al. to Alberto Gonzales, Att'y Gen., Dep't of Justice (Sept. 5, 2006), available at http://www.abanet.org/media/docs/ag_sept52006.pdf.

²²³ Memorandum Regarding Principles of Federal Prosecution of Business Organizations, U.S. Deputy Attorney General Paul J. McNulty, December 12, 2006, available at www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

²²⁴ To be sure, the reforms to the Thompson Memo only improved the lot of corporate defendants because the reforms are specific to them. And these are the same defendants who already typically get the kind of review suggested here, Lynch, *supra* note __, at 2126, thereby decreasing their incentive to lobby for it. But "typically" is not the same as always or consistently, and the uncertainty may lead many of them to seek reform to guarantee that these protections are available in the future and are not doled out on a case-by-case basis.

²²⁵ Asimow, *supra* note __, at 798 ("[S]eparation of functions is obligatory in a practical sense; outsiders litigating with an agency will not tolerate their adversaries whispering in the ears of decisionmakers. Acceptability of procedures by affected persons is indispensable for a smoothly functioning administrative process."). Regulated entities and the bar have similarly pressured agencies to follow this model in those areas where the APA does not require separation. Pedersen, *supra* note __, at 1003. The instances of even greater institutional separation, such as the separation of adjudication and prosecution under the Occupational Safety and Health Act between two separate agencies, were also the end product of powerful lobbying. See Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U. L. REV. 877, 884-885 (1998) (describing the push by the business community to have a separate agency outside the Department of Labor adjudicate disputes under OSHA).

for greater protections of their interests on the criminal side.²²⁶ The procedural and structural reforms they obtain may then inure to the benefit of all defendants. The proposal here, for example, does not bias the system in favor of a particular class of offender. It simply creates a safety valve to protect the innocent and those charged too leniently or harshly, which would include these powerful potential defendants. High-status offenders should therefore support it, and if that is what an important number of their constituents want, the political agents should want it, too.

The political climate also seems well suited for this reform because it helps insure that resources are used most effectively. Although cost pressures do not operate as significant restraints on the federal government in the same way they do on the states,²²⁷ namely with sentencing reforms, cost pressures have led the federal government to cut funding of US Attorneys Offices.²²⁸ As the fiscal crisis deepens, it is likely these cuts will continue. There is thus a greater need to ensure that prosecutors are selecting the right cases for federal intervention. This proposal would help ensure that is the case.

Yet another reason why political circumstances are ripe for this suggestion is that greater attention is now being paid to the gross racial disparities that exist in criminal law enforcement practices. The Sentencing Commission recently decided to limit the disparity between sentences for crack and powder cocaine and apply those changes retroactively.²²⁹ The Supreme Court held that district courts take that disparity into account as a matter of sentencing discretion.²³⁰ And many of the leading presidential candidates announced their support for these reforms,²³¹ signaling that there is some room for national politicians to support reforms.

Finally, because this reform involves structural changes as opposed to substantive policy shifts, it is less likely to face resistance. As Neal

²²⁶ This might therefore be an area like policing where Bill Stuntz has pointed out that legislators may have an incentive to put fundamental checks in place because enough interested citizens are stopped by the police. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 795 (2006). In the same vein, “historically, legislatures have been a good deal quicker to expand criminal procedure protections than to contract criminal liability. *Id.* at 796.

²²⁷ Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005).

²²⁸ See Scot J. Paltrow, *Budget Crunch Hits U.S. Attorney’s Offices*, WALL ST. J., Aug. 31, 2007, at A1.

²²⁹ News Release, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses, Dec. 11, 2007, available at <http://www.ussc.gov/PRESS/rel121107.htm>.

²³⁰ *Kimbrough v. United States*, 128 S.Ct. 558 (2007).

²³¹ See Bob Egelko, *Where They Stand on Crime, Death Penalty*, S.F. CHRON., Feb. 10, 2008, at E6.

Kumar Katyal recently observed in advocating internal checks on the executive branch's foreign affairs decisions, "sometimes broad design choices are easier to impose by fiat than are specific policies."²³² While they may attract less attention, structural reforms are potent and can allow political actors to control their agents.²³³

2. *Prosecutors' Incentives.* The main reason that this reform is the most realistic, however, rests not with Congress but with prosecutors themselves. In order to get Congress to agree to a reform, it must be supported by prosecutors. The benefit of this approach is that it should appeal to the most important prosecutors, namely the Attorney General and the United States Attorneys. These head prosecutors should embrace this reform because it maintains order within the U.S. Attorney's Offices and allow supervisors and other trusted attorneys in the office to exercise oversight over the line assistants. Although it may slow down the processing of a case slightly because the same supervisor can no longer oversee investigations and make these adjudicatory decisions – a cost in efficiency that will vary based on which permutation of the model is adopted (i.e., whether it includes a presentation by the defense attorney or a panel of adjudicators) – the benefits are considerable.²³⁴

²³² Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2324 (2006).

²³³ See Terry Moe, *The Politics of Bureaucratic Structure* in Paul E. Peterson & John E. Chubb, eds., *CAN THE GOVERNMENT GOVERN?* (1989); Andrew B. Whitford, *Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys*, 12 *J. PUBLIC ADMINISTRATION RESEARCH AND THEORY* 3, 8 (2002).

²³⁴ Because prosecutors themselves – and particularly high-level prosecutors – might ultimately decide these reforms are in their interest, the proposal here might be applied more broadly than the federal system to cover the many and varied state prosecutors as well. Indeed, the current draft of the ABA Standards for Criminal Justice includes as one of its general principles that "[g]enerally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation." *ABA Standards for Criminal Justice: Investigative Standards for the Prosecutor*, Standard 1.2(e), Draft September 2007 (on file with author).

This Article has focused on the federal system and not directly analyzed state prosecutors for several reasons. First, the federal system is important in its own right because of its size. The federal prison population is now larger than any state. And, as the national system, other jurisdictions often look to it for guidance. Second, any reform is more administrable in the federal system because of the relative uniformity of office structure and the offices' shared political oversight by the Department of Justice and Congress. As Stephanos Bibas has noted, "[t]here is more centralized bureaucracy and oversight at the federal than the state level, which helps to keep far-flung federal offices in line." Bibas, *supra* note __, at 143. It also facilitates the implementation of the kind of structural reform advocated here. Moreover, the Administrative Procedure Act similarly governs all federal agencies, so it also applies broadly and allows for a ready comparison with the prosecutors' office. State prosecutors' offices are far more varied than federal offices, and the politics of each office and each state are also distinct. Some may lack enough full-time attorneys to separate functions. Others may resist any reform that adds even a minor layer of review because the office is already strained for time and money. State administrative law also varies. Thus, the translation of these ideas to state offices would require more contextual analysis.

Consider first the incentives of the Attorney General. He or she has an interest in having Assistant United States Attorneys follow the policies of the Department of Justice.²³⁵ That is why there are a variety of directives from Main Justice about how cases should be prosecuted and the standards that should be used.²³⁶ A structural reform along the lines suggested here would be on par with these other directives. It would put trusted personnel in a position to make the most important decisions in a case without having their judgment skewed by prior exposure to the investigation. These will typically be supervisors or experienced prosecutors who are more likely to adhere to the policies of the U.S. Attorney than would line assistants, and the U.S. Attorney's policies, in turn, are more likely than the line assistant's views to correspond to the Attorney General's. That is because the Attorney General and the United States Attorneys are appointed by the President and likely share the President's goals or else face removal. AUSAs, in contrast, hold their positions for longer and may not share the views of the sitting President.

Although some DOJ directives are met in practice with more resistance than others, a command from Main Justice to United States Attorneys to restructure offices along the lines recommended here should be embraced by every United States Attorney as good management – or at least not resisted as too cumbersome. Every United States Attorney has the incentive to ensure that his or her prosecutors are following his or her enforcement priorities and policies. As offices have grown in size and more attorneys decide to stay with the government for longer periods, U.S. Attorneys have realized that they have a harder time controlling their line assistants.²³⁷ As a result of these factors, most U.S. Attorneys have “created more formal and structured office hierarchies.”²³⁸ Most offices are now set up to have separate criminal and civil divisions, and the larger offices further divide based on substantive areas, such as narcotics, violent crime or white collar cases.²³⁹ There is typically a first assistant or deputy to the U.S. Attorney, as well as a chief of the criminal and civil divisions, and all

²³⁵ See Richman, *supra* note __.

²³⁶ The Attorney General has the authority to control AUSAs pursuant to 28 U.S.C. § 519, which gives the Attorney General the authority to “direct all United States Attorneys . . . in the discharge of their respective duties.”

²³⁷ See Lochner, *supra* note __, at 288.

²³⁸ *Id.*

²³⁹ Lochner, *supra* note __, at 289.

of these supervisors are charged with monitoring the line attorneys to make sure they are complying with Office policies.²⁴⁰

Once such hierarchies are established, separating functions is a small additional step and one unlikely to provoke resistance by either the line assistants or the U.S. Attorneys. After all, the approach proposed here would assist U.S. Attorneys in achieving greater control of their attorneys and of getting unbiased decisionmaking, which is a result that they should also favor. There is no *ex ante* reason why a US Attorney should not want objective decisionmaking about the merits of a case. On the contrary, objective decisionmaking is most likely to result in the best deployment of office resources.

That would explain why some U.S. Attorneys already have put in place a decisionmaking model that is not far from what is being suggested here. Although it is exceedingly difficult to get information on the inner workings of all U.S. Attorneys' Offices because of a resistance at DOJ to share any information, interviews and published accounts shed light on some office practices.

One office that follows a model close to the one advocated here is the United States Attorney's Office for the Southern District of California ("San Diego Office").²⁴¹ The San Diego Office employs what it calls "indictment review" in all investigatory cases. The line assistant who worked on the investigation of the case must write a prosecution memo, which is forwarded to the Chief of the Criminal Division and the First Assistant, as well as to every other line assistant in the section. The distribution to line assistants in the relevant section (e.g., major frauds or general crimes) allows other AUSAs to check for consistency with similar cases. The memo contains a summary of the facts and the evidence, whether the prosecutor anticipates an indictment, what the anticipated sentence, and any weaknesses in the case. Although the supervisors who receive the prosecution memo might be involved in the investigation as well, they typically are not unless the investigation involved a Title III wiretap. To be sure, the views of the line assistant who investigates the case typically receive deference, but the supervisors also ask tough questions and will send the case back to the line assistant for revisions if they are not happy with the answers. The San Diego Office therefore employs a variation of the model here: a separate team of adjudicators will review the charges and second-guess the attorney who has investigated the case. And

²⁴⁰ Lochner, *supra* note __, at 289. Other offices go further and have written office policies on when to decline to bring cases. *Id.*

²⁴¹ This information was obtained from an interview with an Assistant United States Attorney in the Office who asked to remain anonymous.

because that separate team includes the Chief of the Criminal Division and the First Assistant, they have the final say in how the case should be charged.

Other offices follow another variant of the model proposed here by allowing for an appeal up the chain of command if they do not like the line prosecutor's decisions. In white-collar cases in the Southern District of New York, for example, defense lawyers actively make their case to the line assistant working on the case, but "[t]he presentations are not limited to the prosecutor in charge of the matter; if the line prosecutor rejects the defense's contentions, counsel may seek 'appellate review' by the prosecutor's supervisors, at ascending levels of prosecutorial bureaucracy, from unit chief to criminal division chief, to the United States Attorney."²⁴² The District of Columbia US Attorney's Office similarly has a policy whereby defense lawyers can seek a meeting with an AUSA's supervisor to review the terms of a plea offer.²⁴³ It is unclear whether this supervisor will have also advised the attorney at the earlier investigative stage of the case, in which case he or she may share biases of the line assistant. But further appeals up the chain of command are also available on a discretionary basis, depending on "whether the case is high-profile, sensitive, or unusually significant, whether defense counsel has raised policy concerns that have implications beyond the case at issue, whether there has been a split of opinion at lower levels, and whether the line prosecutor and lower-level decision makers believe the defense counsel's concerns merit higher-level decision-making."²⁴⁴

The District of Columbia also has a separation policy involving departure motions. In particular AUSA decisions whether or not to seek a departure under the Sentencing Guidelines, including a departure based on substantial assistance to the government, must be approved by a special committee.²⁴⁵ This committee consists of six attorneys, three of whom are supervisors and three of whom are senior line assistants from different sections of the Criminal Division.²⁴⁶ This structure therefore mirrors the proposal here, in that a separate body, including individuals who were not part of the investigation or decision to prosecute, must approve a final adjudicatory decision about substantial assistance and sentencing.

²⁴² Lynch, *supra* note __, at 2126.

²⁴³ Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1082 (2006).

²⁴⁴ *Id.* at 1082-1083.

²⁴⁵ Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1073 (2006).

²⁴⁶ *Id.*

Quite a few U.S. Attorneys follow some sort of structural separation for substantial assistance motions. One study commissioned by the United States Sentencing Commission found that more than two-thirds of the districts required at least approval by a supervisor assistant before a §5K1.1 motion could be filed, and most of these used additional review procedures as well.²⁴⁷ A full quarter of the U.S. Attorney Offices employ a substantial assistance committee, with criminal division chiefs, unit chiefs, and other AUSAs “frequently” among the membership.²⁴⁸ Although compliance with these procedures is not entirely consistent,²⁴⁹ and some of the supervisors on committees may have also been involved in investigatory decisions, the fact that these mechanisms are in place demonstrates both their attraction to U.S. Attorneys and their feasibility. Adjusting these structures to ensure that individuals involved in the investigation are not among the membership would be a relatively minor modification, and once the benefits of objectivity are pointed out, a modification likely to be accepted.

Where resistance to this reform is likely to be greatest is in smaller offices, where supervision tends to be less intense and where US Attorneys might be of the view that oversight can be achieved more informally by getting to know each attorney and their capacities for wise decisionmaking.²⁵⁰ Although these offices might have a preference for a more informal model, it is unlikely they would resist a DOJ directive to restructure their offices along these lines.²⁵¹ It is a relatively costless alteration in practice, and most U.S. Attorneys should see the benefits of less biased decisionmaking.

But even if some offices resist in practice, many others should embrace this proposal. If only the largest offices readjust their internal workings, that would be a vast improvement over the status quo.

One might well ask at this point why the Department has not yet mandated the structural separation outlined here if it is so beneficial. Path dependence and an inability to recognize the adjudicative nature of

²⁴⁷ Maxfield & Kramer, *supra* note __, at 7 n.18.

²⁴⁸ *Id.*

²⁴⁹ The Maxfield & Kramer study found a compliance rate of 41.2 percent for review committees. *Id.* at 8.

²⁵⁰ Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 144 (2005). (noting that larger urban offices have more supervisory oversight).

²⁵¹ For example, one small office (approximately 25 AUSAs) has relatively little supervision of AUSAs and none in the case of bills of information and complaints. See interview note #3 (on file with author). This office relies on informal oversight; lawyers develop reputations and earn the trust of their supervisors. But even in an office with this culture, the AUSA interviewed stated that it was “a good idea to have independent review and not impracticable.” *Id.*

prosecution provide at least part and maybe all of the answer. To see the benefits of the structural separation recommended here requires as a first step that one acknowledge that prosecutors are combining two types of powers: enforcement and adjudicative. Prosecutors rarely see their job in these terms. Everything they do is, to them, part of the prosecutorial function. Thus envisioning an office restructuring that separates the adjudicative from the investigative part of their job cuts against the view of prosecutors that they have of themselves. While it is standard to do this in regulatory agencies, it is not the approach most prosecutors – or scholars, for that matter – take. But once the office is seen in that light, the benefits of structural separation should sell themselves.

CONCLUSION

Controlling prosecutorial discretion has troubled criminal law scholars for decades. But despite consistent calls for reform, very little has changed. Indeed, what has changed, if anything, is that prosecutors now have even more power. Guilty pleas are up, trials are down, and mandatory punishments allow prosecutors to set the terms of a sentence.

Scholars have looked almost everywhere for the solution but within the prosecutor's office itself. Administrative law has long used institutional design to control the abuse of discretion in agencies. Applying that same insight to prosecutors' offices, it is possible to construct a check on prosecutorial abuse that is effective and politically viable.