

## Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model

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Justice Robert Jackson famously characterized the federal prosecutor as having “more control over life, liberty, and reputation than any other person in America.”<sup>1</sup> Sixty years later, Judge Gerard Lynch raised the prosecutor’s standing when he remarked that federal prosecutors perform “the role of god.”<sup>2</sup> Current white collar criminal prosecutions suggest that characterizing federal prosecutors as gods is the better description. Riding a tide of public outrage following the discovery of massive fraud at Enron and other firms, prosecutors have attained something akin to heroic status.<sup>3</sup> The failure of the civil

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1. Robert H. Jackson, *The Federal Prosecutor*, 24 *J. Am. Judicature Soc’y* 18, 18 (1940). Jackson, then Attorney General, was speaking at a meeting of federal prosecutors.

2. Gerard Lynch, *Panel Discussion: The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator*, 26 *Fordham Urb. L.J.* 679, 682 (1999). Judge Lynch offered this assessment before his appointment to the United States District Court of the Southern District of New York.

3. The current heroic stature of the federal prosecutor is somewhat unexpected given that the public, academic commentators, and Congress have only recently registered significant concerns over the extent of prosecutorial discretion. Consider the general critique of the Starr report and the independent counsel act. See e.g., George D. Brown, *The Ethics Backlash and the Independent Counsel Statute*, 51 *Rutgers L. Rev.* 433 (1999); Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 *Am. Crim. L. Rev.* 463 (1996); see also Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *Iowa L. Rev.* 393 (2001); Pamela H. Bucy, *The Path from Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 *St. Louis Univ. L.J.* 3, 50 (2000) (analyzing prosecutorial decisions in health care fraud).

Congress’s concern is not confined to the independent counsel statute. See McDade Amendment, 28 U.S.C. § 530B (2004) (imposing state ethics standards on federal government attorneys); Hyde Amendment, 18 U.S.C. § 3006A (2004)

regulatory scheme and traditional gatekeepers to prevent or even to report unlawful conduct in corporate offices makes the federal prosecutor the main vindicator of the public interest in lawful business behavior.<sup>4</sup> Prosecutors have successfully prosecuted scores of wrongdoers by completing investigations, obtaining indictments, and frequently securing guilty pleas.

The success of prosecutors in resolving these cases is due to several factors. Significantly, all of them were in place before Congress enacted the Sarbanes-Oxley Act.<sup>5</sup> Sarbanes-Oxley further increases the authority of federal prosecutors in white collar cases by creating new crimes, enhancing sentences of existing crimes, and authorizing more funds for enforcement.<sup>6</sup> More recent initiatives have further enlarged prosecutorial authority, initiatives such as revised Department of Justice policies, punishment enhancements under the Sentencing Guidelines, the American Bar Association's interpretation of lawyers' obligations, and Congressional directives, such as the

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(authorizing federal courts to award reasonable attorney's fees and other litigation expenses when the United States' position was vexatious, frivolous, or in bad faith).

4. State prosecutors, notably Eliot Spitzer, Attorney General of New York, have also actively pursued misconduct in the business sector. Stephen Labaton, *Fund Misconduct Is Common, Panel Is Told*, N.Y. Times, Jan. 28, 2004, at C1 (recounting testimony of Spitzer before a Senate committee). The Attorney General of Oklahoma filed criminal charges against WorldCom and several high-level executives, which were recently settled. News Release, W.A. Drew Edmonson, Attorney General, *State to Gain 1600 Jobs From WorldCom Agreement* (March 12, 2004). State enforcement can temper the tendency for changes in policy to follow national election results. See Roger Sherman, *Guiding Competition in the 21st Century*, Cornelson Distinguished Lecture, Davidson College, March 21, 2002 (copy on file with author).

5. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

6. See Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 Fla. L. Rev. 937, 940-56 (2003) (commenting on the criminal aspects of Sarbanes-Oxley Act).

For contrasting views of the efficacy of the criminal provisions of Sarbanes-Oxley, compare Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime after Sarbanes-Oxley*, 81 Wash. U. L.Q. 357 (2003) with Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 St. John's L. Rev. 671 (2002).

Feeney Amendment.<sup>7</sup> Along with Sarbanes-Oxley, these developments provide prosecutors even greater authority and more powerful tools for prosecuting future white collar crimes. These developments raise the issue of whether such enhanced power is consistent with the values embodied in an adversarial system. I address this issue by considering the effects of prosecutorial power as it existed before the passage of Sarbanes-Oxley and the adoption of other initiatives. My focus is the policy implications of valid exercises of prosecutorial power.

Although my inquiry is limited to federal prosecutorial practices in white collar cases, the general topic of prosecutorial authority is of significant concern, especially when it is directed at those who cannot afford competent counsel. It is commonly observed that white collar offenders are treated more deferentially and punished less harshly than are other offenders; the implication is that white collar offenders should be subject to the same treatment as street criminals.<sup>8</sup> Of course, the normative implication might run the other way—non-white collar criminals should have access to effective counsel and be subject to less harsh punishment.<sup>9</sup> This inquiry indicates that even white collar offenders, who generally are not without financial resources, are well-represented, and have benefit of counsel well in advance of indictment, are powerless before the full force of governmental authority. The implications of the power that federal prosecutors

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7. See Pamela H. Bucy, "Carrots and Sticks": Post-Enron Regulatory Initiatives, 8 *Buff. Crim. L. Rev.* 277 (2004) (discussing effects of these initiatives).

8. The perception that white collar criminals are immune to harsh prison terms may not be entirely accurate, especially given the federal Sentencing Guidelines and new Department of Justice directives. See *infra* text accompanying notes 82-88. Those penalties, however, may be relatively less severe than those accorded other crimes.

9. See Daryl K. Brown, *Street Crime, Corporate Crime and the Contingency of Criminal Liability*, 149 *U. Penn. L. Rev.* 1295 (2001) (explaining why street crime should be treated like white collar crime, rather than vice versa); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 *Emory L.J.* 753, 875 n.501 (noting that "severity breeds severity" and that advocating severe penalties for middle-class criminals is contrary to the interests of poor minority criminals).

exercise over white collar offenders apply with even greater force to other offenders.

Part I illustrates the extent and sources of prosecutorial discretion by reviewing the cases against Arthur Andersen, Martha Stewart, and Enron executives. Each case specifically illustrates the extent of prosecutorial discretion in one of the three stages of resolving a criminal matter—investigating, charging, and sentencing. The review indicates that the term “prosecutorial discretion” is something of a euphemism, and that “prosecutorial power” more accurately describes the authority of the federal prosecutor in white collar cases.

In part II, I consider the implications of prosecutorial power by comparing the role of federal prosecutors to that of prosecutors in the French inquisitorial criminal justice system. Judge Gerard Lynch has remarked that certain prosecutorial practices depart significantly from an adversarial model and move the United States’ adversarial system closer to the inquisitorial system used in Western Europe.<sup>10</sup> While agreeing with this assessment, I would add that it does not go far enough. The federal system is like an inquisitorial system in that it also resolves issues of criminality through investigation, rather than through trial. Unlike an inquisitorial system, however, the federal system operates without the benefit of institutional arrangements and procedures that provide a counterweight to prosecutorial power. Moreover, federal prosecutors exercise far greater power over sentences. Thus, even in white collar cases, the ideal of adversarial parties who stand roughly equal before a neutral factfinder—prerequisites of an adversarial system—remains an ideal.

In part III, I suggest that the widespread method of enforcing federal statutes through a quasi-inquisitorial process may not be an entirely effective method to achieve the goal of deterring white collar crimes. Specifically,

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10. See Gerard E. Lynch, *Our Administrative System of Justice*, 66 *Fordham L. Rev.* 2117 (1998).

resolving criminal matters through investigation and plea bargaining forfeits significant advantages of public trials. Open, public resolutions that are supported by an evidentiary record provide notice to the business community by publicly enjoining specific illegal practices. Trials also strengthen and reinforce the social norms of the business community that encourage responsible, honest dealings and discourage fraudulent practices. Further, a quasi-inquisitorial system that promotes disparate sentences may erode confidence that the white collar criminal justice system is even-handedly and consistently administered. Thus even valid use of prosecutorial power may be problematic in the long-run. Although direct reductions in the power of federal prosecutors are unlikely, insights from the inquisitorial model provide a starting point for redressing the most pernicious effects of our quasi-inquisitorial federal criminal justice system.

#### I. THE EXERCISE OF PROSECUTORIAL DISCRETION IN CURRENT WHITE COLLAR CASES

In the cases involving executive wrongdoing that were tracked by Professor Brickey through August 2003, federal prosecutors charged officers and executives of seventeen firms with criminal conduct and indicted eighty-eight defendants.<sup>11</sup> Of these, forty-seven cases were disposed of by August 2003.<sup>12</sup> All but one case, that of Arthur Andersen, was resolved by a guilty plea.<sup>13</sup>

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11. See Brickey, *supra* note 6, at 382-401. Prosecutors have indicted more business executives since November 2003. See, e.g., Alex Berenson, 3 Plead Guilty in Computer Associates Case, *N.Y. Times*, Apr. 9, 2004, at C1; Reliant and 4 Officers Indicted in California Energy Shortage, *N.Y. Times*, Apr. 9, 2004 at C5; Carrie Johnson, Ex-Mutuals.com Officials Charged, *Wash. Post*, Mar. 16, 2004, at E4 (reporting indictment of three corporate officials at a Dallas money management firm for conspiring with large clients to engage in predatory trading). See also Kathleen F. Brickey, *Enron's Legacy*, 8 *Buffalo Crim. L. Rev.* 221, 247 (2004) (table 1) (stating that as of November 2003, the number of indicted individuals had risen to 109).

12. See Brickey, *supra* note 6.

13. See *id.*

An update of Professor Brickey's summary through May 2004 indicates that eleven more defendants were tried,<sup>14</sup> and four others pleaded guilty.<sup>15</sup> Of the fifty-eight cases disposed of through May 2004, fifty defendants, or 86.2 percent, pleaded guilty. More trials are scheduled as this is written, and it is not unreasonable to expect more guilty pleas as trial dates approach.

The impressive record attests to the extent of prosecutorial authority in investigating a criminal matter, obtaining indictments, and negotiating guilty pleas. The cases against Arthur Andersen, Martha Stewart, and the Enron executives more specifically illustrate the strength and scope of that authority. The cases also identify the sources of prosecutorial power and show how they reinforce each other.

#### *A. Arthur Andersen—the Power to Charge*

Arthur Andersen, LLP, one of five major accounting firms, was Enron's chief auditor.<sup>16</sup> While preparing for an

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14. See Geraldine Szott Moohr, Updated Summary, May 31, 2004 (on file with author).

Of these, four, Martha Stewart, Peter Bacanovic, Dynegy executive Jamie Olis, and Credit Suisse executive Frank Quattrone, were found guilty. *Id.* Three Qwest executives were acquitted (John Walker, Bryan Treadway, and Grant Graham). *Id.* There were also three mistrials: Tyco executives Dennis Kozlowski and Mark Swartz and Qwest executive Thomas Hall. *Id.*

As this article was being prepared for publication, Ken Lay, founder and former Chief Executive Officer of Enron, was indicted on one overarching count of conspiracy, seven fraud counts and three counts of making false statements to banks. See Carrie Johnson, *Founder of Enron Pleads Not Guilty; 11 Criminal Charges Against Lay Unsealed*, Wash. Post, July 9, 2004, at A1.

This summary also does not include the conviction of Adelphia executives John Rigas and Timothy Rigas or the acquittal of co-defendants Michael Rigas and Michael C. Mulcahey. See Brooke A. Masters, *Michael Rigas Gets Mistrial*, Wash. Post, July 10, 2004, at E1. Mark Belnick, former general counsel of Tyco, which also acquitted during the publication process. See Brooke A. Masters & Carrie Johnson, *Former Tyco Executive Acquitted*, Wash. Post, July 16, 2004, at E1.

15. See Moohr, *supra* note 14.

16. For commentary on the Arthur Andersen case, see Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 Wash. U. L.Q. 917 (2003); W. Amon Burton, Jr. & John S. Dzienkowski, *Reexamining the Role of In-House Counsel after the*

SEC inquiry into its audit of Enron's financial statements, Andersen's lawyers discovered that thousands of emails and documents were missing or destroyed.<sup>17</sup> In January 2002, the firm reported that David Duncan, the Andersen partner in charge of the Enron account, had instructed employees to destroy documents relating to Andersen's work at Enron.<sup>18</sup> Two months later, Andersen and Duncan were each charged with one count of obstructing justice.<sup>19</sup> In June, a jury found the firm guilty.<sup>20</sup> By then, market forces had stripped the firm of its value and future earnings, and Andersen was formally sentenced to a \$500,000 fine.<sup>21</sup>

The Arthur Andersen case illustrates the most basic authority of prosecutors—to charge or not. The discretion to charge corporations is governed by guidelines formulated by the Department of Justice.<sup>22</sup> These guidelines do not

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Conviction of Arthur Andersen, in *Enron: Corporate Fiascos and Their Implications* 689 (Nancy B. Rapoport & Bala G. Dharan eds., 2004); Stephan Landsman, *Death of an Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice*, 78 *Chi-Kent L. Rev* 1203, 1203 (2003); Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 *Ohio St. J. Crim. L.* 443 (2004).

17. See Richard A. Oppel, Jr., *Enron's Collapse: The Records; Andersen Says Lawyer Let Its Staff Destroy Files*, *N.Y. Times*, Jan. 14, 2002, at A13.

18. See Kurt Eichenwald, *Enron's Many Strands: The Accountants; Miscues, Missteps and the Fall of Andersen*, *N.Y. Times*, May 8, 2002, at C1.

19. See *Indictment, United States v. Arthur Andersen, LLP*, CRH-02-121 (S.D. Tex. filed Mar. 7, 2002).

20. The verdict proved problematic when it was reported that the jury relied on a theory of obstruction that was not alleged in the indictment. See Jonathan D. Glater, *Jurors Tell of Emotional Days in a Small Room*, *N.Y. Times*, June 17, 2002, at A14 (disclosing jurors' reliance on attorney Nancy Temple's suggestions to alter a memo drafted by David Duncan). Andersen immediately appealed, see *Andersen's Motion for Judgment of Acquittal*, No. H-02-0121 (S.D. Tex.), reprinted in Julie R. O'Sullivan, *Federal White Collar Crime: Cases and Materials* 449 (2d ed. 2004), and the court denied the motion, see *id.* at 461.

21. See Mary Flood & Tom Fowler, *Enron's Auditor Is Given the Max*, *Houston Chron.*, Oct. 17, 2002, at A1.

22. The Department of Justice Charging Guidelines authorize prosecutors to consider nine factors when deciding whether to charge a corporation or business entity. See Memorandum from Deputy Attorney General Larry D. Thompson to United States Attorneys of Jan. 20, 2003 re Principles of Federal Prosecutions of Business Organizations 161-62, available at <http://www.usdoj.gov/usao/eousa/>

overly constrain the discretion to charge corporations, and, in any case, are not enforceable.<sup>23</sup> Considering criminal charges against Andersen was nevertheless somewhat unusual; Andersen had reported the document destruction, was cooperating with investigators, and, incidentally, was making efforts to compensate Enron investors. Citing the firm's involvement with frauds at other firms, the prosecutors indicated they would forego indictment only if Andersen admitted its guilt.<sup>24</sup> Negotiations to settle the matter without an indictment continued for almost another month, but Andersen was ultimately indicted on March 14, 2002.<sup>25</sup> Even after Duncan pleaded guilty and agreed to cooperate in the case against Andersen,<sup>26</sup> Andersen's lawyers sought to resolve the matter, but ultimately the parties proceeded to trial.<sup>27</sup>

The authority of federal prosecutors to charge and convict a business entity is based on the doctrine of respondeat superior, which makes business firms criminally liable for crimes committed by their agents.<sup>28</sup> The standard for liability under this doctrine is similar to the standard used to establish tort liability.<sup>29</sup> If an agent, such as David Duncan, commits a crime while acting

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foia\_reading\_room/usam/title9/crm00161.htm [hereinafter Thompson Memo]. The factors include the pervasiveness of wrongdoing within the corporation, the corporation's history of similar conduct, timely and voluntary disclosure, existence and adequacy of a compliance program, remedial efforts, collateral consequences, and the adequacy of prosecuting individuals and civil or regulatory enforcement actions. *Id.*

23. See Jed S. Rakoff, *The Exercise of Prosecutorial Discretion in Federal Business Fraud Prosecutions*, in *Corrigible Corporations & Unruly Law* 173, 179 (Brent Fisse & Peter A. French eds., 1985) (critiquing internal guidelines).

24. See Eichenwald, *supra* note 18 (listing Andersen's involvement with frauds at Sunbeam, Waste Management, and the Baptist Foundation of America). Prosecutors were reportedly concerned that Andersen did not appreciate the seriousness of the charge and that it had failed to exercise proper oversight of the Houston office. *Id.*

25. See *id.* (describing prosecutor's efforts as "unusually aggressive").

26. See *Guilty Plea and Cooperation Agreement, United States v. Duncan*, CRH-02-209 (S.D. Tex., filed April 7, 2002).

27. See Eichenwald, *supra* note 18.

28. For a useful history of the concept of corporate criminality see Wayne A. Logan, *Criminal Law Sanctuaries*, 38 *Harv. C.R.-C.L. L. Rev.* 321, 348-54 (2003).

29. See *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909) (analogizing criminal guilt with tort liability).

within the scope of his authority and for the benefit of the corporation, the firm may be found guilty of the agent's offense.<sup>30</sup> Thus, once the agent's guilt is established it is relatively easy, barring exceptional circumstances, to convict the firm.

The case of Arthur Andersen also demonstrates the consequences that follow the announcement of a firm's involvement with the criminal justice system. These effects are known as collateral consequences because they occur outside of and apart from the state-imposed consequences—the stigma of conviction and punishment. Collateral consequences that affect business firms generally include class-action civil suits, enforcement actions by regulatory agencies, and being barred from government contracts.<sup>31</sup> Convicted individuals may not practice before the SEC or serve as officers or directors of publicly traded companies. A second collateral consequence is the even more debilitating reaction of the marketplace, which independently responds in ways that can impose severe financial costs on the firm. The combined effect of the legal standard of corporate criminal liability, collateral consequences that flow from even an announcement of an investigation, and reactive market forces greatly enhance the power of prosecutors during the investigation of white collar crime.

The Andersen case illustrates this dynamic. If the firm was indicted or found guilty, demand for Andersen's services was sure to diminish; there is no market for an accounting firm with a tarnished reputation. Andersen therefore sought to avoid indictment and, when that failed, tried to seek an accommodation with prosecutors.

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30. See *id.* See also *United States v. Sun-Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1998), *aff'd* on other grounds, 526 U.S. 398 (1999) (noting that purpose of imputing wrongdoer's conduct to the firm is to encourage firms to monitor employees).

31. Parallel civil proceedings are also brought against individual defendants. See Brickey, *supra* note 6, at 24 (presenting summary indicating that the fourteen former Enron executives facing criminal charges are all also facing civil SEC enforcement actions). Andersen partners testified that they were greatly concerned over possible civil suits. See Landesman, *supra* note 16, at 1236-37.

Andersen's attempts to escape the dilemma—firing Duncan, negotiating to resolve its Enron obligations, entering merger talks with another accounting firm, and forcing the resignation of its chief executive officer—were unavailing.<sup>32</sup> The market responded quickly and decisively, and even before the trial began, the \$9 billion company with offices throughout the world, hundreds of partners, and 28,000 employees was “all but dead.”<sup>33</sup> Although courts may punish business firms by dissolving them, in this case the firm was essentially dissolved at the indictment stage, well in advance of adjudication and sentencing. For this reason, indicting a business firm is often controversial.<sup>34</sup>

Even though such indictments are not routine,<sup>35</sup> the power to indict, combined with collateral consequences and

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32. See Eichenwald, *supra* note 18. Andersen reportedly offered Enron plaintiffs \$750,000,000, to be paid in part from future earnings. *Id.* Paul Volcker, former chair of the Federal Reserve Board, lent his considerable prestige to an effort to reform the company. *Id.* Finally, Andersen proposed a merger with another accounting firm who hesitated because of Andersen's potential liability to Enron investors. *Id.* “The potential indictment was costing the firm clients. The loss of clients decreased its ability to settle civil litigation. The lack of settlements made it harder to sell the firm. And without a[n] agreement to sell the firm], it was impossible for Andersen to consider a plea.” *Id.*

33. “The company's over; there's really not any business left . . . .” Mary Flood & Tom Fowler, Andersen, or What's Left, to Learn Its Penalty Today, *Houston Chron.*, Oct. 16, 2002, at B1 (statement of Andersen's trial attorney, Rusty Hardin); Eichenwald, *supra* note 18 (explaining that Andersen had lost hundreds of clients and dozens of foreign affiliates who joined other auditing firms and its remaining assets were needed to compensate Enron investors).

34. Compare Lou Dobbs, There's More to Journalism Than “Just the Facts,” *Wall St. J.*, April 9, 2002, at A26 (noting the effect of the Andersen indictment on employees, retirees, and Enron plaintiffs and criticizing the Justice Department for indicting Andersen) with James O'Toole, Spreading the Blame at Andersen, *N.Y. Times*, Mar. 26, 2002, at A27 (arguing that the entire firm bears responsibility for either managerial incompetence or ethical turpitude).

35. Thus far other firms involved in the recent surge of business misconduct have not been charged, although some may be equally cast as perpetrators rather than victims. See J. Gregory Sidak, The Failure of Good Intentions: Fraud and the Collapse of American Telecommunications after Deregulation, 20 *Yale J. on Reg.* 207 (2003) (discussing damage to the industry caused by WorldCom and the anticompetitive purpose of its fraud and recommending that the FCC revoke its licenses and liquidate the firm).

Eric Holder, former deputy attorney general, supported the Andersen indictment but indicated he would not have indicted WorldCom because the collateral consequences—barred from government contracts, pending bankruptcy

market forces, enhances the power of prosecutors to investigate corporate crime. The mere threat of a criminal charge motivates firms to conduct in-house investigations, cooperate fully with prosecutors, distance themselves from the conduct of their agent, and jettison employees involved in the transaction.<sup>36</sup> Risks to firms and consequent incentives to cooperate with the investigation are heightened by the Department of Justice's expectation that firms disclose confidential information uncovered by a firm's own investigation, even if that means waiving attorney-client and work-product privileges.<sup>37</sup>

The case of Arthur Andersen shows that federal prosecutors have the power and the tools to bring down an influential and wealthy firm. The case also indicates how the sources of prosecutorial power come to bear during the investigation stage of a criminal matter that occurs, as most white collar crimes do, within the context of a business entity. The legal doctrine of respondeat superior, collateral consequences imposed by non-judicial actors, and inevitable market forces combine to heighten pressure on a firm to cooperate in the investigation. The power of investigators during the investigation stage is further enhanced by the prosecutors' authority to decide what crimes will be charged, as illustrated by the case of Martha Stewart.

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restructuring, the impact on employees—would be “too substantial.” See Oesterle, *supra* note 16, at n.38 (citing interview with Holder on NPR Morning Edition radio broadcast, July 31, 2002); see also Ann Davis, *Enron Heat Descends on Smaller Players; Others Enjoy Shade*, *Wall St. J.*, Dec. 1, 2002, at C1 (reporting that Manhattan District Attorney's Office decided not to prosecute Enron's biggest bankers, J.P. Morgan Chase & Co. and Citigroup Inc., opting instead for civil settlement).

36. For commentary on issues concerning corporate employees, see Ellen S. Podgor, *White Collar Cooperators: The Government in Employer-Employee Relationships*, 23 *Cardozo L. Rev.* 795, 808 (2002).

37. See Thompson Memo, *supra* note 22, pt. VI (directing prosecutors to consider the willingness of corporations to cooperate, including, if necessary the waiver of privileges). Courts have been unwilling to recognize partial waivers, so corporations who waive the privileges for criminal defense purposes are unable to claim the privilege in civil lawsuits.

*B. Martha Stewart—The Power to Choose the Charges*

Martha Stewart, the founder and chief executive of Martha Stewart Omnimedia Ltd., is a nationally recognized author and businesswoman, a celebrity who is at once credited and ridiculed for reviving the public's interest in aesthetic domestic arts.<sup>38</sup> The initial inquiry focused on whether Stewart had engaged in insider trading when she sold 3,928 shares of ImClone stock.<sup>39</sup> Her friend, Sam Waskal, ImClone's founder and major shareholder, unlawfully traded on non-public information—that the Food and Drug Administration had declined to approve the company's cancer drug<sup>40</sup>—and prosecutors suspected that Stewart also had traded on that information. In an effort to avoid that charge, she gave the reasons for her sale to investigators from the FBI, the SEC, and the U.S. Attorney's office in two interviews.<sup>41</sup> Stewart also assured shareholders of her company that she was innocent of any wrongdoing.

Ultimately, Stewart was not charged with insider trading,<sup>42</sup> but with two counts of making false statements during interviews with government investigators, one count of obstructing an agency proceeding by making false

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38. For a gracious acknowledgment of Stewart's contribution, see Ken Druse, *Can Plants Survive a Martha Drought?*, N.Y. Times, Mar. 11, 2004, at D1.

39. See Indictment, *United States v. Stewart*, 03 Cr. 717 (MGC) (S.D.N.Y. filed June 4, 2003).

40. Waskal pleaded guilty to charges of insider trading and is currently serving a seven year sentence. See Brickey, *supra* note 6, at 392.

41. See Indictment, *supra* note 39. Stewart maintained that she sold the shares on the news that the share price had fallen below \$60 per share, as previously agreed with her broker and co-defendant, Peter Bocanovic. See Memorandum of Law in Support of Martha Stewart's Omnibus Pre-Trial Motions, *United States v. Stewart*, 03 Cr. 717 (MGC) (S.D.N.Y. Oct. 6, 2003). The government argued that this was a lie and that she had traded because of information conveyed to her about Waskal's sales. See Indictment, *supra*.

42. The SEC has initiated an enforcement action on the insider trading charges. The alleged violation appears to be tippee liability predicated on the broker's misappropriation of confidential information. See generally Joan MacLeod Heminway, *Save Martha Stewart? Observations about Equal Justice in U.S. Insider Trading Regulation*, 12 *Tex. J. Women & L.* 247 (2003) (discussing SEC enforcement action against Stewart).

statements before SEC investigators, and conspiring to commit those offenses.<sup>43</sup> She was also charged with securities fraud, based on her statements to shareholders that disclaimed criminal conduct,<sup>44</sup> but was acquitted of that charge. At trial, her broker's former assistant, Douglas Faneuil, who had pleaded guilty to a misdemeanor and agreed to cooperate with prosecutors, testified for the government.<sup>45</sup> The jury found Stewart guilty of all four obstruction counts.<sup>46</sup>

The power of the prosecutor to charge is two-fold; the power to indict or not (as the review of the Andersen case demonstrates) and the power to decide what offenses to charge.<sup>47</sup> The prosecutor's discretion regarding specific charges emanates from and is enhanced by the federal criminal code. At once broad and deep,<sup>48</sup> it provides prosecutors a wide range of white collar offenses from which to choose. Its breadth is a function of the expansive and open-ended language of the statutes, which allows them to be applied to a wide and unspecified range of conduct.<sup>49</sup> The code is deep in the sense that several

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43. See Indictment, *supra* note 39.

44. See *id.*

45. See *United States v. Faneuil*, 02-CR-1287 (S.D.N.Y. Oct. 2, 2002) (Misdemeanor Information) (charging a violation of 18 U.S.C. § 873).

46. Constance L. Hays & Leslie Eaton, *Stewart Found Guilty in Lying in Sale of Stock*, N.Y. Times, Mar. 6, 2004, at A1.

47. As in the Andersen case, the decision to indict Stewart generated considerable debate, especially given the relatively low value of the trade and her celebrity status. See Constance L. Hays, *Martha Stewart Uses Web to Tell Her Side of Story*, N.Y. Times, June 6, 2003, at C1 (discussing whether Stewart was indicted because of her fame and whether it would be wrong not to indict her for that reason); David Carr, *For the Press, a Case That Is an Irresistible Draw*, N.Y. Times, June 5, 2003, at C5; Kurt Eichenwald, *Prosecutors Have Reasons for Stalking Celebrities*, N.Y. Times, June 5, 2003, at C4; see also *infra* note 56 (noting controversy regarding the securities charge).

48. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 512 (2001). Or, in the words of Professor Julie O'Sullivan, "sprawling and redundant." O'Sullivan, *supra* note 20, at 18.

49. The breadth of white collar offenses has long been the subject of significant commentary. See e.g., John C. Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 Am. Crim. L. Rev. 1, 19 (1983) (noting that recent expansion of the mail fraud statute permits the prosecutor "to exercise virtually unfettered discretion in defining the kind of

offenses often apply to the same substantive conduct. The charges against Stewart reflect both the breadth and depth of the code.

The securities statute under which Stewart was charged is a typical federal fraud statute, written in broad, open-ended terms that, whether by accident or design, capture a wide range of conduct. The securities provision makes it unlawful to “use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance” in contravention of rules established by the SEC.<sup>50</sup> The relevant rule, rule 10b-5, is hardly more specific; it makes it unlawful “[t]o make any untrue statement of a material fact . . . or [t]o engage in any act . . . which operates . . . as a fraud or deceit . . . in connection with the purchase or sale of any security.”<sup>51</sup> This conduct becomes criminal when the violation is “willful.”<sup>52</sup> Over the years, judicial decisions broadly interpreted these terms and gradually expanded the reach of the securities statutes to reach several different forms of insider trading.<sup>53</sup>

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misbehavior on which he intends to focus”); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 *Yale L.J.* 405 (1959) (analyzing the federal conspiracy statute).

The mail and wire fraud statutes raise significant vagueness concerns and have long been the subject of critical commentary. See generally Coffee, *supra*; Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 *Harv. J. on Leg.* 153, 178-79 (1994); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 *S.C. L. Rev.* 223 (1992); Gregory Howard Williams, *Good Government by Prosecutorial Decree, The Use and Abuse of Mail Fraud*, 32 *Ariz. L. Rev.* 137 (1990). Although courts have registered concerns, see e.g., *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *aff'd* on alternate grounds sub nom. *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), cert. denied, *Rybicki v. United States*, 125 S. Ct. 32 (2004), they have rejected the argument that the honest services amendment to the mail fraud statute is unconstitutionally vague. See e.g., *Rybicki*.

50. 15 U.S.C. § 78j(b) (2001).

51. 17 C.F.R. § 240.10b-5.

52. 15 U.S.C. § 78ff(a) (2004).

53. See Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 *Wm. & Mary L. Rev.* 2209, 2238-46 (2003) (analyzing development of insider trading law and suggesting that expansive judicial interpretations are more likely when a government agency is charged with civil, remedial enforcement).

As a result of judicial interpretations, insider trading now includes trading

In drafting such broad provisions, Congress may have intended that the courts, through the adjudication of specific conduct, define terms such as “deceptive device,” “willfully,” “materially,” and “in connection with.”<sup>54</sup> But in the first instance that authority devolves to the prosecutor who first interprets statutory language when determining whether the statute covers the conduct at issue. This pattern—prosecutors raising new interpretations and courts acceding to them—leads to an incremental, but inexorable, expansion of the laws.<sup>55</sup>

This dynamic allowed prosecutors to charge Stewart with a novel and untested form of securities fraud. The government’s theory was that Stewart committed securities fraud when she publicly asserted her innocence. According to the prosecution, her denials of wrongdoing were materially false statements, made with the intent to defraud investors by slowing or stopping the erosion of the company’s share value. Despite its novelty and expansiveness,<sup>56</sup> the trial court denied the motion to

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by temporary outsiders, tippee liability, and trading based on the misappropriation of confidential information. See *Cady, Roberts, & Co.*, 40 S.E.C. 907 (1961), cited approvingly in *Chiarella v. United States*, 445 U.S. 222 (1980); *Dirks v. SEC*, 463 U.S. 646 (1983); *United States v. O’Hagan*, 521 U.S. 642 (1997).

54. For insight on the institutional forces that motivate Congress to enact ambiguous and broad statutes, see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757 (1999).

Although it is easy to fault the judiciary’s propensity to define the elements of white collar crimes, Congress often leaves little choice. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (“Congress has done nothing in the interim further to illuminate RICO’s key requirement of a pattern of racketeering. . . . It is, nevertheless a task we must undertake in order to decide this case.”); *United States v. Brumley*, 116 F.3d 728, 732 (5th Cir. 1997) (en banc) (“We must next find the meaning of honest services as used in this federal statute.”).

55. The general pattern has been noted by many commentators. See e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 *Harv. L. Rev.* 469 (1996); Richman, *supra* note 54; Solan, *supra* note 53; J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 *Hastings L.J.* 1199, 1252-55 (1999); Stuntz, *supra* note 48; see also Moohr, *supra* note 49, at 178-79 (noting process in context of the mail and wire fraud statutes).

56. The government’s characterization of Stewart’s statements as securities fraud generated significant controversy. See e.g., David Mills & Robert Weisberg, *Flunking the Martha Test*, *Wall St. J.*, Jan. 16, 2004, at A10 (professors who

dismiss the charge,<sup>57</sup> and thus tacitly approved the government's theory that denials of wrongdoing could constitute a scheme to defraud investors. Ultimately, the court acquitted Stewart of securities fraud after finding that the government had not proved its case.<sup>58</sup>

In addition to the ambiguity of white collar criminal statutes, the conduct at issue in white collar cases can itself be ambiguous. An act, ethical or unethical, may or may not give rise to civil liability, and may or may not be the basis for a criminal charge.<sup>59</sup> In some cases, neither prosecutors nor courts know whether the conduct at issue is encompassed by the criminal law.<sup>60</sup> Whether conduct is criminal can depend on the actor's state of mind,<sup>61</sup> the egregiousness of the conduct and resulting harm,<sup>62</sup> and is

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teach a course in white collar crime at Stanford Law School conclude that a statement of innocence about an offense unrelated to the firm does not defraud shareholders); Brooke A. Masters, Securities Charge Could Be Biggest Threat to Stewart, Wash. Post, June 19, 2003, at E02 (quoting David E. Marder, former SEC enforcement lawyer: "[the government] has alleged you manipulated stock prices simply by protesting your innocence"); William Safire, Fight It, Martha, N.Y. Times, June 12, 2003, at A35; Alex Berenson, Defining Martha Stewart's Alleged Crime, N.Y. Times, June 8, 2003, at WK5.

57. See Memorandum, *supra* note 41 (arguing the securities fraud charge violated due process and infringed First Amendment rights).

58. See *United States v. Stewart*, 305 F. Supp. 2d 368 (S.D.N.Y. 2004) (ruling that in the light of the evidence no reasonable juror could find beyond a reasonable doubt that Stewart had lied for the purpose of influencing the price of her company's stock).

59. See *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996); *United States v. Emery*, 34 F.3d 911 (7th Cir. 1994); *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *aff'd* on alternate grounds *sub nom.* *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), cert. denied, *Rybicki v. United States*, 125 S. Ct. 32 (2004); *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996).

60. Pamela H. Bucy, *White Collar Crime: Cases & Materials* 2 (2d ed. 1998) (noting that in white collar crime it may be difficult to determine whether identified conduct constitutes a crime); William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1883 (2000) (noting that *the* issue in white collar criminal law is the boundaries of an offense).

61. See *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998); cert. denied, 526 U.S. 1016 (1999) (holding that otherwise lawful conduct—filing lawful, albeit frivolous, appeals—obstructed justice because conduct was motivated by an improper purpose).

62. See *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970); *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996) (distinguishing between hyping a company or product and misleading buyers and investors).

sometimes a matter of degree.<sup>63</sup> The combination of ambiguous conduct and broad, vague statutes enhances prosecutorial power by implicitly authorizing prosecutors to classify certain conduct as criminal.

The depth of the federal criminal law—duplicative statutes that apply to similar conduct—increases the prosecutorial power in a second way, by giving prosecutors a plethora of offenses from which to choose.<sup>64</sup> The three crimes that Stewart was convicted of, false statement,<sup>65</sup> obstruction,<sup>66</sup> and conspiracy,<sup>67</sup> were all based on the same underlying conduct, the statements she made to investigators about the reasons for her sale. In misrepresenting those reasons, she committed the false statement offense and because SEC investigators were present when she made the false statement, she obstructed an agency hearing. Moreover, she made those statements after agreeing with her broker to make false statements, obstruct an agency proceeding, and commit perjury.<sup>68</sup>

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63. In the words of Justice Holmes, “[T]he law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.” *Nash v. United States*, 229 U.S. 373, 377 (1913) (discussing the Sherman Act).

64. See *United States v. Wells*, 519 U.S. 482, 505-09 & nn.8-10 (1997) (Stevens, J., dissenting) (noting there are “at least 100 federal false statement statutes”); Jeffrey Standen, *An Economic Perspective On Federal Criminal Law Reform*, 2 *Buff. Crim. L. Rev.* 249, 290 (1998) (reporting his personal count of 325 offenses involving fraud).

65. See 18 U.S.C. § 1001 (2004) (prohibiting “knowingly and wilfully” making a false statement to virtually any federal government official).

66. See 18 U.S.C. § 1505 (2004) (prohibiting obstructing the due and proper administration of the law authorizing an agency proceeding).

67. See 18 U.S.C. § 371 (2004) (conspiring to commit an offense against the United States).

68. The prosecutorial authority to charge multiple offenses for the same underlying conduct is not always limited by the Double Jeopardy Clause, which bars multiple punishment for the same offense. U.S. Const. amend. V (“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”).

The test for ascertaining whether the constitutional right against multiple punishments for the same offense has been violated makes it difficult to establish double jeopardy. See *Blockburger v. United States*, 284 U.S. 299 (1932) (in comparing charges, each provision of one criminal statute must require proof of a fact that the other statute does not). In applying the Blockburger test to claims of multiple punishments for the same offense, courts determine “whether congress

Just as the Arthur Andersen case reflects the power of the prosecutor to charge, the Martha Stewart case illustrates the prosecutors' power to decide what to charge.<sup>69</sup> The breadth and depth of the federal criminal code enhances prosecutors' authority in discharging their investigative and charging functions. Other similarities between the cases are that both defendants found it difficult to manage the collateral consequences of a federal investigation and both faced the testimony of a cooperating witness who had obtained a plea bargain.<sup>70</sup> The power of prosecutors to obtain plea bargains and cooperation agreements is most clearly illustrated by the cases against the Enron executives.

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intended to authorize separate punishments for the conduct in question." *United States v. Holmes*, 44 F.3d 1150, 1153-54 (2d Cir. 1995). Charges that seem intuitively multiplicitous often do not meet the standard. See *United States v. Woodward*, 469 U.S. 105 (1985) (holding that charging defendant with false statements, 18 U.S.C. § 1001, and failing to report transportation of currency, 31 U.S.C. § 1058, does not violate the double jeopardy clause).

The Sentencing Guidelines require that similar charges be grouped, thus mitigating somewhat the effect of multiple charges by reducing the possibility of separate sentences for each offense. See U.S. Sentencing Guidelines Manual pt. D, §§ 3D1.1 to 3D1.5 (2003) (grouping of charges depends on several factors, the most important of which is the amount of loss). Grouping offenses does not, however, lighten the task of defending against prosecution of multiple crimes in the first place. In addition, multiple charges can also lead the jury to conclude that the accused must have engaged in some criminal act. For these reasons, the practice of filing multiple charges encourages defendants to plead guilty.

69. New DOJ policies may constrain the prosecutor's power to charge. See Memorandum from Attorney General John Ashcroft to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) [hereinafter Ashcroft Memorandum], available at <http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrgmem.pdf> (last visited Nov. 12, 2004). The directive emphasizes that prosecutors are to charge "the most serious, readily provable offense or offenses that are supported by the facts of the case." *Id.* Three exceptions to this standard, however, preserve prosecutor's discretion to charge—and thus to plea bargain. *Id.* (providing exceptions of fast-track programs, cases of substantial assistance, and "other exceptional circumstances" such as over-burdened office and the duration of trial).

70. In both cases the defendants were not charged with the primary offense—fraud in Andersen's case and insider trading in Stewart's. Rather, prosecutors used the ancillary charge of obstruction. See Oesterle, *supra* note 16, at 446-55 (criticizing "sideshow" charges as a way to sate public pressure for justice and to avoid the risk of losing a "main show" prosecution). But see Brickey, *supra* note 16, at 922-31 (defending the decision to indict Andersen).

C. *The Enron Executives—The Power to Secure Plea Bargains*

Enron prosecutors overcame significant obstacles to investigating allegations of white collar crimes: the secrecy and complexity of contested conduct. Frauds such as those at Enron involve deceptions that are effected without the knowledge of others. Although lower level employees who implement decisions may be involved, they often do not understand the import of the matter, and, before Sarbanes-Oxley, arcane accounting rules protected the decisions from outside scrutiny. In addition to being cloaked in secrecy, many white collar frauds are inordinately complex, involving complicated transactions and deals that require expertise in their commission, detection, and prosecution. The adage, “follow the money” becomes an ineffective guide in these circumstances.<sup>71</sup>

The investigation of the complex financial fraud at Enron followed a typical course, as prosecutors closed cases by indicting corporate officers and obtaining plea and cooperation agreements from them. In addition to David Duncan and Arthur Andersen, indicted individuals include four mid-level Enron executives, three NatWest bankers, four Enron energy traders, and nine from Enron’s Broadband division.<sup>72</sup> Three top executives, former Chief Financial Officer Andrew Fastow, former Chief Executive Jeffrey Skilling, and former Chief Accounting Officer Richard Causey, have been indicted; Andrew Fastow pleaded guilty and has agreed to cooperate with prosecutors.<sup>73</sup> This record reflects the power of federal prosecutors at the investigation stage—even in the case of high-level executives and subtle frauds. The cases also

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71. For commentary on the accounting strategies used by Enron, see Bala G. Dharan & William R. Bufkins, *Red Flags in Enron’s Reporting of Revenues and Key Financial Measures*, in *Enron: Corporate Fiascos and Their Implications*, supra note 16, at 97. Reportedly, “even the IRS did not understand them.” Brickey, supra note 6, at 373.

72. See Brickey, supra note 6, at 386-88. The charges included conspiracy, fraud, false statements, and money laundering. *Id.*

73. See Moohr, supra note 14.

show how prosecutors' authority over the final phase, sentencing, increases prosecutors' power at the initial investigation stage. Plea bargains often include agreements to cooperate with investigators,<sup>74</sup> an important investigative tool that allows federal prosecutors to pierce the secrecy and complexity of corporate frauds.

The indictment and the plea and cooperation agreement of Andrew Fastow, Enron's former chief financial officer, illustrate how plea bargaining strengthens prosecutorial power at the investigation stage. First, prosecutors used information provided by individuals who agreed to cooperate<sup>75</sup> to indict Fastow on ninety-eight counts that include charges of conspiracy, wire fraud, money laundering, and obstruction of justice.<sup>76</sup> Second, Fastow was convinced to plead guilty and cooperate after his wife, Lea Fastow, a former assistant treasurer at Enron, was indicted on tax charges.<sup>77</sup> Fastow agreed to plead guilty to two counts of conspiracy.<sup>78</sup> Under the plea

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74. For commentary on cooperation agreements, see Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 Fed. Sent. Rep. 292 (1996); Podgor, *supra* note 36.

75. In October, 2003, two mid-level executives, David Delainey and Wesley Colwell, were indicted and agreed to cooperate and reportedly provided information about Fastow's role in the fraud. See Mary Flood, *Ex-Enron Accountant Surrenders*, *Houston Chron.*, Jan. 23, 2004, at A1.

76. Indictment, *United States v. Fastow*, No. H-2-02-0665 (S.D. Tex. filed Oct. 31, 2002).

77. See John A. Townsend, *An Analysis of the Fastow Plea Agreements*, draft printed Feb. 3, 2004 (on file with author) (explaining that indictment alleges tax perjury and not tax evasion, a more serious offense). Lea Fastow was also indicted for conspiracy and money laundering conspiracy. *Id.*

78. Andrew and Lea Fastow negotiated agreements under which Lea Fastow would serve five months in prison and five months in home detention and Andrew Fastow would plead guilty to two counts of conspiracy, serve ten years in prison, and forfeit \$23 million. See Mary Flood, *Tail Wagging Dog in Fastows' Cases*, *Houston Chron.*, Jan. 13, 2004, at B1.

The deal was almost derailed when United States District Judge David Hittner refused to sentence Lea Fastow without receiving a pre-sentencing report, but was reinstated when she agreed to be sentenced in April, with the proviso that she could withdraw the plea if sentenced to more time in prison. See Kurt Eichenwald, *Ex-Chief Financial Officer of Enron and Wife Plead Guilty*, *N.Y. Times*, Jan. 15, 2004, at C3. Judge Hittner refused, at the April sentencing hearing, to follow the plea arrangement, and Lea Fastow withdrew her plea. See Mary Flood & Purva Patel, *Lea Fastow Opts for Jury Trial*, *Hous. Chron.*, Apr. 8,

agreement he will serve ten years in prison, the maximum sentence for the counts to which he had pleaded.<sup>79</sup> Just as the pleas of other executives hastened Fastow's agreement, his agreement to cooperate reportedly enabled the government to indict Causey and Skilling on various counts of securities fraud, wire fraud, and insider trading.<sup>80</sup>

As this record indicates, much of the success of the current criminal investigations is a result of the prosecutor's authority to negotiate plea agreements. In one sense, all defendants may negotiate to exchange their expensive procedural rights and a long sentence for the "certainty and ease of conviction" and a lesser sentence.<sup>81</sup> Defendants such as Fastow, who have information about the crime and the involvement of others, have an additional bargaining chip. Faced with the risk of long prison terms, these defendants can trade information for a lesser term

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2004, at A1. Ultimately, Lea Fastow was sentenced to one year in prison. See Lea Fastow Gets a Year in Enron Plea, N.Y. Times, May 7, 2004, at C7.

79. Although the prison sentence is a fraction of the term suggested by the indictment, in other respects the plea agreement appears to favor the government. In addition to the maximum penalty for two counts of conspiracy, the government retained the right to pursue other charges if it is dissatisfied with Fastow's cooperation. See Plea Agreement, United States v. Fastow, CRH-02-0665 (S.D. Tex. Jan. 15, 2004). The value of Fastow's plea agreement is indicated in the chief prosecutor's statement, "For the first time, the Enron task force has a seat on the 50th floor' of the Enron building." Eichenwald, *supra* note 78.

80. See Mary Flood, Ex-Enron Accountant Surrenders, Houston Chron., Jan. 23, 2004, at A1 (reporting Fastow had explained the fraudulent nature of one of Enron's special purpose entities, which allowed Enron to overstate its earnings); United States v. Skilling, No. H-04-25 (S.D. Tex., filed Feb. 18, 2004). Causey and Skilling have pleaded not guilty and as of this writing are preparing for trial.

The strategy was also used to obtain the indictment of Ken Lay, former CEO of Enron. Prosecutors reportedly used information provided by five alleged conspirators, including Andrew Fastow, who are cooperating with the government. See Brooke A. Masters, Focus Kept Narrow in Indictment of Lay, Wash. Post, July 10, 2004 at E1.

The same pattern emerged at WorldCom. Following the guilty plea of Scott Sullivan, former chief financial officer of WorldCom, prosecutors indicted Bernard Ebbers, the firm's chief executive officer, on conspiracy and fraud charges. See Barnaby J. Feder & Kurt Eichenwald, Ex-WorldCom Chief Is Indicted by U.S. in Securities Fraud, N.Y. Times, Mar. 3, 2004, at A1; see also Brickey, *supra* note 6, at 371-72 (explaining that the same strategy was used in the prosecution of executives at Adelphia and at an earlier stage in the WorldCom investigation).

81. See Lynch, *supra* note 10, at 2132.

because prosecutors have an incentive to forego long prison terms when they can obtain information and testimony that leads to actors higher in authority.<sup>82</sup> These dynamics occur because of the prosecutor's power to negotiate plea agreements, an authority that emanates from a combination of statutory penalties and the Sentencing Guidelines.

The Guidelines allow prosecutors to influence sentencing in a number of ways. As to white collar cases, the Guidelines increased the certainty that white collar criminals will suffer some term of imprisonment.<sup>83</sup> The Guidelines also increased the influence of prosecutors over sentencing after a conviction or a plea bargain.<sup>84</sup> The

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82. New DOJ policies, mandated by the Feeney amendment, may limit federal prosecutors' authority to obtain plea bargains. See Ashcroft Memorandum, *supra* note 69. Sentencing recommendations must honestly reflect the totality and seriousness of the conduct and be fully consistent with the Guidelines, applicable statutes, and readily provable facts. *Id.* Prosecutors are not to request downward departures. *Id.*

Attorney General Ashcroft cited Congress's purpose to limit judicial discretion to depart from the Guidelines to justify the constraints on prosecutors and judges. See *id.* It appears, however, that the DOJ played a significant role in the legislation. Rep. Tom Feeney (Rep.-Fla.), the bill's sponsor, reported that he "was simply the 'messenger'" and that the bill was drafted by two Justice Department officials, Associate Deputy Attorney General Daniel Collins and Jay Apperson, counsel to the House Judiciary Committee). See Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign against Soft Sentences by Judges*, *Wall St. J.*, Aug. 6, 2003, at A1; see also David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 *SMU L. Rev.* 211, 229 (2004) (noting Feeney was "prodded" by the Department of Justice).

83. See U.S. Sentencing Guidelines Manual ch.1, pt. A(4)(d) (2003) (noting treatment of white collar offenses as serious crimes that justify prison terms rather than probation); see also *Mistretta v. United States*, 488 U.S. 361, 376 (1989) (stating that a purpose of the Guidelines was to correct "lenient" treatment of white collar criminals).

84. Agreement on this point is practically universal. See, e.g., George Fisher, *Plea Bargaining's Triumph* 205-39 (2003) (reviewing effect of Guidelines on plea bargaining in the federal system).

The Guidelines reduced judicial discretion by requiring judges to calculate a guideline range and then to sentence within that range. Sentences that depart from the guideline range are appealable. At the same time, the Guidelines increased prosecutorial discretion by, for instance, authorizing prosecutors to recommend a departure from the guideline range based on substantial assistance. See U.S. Sentencing Guidelines Manual § 5K1.1 (2003). The court cannot depart

prosecutor exercises influence over the sentences that follow conviction, largely because the federal prosecutor has inherited the discretion that was once the court's.<sup>85</sup> That power influences defendants to plead guilty and to waive trial. As exemplified by the cases against the Enron executives, the accused individual with information about wrongdoing by others may negotiate for a lesser prison sentence in return for cooperation and testimony. In addition, defendants who recognize the prosecutor's influence in recommending a final sentence to the court may rationally decide that it is wiser to plead guilty than to risk facing the same prosecutor if convicted.<sup>86</sup>

A prosecutor's power to obtain guilty pleas and to condition the plea agreement on cooperation with the investigation increases as the length of the potential sentence increases. The length of the prison term for white collar offenses largely depends on the amount of financial loss suffered by the victim.<sup>87</sup> This calculation, implemented by the Guidelines' loss table, can drastically increase the prison sentence. In November 2001, the Commission revised the loss table and redefined the term "loss"; the effect was to increase sentences of white collar crimes.<sup>88</sup>

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on substantial assistance grounds without a prosecutorial motion. See generally Cynthia K. Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 Rutgers L. Rev. 199 (1997). In addition, departure for other reasons is limited. See U.S. Sentencing Guidelines Manual § 5K2.0 (2003) (policy statement). Most recently, Congress further limited judicial discretion when it enacted the Feeney Amendment. See *supra* note 82.

85. The consternation that met Judge Hittner's decision to reject the plea bargained sentence of Lea Fastow demonstrates the widespread recognition that this decision belongs to the prosecutor. See *supra* note 78; Kurt Eichenwald, *Lea Fastow Withdraws Plea in Tax Case*, N.Y. Times, April 8, 2004, at C4 (recounting critique of Judge Hittner for upending attempted resolutions and pushing parties toward a trial that neither wanted); Flood & Patel, *supra* note 78, at A1 (citing criticism that the decision was a "miscalculation of the judge").

86. See Fisher, *supra* note 84, at 224-27 (explaining the operation of this dynamic and the effect of the Guidelines on plea bargaining).

87. See U.S. Sentencing Guidelines Manual § 2B1.1 (2003); see also Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 Ind. L. Rev. 5, 25-28 (2001) (explaining significance of financial loss in the Guidelines for white collar crimes).

88. See U.S. Sentencing Guidelines Manual § 2B1.1 (2003) (combining losses

The effect of the increased penalties following the 2001 reform is reflected in the sentence received by Jamie Olis, a mid-level executive at Dynegy, an energy trading firm. A jury convicted Olis for devising a fraudulent accounting scheme after his former boss, who had pleaded guilty and agreed to cooperate with prosecutors, testified against him.<sup>89</sup> Based on an estimate of investor losses of \$100 million, Olis was sentenced to over twenty-four years in prison.<sup>90</sup> The sentence is extraordinarily high when

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from theft and fraud crimes into one table and increasing offenses levels that attach to ranges of economic loss). The Commission defined monetary loss more broadly to include all losses that the defendant knew or reasonably should have known were a potential result of the offense. See U.S. Sentencing Guidelines Manual § 2B2.2, cmt. n.2 (2003).

Following the Sarbanes-Oxley Act, sentences were adjusted again to implement the increased penalties for white collar crimes enacted by Congress. See Highlights of the 2003 Amendments, XII, Federal Sentencing Guideline Manual (Nov. 1, 2003).

89. See Laura Goldberg, *Ex-Dynegy Exec Gets 24 Years*, *Houston Chron.*, March 26, 2004, at A1 (reporting charges of securities fraud, mail fraud, wire fraud and conspiracy); Simon Romero, *Stiff Sentence Is Possibility for a Name Not So Known*, *N.Y. Times*, March 24, 2004, at C1.

90. See Goldberg, *supra* note 89. As this article was being prepared for publication, the Supreme Court issued *Blakely v. Washington*, 124 S. Ct. 2531 (2004), a decision that may significantly reduce prosecutors' power to leverage guilty pleas. A bare majority struck down a Washington state sentencing statute under which judges could increase the sentence above the maximum state guideline range based on facts that were neither reflected in the jury's verdict nor admitted by the defendant. The decision and its reasoning appear to apply to the federal Sentencing Guidelines, which similarly allow judges to enhance sentences.

The majority explained that the term "statutory maximum," previously viewed as referring to the sentence range provided by the federal criminal statute, "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . [T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 2537.

The circuits split immediately on whether and to what extent *Blakely* applies to the Guidelines. Compare *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), and *United States v. Mueffelman*, 2004 WL 1672320 n.25 (D. Mass. July 26, 2004), with *United States v. Pineiro*, 377 F.3d 464, (5th Cir. 2004), *United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004) (en banc) (certifying the question of *Blakely's* applicability to the federal Sentencing Guidelines), and *United States v. Mincey*, 2004 WL 1794717 (2d Cir. Aug. 12, 2004).

The Court has granted certiorari and expedited status to two cases and will hear argument early in the 2004 term to determine whether *Blakely* applies to

compared to the six to seven year sentence authorized by the previous loss table.<sup>91</sup>

The Enron indictments illustrate that the prosecutor's power to negotiate pleas and cooperation agreements is made possible by the ability to bring multiple charges and to influence the ultimate sentence, which now mandates harsh penalties for white collar crimes. This power to influence ultimate sentences enables prosecutors to unravel complex financial transactions and to indict executives at the highest levels.

Taken together, the cases of Arthur Andersen, Martha Stewart, and the Enron executives show how several factors combine to confer great power on prosecutors at the investigation, charging, and pleading stages of a criminal matter. Although each source of prosecutorial authority strengthens the prosecutor's power, the totality of prosecutorial authority is the result of their combined effect. The substantive laws and other forces that contribute to prosecutorial power are related to and reinforce one another. For example, the doctrine of respondeat superior interacts with the damaging collateral consequences of an indictment and the economic punishment imposed by market forces. The sentencing authority is augmented by the prosecutor's charging power, which because of the depth, breadth, and vagueness of substantive laws like securities fraud and mail and wire

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the Guidelines and, if so, whether the entire Guideline system is unconstitutional. See *United States v. Fanfan*, 125 S. Ct. 12 (Aug. 2, 2004); *United States v. Booker*, 125 S. Ct. 11 (Aug. 2, 2004).

A holding that *Blakely* applies to the Guidelines' enhancement provisions will result in some reallocation of the current distribution of authority over sentencing among prosecutor, judge, and jury. Under a pure-*Blakely* regime, the government must prove to a jury beyond a reasonable doubts any facts that enhance sentences. In the case of *Jamie Olis*, a jury would have to find, beyond a reasonable doubt, that investors' losses were \$100 million. Ultimate sentencing thus becomes less certain than under the existing system in which prosecutors have great influence over sentencing by judges, and this lack of certainty would seem to reduce prosecutors' ability to leverage plea bargains.

91. See *Goldberg*, supra note 89. See also *Bowman*, supra note 87, appendices A & B, at 86-101 (providing loss guidelines before and after the 2001 amendments to the Guidelines); *Moohr*, supra note 6, at 954 (noting that prison sentence for attempted murder and torture is twenty years).

fraud allows prosecutors to charge several offenses for one course of conduct and to initiate new theories of fraud and obstruction. Prosecutorial authority to secure plea bargains is based on the statutory penalties authorized by Congress for each of the charged offenses and is strengthened by recent amendments to the Guidelines. In sum, prosecutorial power rests on a web of interrelated substantive, procedural, and policy authorizations which is complicated to trace and would be difficult to modify.

Prosecutorial power is strongest and most effective in the pre- and post-trial stages of a criminal matter. The prosecutor's authority to charge or not, to choose charges, to indict a firm as well as individual officers, and to secure cooperation agreements shifts the focus of the case to the pre-trial investigatory stage. The capacity to affect post-conviction sentencing by structuring initial charges and by promising or withholding a request for cooperation credit further enhances prosecutor's pre-trial authority. One underlying concern is that firms and individuals have strong incentives to cast blame on employees and fellow workers. Naming and abandoning an individual executive leads to an inference that the person engaged in wrongdoing, and simply being the subject of investigation tarnishes a reputation and credibility. Unlike Arthur Andersen and Martha Stewart, in most white collar cases (as in other federal cases) there is no public trial because the accused pleads guilty. There is thus no countervailing balance to resist public pressure for punishment and an administration's imperative to respond quickly and conclusively.

There are a number of perspectives from which to evaluate this state of affairs. The issue I address below is of a general nature—the effect of the expansion of prosecutorial power and the consequent absence of public trials on the federal criminal justice system. One way to address the question is to compare the current federal criminal justice system, nominally an adversarial system, to a European inquisitorial system.

## II. PROSECUTORIAL POWER IN AN ADVERSARIAL SYSTEM

Judge Gerard Lynch has argued that the prevalence of plea bargaining moves our adversarial system closer to the European inquisitorial system.<sup>92</sup> The following comparative inquiry endorses that view as to federal prosecutions of white collar crime. I begin by briefly reviewing the basic premises and institutional settings, and then explore the role of prosecutors in each system during an investigation, the decision to charge, and the negotiation of a guilty plea. The analysis shows that the approach used in federal prosecutions of white collar crimes, which relies in practice on investigation rather than trial, bears a marked similarity to the approach of an inquisitorial system. I conclude that the current course of the federal authorities in business crimes incorporates the inquisitorial system's weaknesses but not its strengths.

One necessarily proceeds with caution when embarking on such a comparison.<sup>93</sup> Modern adversarial and inquisitorial systems are not as distinct as they once were.<sup>94</sup> The inquisitorial system has adopted properties of the adversarial mode, notably by guaranteeing defendants' rights that are similar to those guaranteed by the United States' Constitution.<sup>95</sup> A second complexity is that there is

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92. See Lynch, *supra* note 10.

93. By one account, scholarship in comparative law blossomed in the 1970s as scholars often drew on inquisitorial systems to recommend changes in the American adversarial system. See Richard S. Frase, *Comparative Criminal Justice As a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 539, 545-48 (1990). More recent commentary eschews holistic importation of inquisitorial procedures in favor of adapting some continental procedures for use in the adversarial system.

94. See Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions*, 18 B.C. Int'l & Com. L. Rev. 317, 359-60 (1995) (concluding that Western systems "may be converging"); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009, 1025 (1974) (concluding that our adversarial system occupies a middle ground that combines inquisitorial and accusatorial elements).

95. Forty countries have signed the European Convention for the Protection of Human Rights and Fundamental Freedoms. See William T. Pizzi, *Trials Without*

no single, uniform inquisitorial model; the approach of individual countries to similar circumstances and problems inevitably varies. A third problem is that, as with an adversarial system, actual practices within a system are likely to deviate from the formal model.<sup>96</sup> Mindful of these problems, I measure the federal system as applied in white collar cases against the French model, which is most similar to a pure inquisitorial system.<sup>97</sup>

*A. Basic Premises of the Inquisitorial and Adversarial Systems*

The adversarial and inquisitorial models differ in their approaches to ascertaining the truth, largely as a result of their respective origins. The adversarial system began as common law judges resolved accusations made by one individual against another.<sup>98</sup> Reflecting the accusatory

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Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It 93 (1999) (noting that the Convention includes rights to be presumed innocent until proven guilty, to examine witnesses, to compel attendance of witnesses, and to legal assistance); Richard S. Frase, The Search for the Whole Truth about American and European Criminal Justice, 3 *Buff. Crim L. Rev.* 785, 820 (2000) (reviewing William T. Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (1999)) (noting that European courts increasingly enforce defendant's rights by excluding evidence and reversing convictions).

96. See Thomas Weigend, *Criminal Procedure: Comparative Aspects*, in 1 *Encyclopedia of Crime and Justice* 444 (Joshua Dressler ed., 2d ed. 2002) (noting that "practice can be radically different from the letter of the law and institutions may be quite unlike what they seem on paper").

Variations between theory and practice have engendered vigorous academic debate. See e.g., John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 *Yale L.J.* 1549 (1978); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 *Stan. L. Rev.* 547 (1997).

97. See Frase & Weigend, *supra* note 94, at 359 (noting that French system is more inquisitorial than the German, which occupies a place between the French and American systems); Goldstein, *supra* note 94, at 1018 (noting that French system is the "most typical of a pure inquisitorial model"); see also Frase, *supra* note 93 (explaining that focusing on one national system, rather than the inquisitorial system as a whole, is a preferable analysis).

98. See Philip L. Reichel, *Comparative Criminal Justice Systems 192-94* (3d ed. 2002) (explaining that a semi-private judicial system survived in the United

genesis, judges treated the parties as equals, and allowed the adversaries to make their cases to independent decision makers, jurors, who decided whether the accusations were true.<sup>99</sup> In an ideal adversarial system, the trial is the centerpiece of a broader process. Truth in the adversarial system is a by-product of a competitive process in which the parties put forward evidence and deflect the evidence of the other.

In contrast, continental countries adopted an investigatory approach to criminal matters in which governments utilized the state's power to carry out an inquiry.<sup>100</sup> The premise of the inquisitorial system is that it is possible to reconstruct and understand a crime, a historical event, by means of thorough investigation.<sup>101</sup> Accordingly, the inquisitorial process centered on the tasks of assembling and screening facts. As its name implies, the investigation is the centerpiece of the inquisitorial process. The ultimate issue of guilt or innocence is determined through an official inquiry that is initiated and conducted by the state. In this system, the trial is most accurately characterized as a continuation of the official investigation. The investigation, rather than the trial, is paramount.

The two systems also differ in the roles played by the state. In the adversarial system, although both prosecutor and judge are officials of the state and the state provides the forum, the government's role was traditionally constrained by the equality accorded the parties,<sup>102</sup> by the jury trial, and, later, by defendants' constitutional rights. In the inquisitorial system, state actors traditionally dominated the proceedings, conducting the investigation and managing trial and sentencing.

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States until well into the nineteenth century and providing example of Pennsylvania).

99. Goldstein, *supra* note 94, at 1017 (explaining further that the adversarial system is reactive and the inquisitorial system is proactive).

100. In France, for example, state control of the criminal process was in place by the sixteenth century. See Reichel, *supra* note 98, at 130.

101. See Weigend, *supra* note 96, at 445.

102. See Reichel, *supra* note 98, at 132.

*B. The Institutional Settings*

In France, the officials concerned with investigating, charging, trying, and sentencing criminal defendants are all members of, or report to, the judiciary. French prosecutors work within a centralized bureaucratic hierarchy headed by the Minister of Justice. One effect of this bureaucratic structure is that individual prosecutors are directed by supervising officials; individual decisions are subject to review and possible correction.<sup>103</sup> Thus prosecution policies are not formulated by individual prosecutors, but by superiors functioning at a centralized, higher level.

This contrasts markedly with the institutional setting in which the federal prosecutor works. In the United States' federal adversarial system, the prosecutor is a member of the executive branch, which is generally charged with enforcing laws enacted by Congress. Unlike its French counterpart, the Department of Justice does not wield centralized authority and does not approve or otherwise constrain the decisions of field attorneys.<sup>104</sup> Federal prosecutors are subject to minimal supervision and are authorized to make independent decisions that, with few exceptions,<sup>105</sup> are not subject to approval or direction. Independence and flexibility are prized in the belief that federal prosecutors should be free to respond to local circumstances,<sup>106</sup> which inevitably results in variations

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103. Specifically, individual prosecutors must submit written reports that conform to the written orders of supervisors. See Frase, *supra* note 93, at 559.

104. See Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 *Geo. L.J.* 1171, 1201-05 (1977) (discussing decentralized decision making); Kahan, *supra* note 55, at 486-87 (noting that DOJ guidelines are not always followed and providing example of Rudolf Giuliani's high-visibility crackdown of insider trading that did not have the support of the DOJ).

105. See e.g., U.S. Dep't of Justice, *U.S. Attorneys' Manual*, § 9-110.101 (requiring field attorney to seek approval of the Criminal Division of the DOJ before charging a RICO violation), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam) (last visited Nov. 12, 2004); see also § 9-110.200 (providing guidelines regarding RICO charges).

106. See Lynch, *supra* note 2, at 682 (discussing the independence of district

among field offices.<sup>107</sup> Although federal prosecutors are guided by institutional knowledge and policy,<sup>108</sup> independent decision making and discretionary authority are hallmarks of, not exceptions to, the federal prosecutor's job description.

Prosecutors in the two systems come from different backgrounds and receive markedly different education and training. In France, all magistrates (a group that includes both prosecutorial and judicial officers) are selected to the judicial magistracy on the basis of a highly competitive national examination taken after three years of law school.<sup>109</sup> Successful candidates then complete a two year educational program, which includes three internships, during which they receive a salary.<sup>110</sup> A prerequisite for entry into this program is a commitment to remain in the magistracy for at least ten years.<sup>111</sup> Prosecutors, examining magistrates, and trial judges are all members of the magistracy, sharing the same professional training and belonging to common professional associations. Prosecutors sometimes even change course, becoming judges.<sup>112</sup> In contrast, federal prosecutors are not specifically trained for their position. Nor are they chosen through a competitive examination designed to identify meretricious candidates. Rather, the supervising attorney in each judicial district is appointed by the president for a

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offices from Washington).

107. See generally Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *Fordham L. Rev.* 1511 (2000) (detailing variations between offices in policies regarding grand jury, charging, and in procedural matters); Ruff, *supra* note 104, at 1203 (noting variations depend on the size of the staff, number of cases handled, and extent to which the USA implements formalized procedures). Independence is also accorded to the line prosecutors, Assistant U.S. Attorneys, so there also may be some variation within a particular district. See Adam Liptak & Eric Lichtblau, *New Plea Bargain Limits Could Swamp Courts, Experts Say*, *N.Y. Times*, Sept. 24, 2003, at A23.

108. See Rakoff, *supra* note 23, at 184 (noting that line prosecutors orally convey practices, customs, and traditions).

109. See Frase, *supra* note 93, at 561. A law degree in Europe is an undergraduate degree, taking three to five years to complete. *Id.*

110. *Id.*

111. *Id.*

112. See Langbein & Weinreb, *supra* note 96, at 1559.

four year term.<sup>113</sup> Appointment is a political act, and is often the product of political alliances.<sup>114</sup>

All of these factors have an impact on the career paths open to each set of prosecutors. In France, service as a prosecutor or magistrate is a life-long career.<sup>115</sup> The prosecutor is a civil servant, working within a highly centralized national bureaucratic hierarchy that provides possibilities for advancement and job security. Promotions are guided by the civil service hierarchy and are said to depend as much on dropping cases as on securing convictions.<sup>116</sup> One effect of this long-term employment prospect is that prosecutors and magistrates are more accountable and responsive to their supervisors. They do not have to be concerned with re-appointment when political administrations change, and their prospects improve if they are deemed to function effectively.

In contrast, federal prosecutors cannot count on promotion within a bureaucratic hierarchy. The United States Attorney may not be reappointed when the presidential administration changes, and the successor may not be appointed from within the office. Thus prosecutors with experience in white collar crimes often enter private practice, representing white collar defendants, and others run for political office.<sup>117</sup> There is some evidence that uncertainty about future career prospects may influence prosecutors to seek the credentials

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113. See 28 U.S.C. § 541 (2004). Candidates are nominated by the state's senators, with deference given to the choices of senators who are in the administration's political party.

114. See Ruff, *supra* note 104, at 1205. The presidential appointment is not merely symbolic; it supports the independence of prosecutors from the Department of Justice). *Id.*

115. See Frase, *supra* note 93, at 563 (noting long-term nature of the career is one function of the two year training program and ten year obligation).

116. See Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 *Buff. L. Rev.* 361 (1977).

117. See Moohr, *supra* note 49, at 181 (providing examples of James Thompson, governor of Illinois, and former Attorney General Richard Thornburgh). A more recent, well-known example is the career of Rudy Guiliani, former mayor of New York City.

that accrue from prosecuting high-profile cases.<sup>118</sup> Taken together, the independence of federal prosecutors and the nature of their career prospects are an incentive to focus on results, that is, successful prosecutions,<sup>119</sup> whereas the likely career path of the French prosecutor provides an incentive to focus on following procedures as well as on successfully prosecuting wrongdoers. This is because the decisions of inquisitorial prosecutors are constrained by a bureaucratic hierarchy, education and training, and internal career opportunities. Prosecutors in continental systems are supervised to a much greater extent than federal prosecutors and, in comparison, have much less discretionary authority.

*C. A Functional Analysis of the Two Systems*

With the basic premises in mind, a more specific comparison is possible. Because 95 percent of defendants in the United States' federal system plead guilty before trial,<sup>120</sup> the following discussion analyzes the systems' approaches in pre-trial stages. The work of federal and French prosecutors is compared at the investigation, charging, and plea bargaining stages of a criminal matter. At each stage, one is struck with basic similarities between the systems—and with distinctions that significantly constrain the power of the inquisitorial prosecutor but not the federal prosecutor.

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118. See Edward L. Glaser, et al., What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes, 2 Am. L. & Econ. Rev. 259 (2000) (identifying pattern of federal drug prosecutions that indicate prosecutors choose to charge wealthier defendants with prestigious opposing counsel).

119. See Rakoff, *supra* note 23, at 178 (noting it is “an unusual” prosecutor who is not pleased by positive media coverage that might lead to political power).

120. See Fisher, *supra* note 84, at 223 (stating that, in 2001, 94 percent of cases adjudicated in federal district courts ended with plea bargains and tabulating the increase in plea bargains in federal district courts since 1984). By 2002, the figure had risen to 95 percent. See George Fisher: A Practice As Old As Justice Itself, N.Y. Times, Sept. 28, 2003, § 4, at 11.

### 1. The Investigative Function

The investigation is the primary focus of an inquisitorial system; the same is true in the federal system, as the discussion of current cases indicated. Prosecutors in both the French and the federal systems have broad authority in the investigation stage of a criminal matter. In addition, French and federal prosecutors who supervise and oversee complex white collar investigations are both likely to take an active role in the investigation. Federal prosecutors initiate an investigation when it is brought to their attention by investigators or regulators. In the white collar context, this information may come from law enforcement agents, enforcement divisions of federal regulatory agencies, or complaints from the public. The investigation of serious crimes in France also typically begins with reports from law enforcement officials, and French prosecutors also rely on the police for certain aspects of the investigation.<sup>121</sup> In both systems, prosecutors direct the inquires of enforcement agents, assess evidence, and interview witnesses. Federal prosecutors can also use the grand jury as an investigatory tool, relying on the jury's power to subpoena documents and witnesses who would not otherwise come forward.<sup>122</sup>

Despite this operational similarity, the goals of the investigations are strikingly different, and this distinction has implications for the entire investigatory process. The goal of the French investigation is to assemble a catalogue of evidence, known as a dossier, of the case. The dossier, used by the indicting chamber in deciding whether to charge and by the presiding judge at trial, provides the evidentiary justification for judgment and is thus a legally competent basis for prosecution and conviction.<sup>123</sup> The

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121. See Langbein & Weinreb, *supra* note 96, at 1553 (noting that the actual investigation may be delegated to the police).

122. For commentary on the use of the grand jury, see generally Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 *Am. Crim. L. Rev.* 339, 345 (1999).

123. See Langbein & Weinreb, *supra* note 96, at 1548-49.

dossier includes all the evidence in the case, exculpatory, as well as inculpatory.<sup>124</sup> It typically contains police reports, police interviews, interviews conducted by the magistrate (including interviews of the defendant),<sup>125</sup> witness statements, physical and documentary evidence, and scientific tests of the evidence. In contrast, rather than assemble a dossier to be used by superiors, the goal of the federal prosecutor is more immediate, to gather sufficient evidence to determine whether there is probable cause to bring charges against the defendant. Federal prosecutors will use this evidence at trial, in their role as advocates, to convince the fact finder of the defendant's guilt.

A second distinction between the systems in the investigative stage is that the power of French prosecutors is diffused, distributed along a hierarchy of officials. The prosecutorial function is shared by the judicial police, the prosecutor, and the examining magistrate.<sup>126</sup> A French prosecutor has broad authority to charge or to dismiss the case,<sup>127</sup> but is required to refer serious cases to an examining magistrate. The magistrate conducts a judicial investigation, either to continue the inquiry or to decide whether to approve the prosecutor's request to charge the accused.<sup>128</sup> The multi-stage investigatory process is

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124. See *id.* at 1554 (noting that inclusion of exculpatory evidence makes the dossier "superior to anything regularly available [in U.S.] short of a trial transcript"). It is also noteworthy that defense counsel has the right, in every civil law country, to inspect the entire dossier. See Schlesinger, *supra* note 116, at 365.

125. See Langbein & Weinreb, *supra* note 96, at 1548-49 (noting that the examining magistrate may question the defendant, who may be represented by counsel and who has the right to remain silent).

126. See *id.* at 1551-59. Judicial police investigate independently but are directly supervised by the prosecutor. *Officers de police judiciaire* may also receive delegations of authority from the examining magistrate. The prosecutor (*procureur*), who supervises the police, is supervised by an examining magistrate (*juge d'instruction*), who may mount an independent investigation. *Id.*; see also Richard S. Frase, France in Craig M. Bradley, *Criminal Procedure: A Worldwide Study* 143, 144-47 (1999).

127. Less serious crimes are sent directly to a police court or correctional court; both provide abbreviated hearing procedures. See Reichel, *supra* note 98, at 218-19.

128. See Langbein & Weinreb, *supra* note 96, at 1551-59; see also Comparative

governed by the judicial magistracy and is marked by formal requirements.<sup>129</sup>

This hierarchical investigation of the inquisitorial system contrasts markedly with the independence and the responsibilities of federal prosecutors. The investigatory decisions of the chief prosecutor in each district, the United States Attorney, are generally not subject to supervision of the Department of Justice.<sup>130</sup> Indeed, the line prosecutors who are supervised by the U.S. Attorney may also operate with broad discretionary authority during the investigation.

Finally, both systems face a similar problem, one which the inquisitorial model avoids or, more specifically, neutralizes. As the discussion of Enron officials indicates, the secrecy with which white collar crimes are committed, the complexity of the fraud, and the reliance on documentary evidence require that prosecutors work closely with investigating agents. In each system, the investigation may become less independent and less balanced, and the final conclusions of the prosecutor may reflect biases that result from being closely affiliated with the investigation.<sup>131</sup> Those biases may cause even well-intentioned investigators to make mistakes, to conform their findings to earlier hypotheses, to fail to examine issues thoroughly, or fail to make the effort to understand a perspective that is not their own.

Although this type of bias is probably inevitable in both systems, it seems less likely to affect the French investigation, largely because of the institutional setting in which inquisitorial investigators operate. As just noted, an inquisitorial investigation is limited by bureaucratic rules and supervision. The number of official participants in the

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Criminal Procedure 2 (John Hatchard et al. eds, 1996) (noting that the institution of the examining magistrate has been eliminated in Germany and Italy and debated in France).

129. See Goldstein, *supra* note 94, at 1019.

130. See *supra* text accompanying notes 104-08 (noting independence of federal prosecutors).

131. See Frase, *supra* note 95.

multi-stage investigation, each subject to supervision, is an inherent check on the power to make independent decisions. Moreover, as civil servants working within a bureaucratic hierarchy, inquisitorial investigators have no reason to be partial and indeed are expected to be impartial.<sup>132</sup> In contrast, the federal prosecutor, independent and operating without supervision, is freer to act on any unconscious bias that can result from a close association with investigation.<sup>133</sup> In theory, an adversarial system, in which defendants conduct their own investigations, provides a counterweight to this tendency. In practice, defendants do not have access to a dossier or other information, and difficult and expensive investigations are often impossible to complete. Even in white collar crimes, the resources of the government far outweigh the resources of the accused. Operating without supervision and with great discretionary power, the federal prosecutor acts without a counter-balancing check. On the whole, the inquisitorial prosecutor, while explicitly in charge of the inquiry, exercises less discretion and has less power than the federal prosecutor investigating white collar crimes.

In sum, there are basic similarities between the French system and federal white collar cases during the investigation. Yet significant differences exist. Prosecutorial power in the French system is shared, whereas in the federal system a single prosecutor is likely to have sole authority in the matter. Second, although prosecutors in both systems share the problematic possibility of becoming vested in the outcome of the investigation, the French system better avoids its consequences.

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132. See Schlesinger, *supra* note 116, at 365.

133. See Lynch, *supra* note 10, at 2123 (noting that a prosecutor can become “the judge in her own case”).

## 2. The Charging Function

A criminal investigation culminates in the decision to bring charges against the accused. As noted in the discussion of the Martha Stewart case, the two-fold charging decision encompasses both the decision to charge and the choice of charges. Prosecutors in both the adversarial and the inquisitorial systems have broad authority over initial charging decisions. For instance, both prosecutors may charge the accused with less serious crimes.<sup>134</sup>

As in the investigative stage, however, there are important distinctions between the systems. The French prosecutor relinquishes control over serious cases when, as required, the matter is referred to an examining magistrate. The magistrate approves the prosecutor's decision to press charges and opens a required judicial investigation.<sup>135</sup> This second-level investigation is no mere formality. In 1980, examining magistrates dismissed 20 percent of referred cases for insufficient evidence.<sup>136</sup> If the examining magistrate agrees that the charges are justified, the matter is referred to the indicting chamber,<sup>137</sup> where the case is reviewed by three judges who may dismiss or order trial on lesser charges.<sup>138</sup> The prosecutor's work is thus subject to two evaluations, by the examining magistrate and by the indicting chamber. This screening process is more likely to result in the filing of accurate and readily provable charges,<sup>139</sup> and, on the whole, is

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134. Delict and contravention charges do not receive full judicial screening in the French system. Contraventions are minor offenses; delicts are punishable by imprisonment for up to five years, and would be considered felonies in the federal system. White collar offenses may be categorized as delicts. See Frase, *supra* note 93, at 615 n.464.

135. See *supra* text accompanying notes 126-29. If the magistrate does not agree to press charges, the investigation may be continued.

136. See Frase, *supra* note 93, at 625 n.461.

137. See *id.* (noting that the prosecutor may appeal the magistrate's refusal to refer the matter to the indicting chamber).

138. See *id.* at 625 n.462 (noting that the indicting chamber almost always approves the felony charges recommended by the examining magistrate).

139. See *id.* at 616 (concluding that the hierarchical, career-oriented nature of

“significantly *more* restrained” than in the federal adversarial system.<sup>140</sup>

In the federal system, the prosecutor’s decision to charge is also made with the help of others. In theory, the decision to charge in federal white collar cases is made by the grand jury, as authorized by the Fifth Amendment.<sup>141</sup> The grand jury could be considered analogous to the inquisitorial system’s examining magistrate, that is, to investigate further and to decide whether to charge. Its mandate is to investigate and consider evidence in order to determine whether there is probable cause to believe that the accused committed a federal offense.<sup>142</sup> Thus, the grand jury is theoretically positioned—as is the examining magistrate—to constrain the enthusiasm of a prosecutor for formally charging the accused.<sup>143</sup> A grand jury’s right to refuse to indict the accused counters the power of the state and the prosecutor. The reality, however, is far different, and it is widely acknowledged that the typical grand jury is a tool of the federal prosecutor.<sup>144</sup>

In most cases, the grand jury depends on the prosecutor for information, acts on evidence provided by the prosecutor,<sup>145</sup> and does not conduct an investigation that is independent of the prosecutor’s like that undertaken

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the inquisitorial system results in consistent decisions based on established policies and subject to internal supervisory review).

140. *Id.* at 611.

141. U.S. Const., amend V (“no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury”).

142. See *United States v. Calandra*, 414 U.S. 338, 343 (1974).

143. The grand jury has been described as “a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor.” *United States v. Dionisio*, 410 U.S. 1, 17 (1973). Every defendant is not indicted by a grand jury; for instance, those who plead guilty are normally indicted through the filing of an information with the court.

144. The grand jury’s role is encapsulated in the quip that a prosecutor can convince a grand jury to indict a ham sandwich. *United States v. Reyes*, 167 F. Supp. 2d 579, 592 (S.D.N.Y. 2001) (referring to indictment of the “proverbial ‘ham sandwich’”).

145. See Richman, *supra* note 122, at 342-45 (explaining that prosecutors amass evidence from corporate employers, regulatory agencies, and through their power to threaten prosecution).

by the French examining magistrate. Significantly, the evidence that the grand jury considers does not necessarily include exculpatory evidence because federal prosecutors are not required to present even "substantial" exculpatory evidence to the grand jury.<sup>146</sup> Although a prosecutor may present exculpatory evidence to the grand jury in order to test the strength of a case before trial,<sup>147</sup> there is no formal requirement that ensures that the grand jury make its decision with full information. Thus, while the inquisitorial examining magistrate possesses all available information, including exculpatory evidence, the grand jury may not even be aware that exculpatory evidence exists.

The inquisitorial prosecutor's power to charge is limited in a second, indirect way, which again distinguishes the two systems. The victim of a crime, or indeed any French citizen, may file criminal charges directly with the court,<sup>148</sup> a practice that has the effect of encouraging prosecutors to file charges.<sup>149</sup> The procedure is significant because, unlike the federal prosecutor, the French

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146. *United States v. Williams*, 504 U.S. 36 (1992). The government is required, however, to give the defendant exculpatory evidence. See *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

Judicial supervision of the government's management of the grand jury is limited. See *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (reversing the district court's dismissal of the indictment because of prosecutorial errors in the grand jury proceedings where such errors did not prejudice defendant); *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986) (dismissal is appropriate when error, such as racial discrimination in selection of grand jurors, is fundamentally unfair). The prosecutor's responsibility to explain applicable law to the grand jury is generally not subject to review. See *In re Grand Jury 79-01*, 489 F. Supp. 844 (N.D. Ga. 1980).

Department of Justice guidelines advise prosecutors to disclose exculpatory evidence to the grand jury only when the prosecutor is "personally aware of substantial evidence which directly negates the guilt of a subject of the investigation." U.S. Dep't of Justice, U.S. Attorneys Manual, *supra* note 105, § 9-11.233. Even this low standard is not enforceable.

147. See *Podgor*, *supra* note 107, at 1516 (noting also that the prosecutor who "seeks justice" would clearly want to present full information to the grand jury).

148. See *Weigend*, *supra* note 96, at 449. This speedy, inexpensive, and efficient course allows victims to seek damages through criminal proceedings rather than by suing in civil court. *Id.*

149. See *id.* (noting that this privilege may go too far in subjecting the magistrate's discretion to the judgment of an individual victim).

prosecutor may not drop or reduce the severity of charges once they have been filed.<sup>150</sup> From that point, the magistrate and ultimately the trial court have sole discretion to decide whether the charges fit the facts alleged. In contrast, the federal prosecutor retains discretion to adjust the number and severity of the charges.

Those accused of federal white collar crimes are likely to be represented by counsel during the investigation, in grand jury proceedings, and while the prosecutor is deciding on charges, largely because internal investigations by firms and grand jury subpoenas make them aware of the investigation.<sup>151</sup> This may lead to the perception that these stages are adversarial in nature, but they are not. Decisions to charge and the choice of offenses are made by the prosecutor, not by an independent third party. Nor are these decisions subject to review. Although defense counsel may seek an interview with the prosecutor or the prosecutor's supervising attorney to argue against indictment or over charges,<sup>152</sup> neither official is obliged to grant the interview, much less consider the request.<sup>153</sup>

In sum, the discretion and authority of the federal prosecutor in performing the charging function far exceeds that of the French prosecutor. The inquisitorial system is organized to provide checks on the prosecutor's power to charge defendants, through supervisory review and the inability of the prosecutor to drop or reduce the charges. In addition, the possibility that someone else will file charges if the prosecutor declines thwarts the French prosecutor's power not to charge.

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150. See Frase, *supra* note 93, at 613; see also *id.* at 617-25 (discussing decisions to decline filing additional charges, to file more serious charges, and to reduce the severity of the charge).

151. For commentary on the defense function during this stage, see Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* 192-201 (1985).

152. See Lynch, *supra* note 2, at 696-97 (remarking that many defense lawyers do not approach prosecutors).

153. In an effort to dissuade the government from filing criminal charges, lawyers for Arthur Andersen met with Michael Chertoff, chief of the DOJ criminal division. See Eichenwald, *supra* note 18. Mr. Chertoff reportedly agreed "to sleep on" the defense request, but ultimately filed charges. *Id.*

### 3. The Sentencing Function

In contrast to the investigatory and charging phases of a criminal investigation, adversarial and inquisitorial prosecutors differ markedly in their ability to influence sentences and guilty pleas. As the Enron cases indicate, the federal prosecutor influences sentences and holds broad authority to exchange lower prison terms for a guilty plea and cooperation. Overall, guilty pleas are such an integral part of the federal adversarial system that 95 percent of defendants forego trial.<sup>154</sup> In the current enforcement effort, of the fifty-eight cases that reached conclusion as of May 2004, fifty, or 86.2 percent ended with guilty pleas.<sup>155</sup>

This power far exceeds the influence of the French prosecutor over sentencing. In the inquisitorial system, the use of guilty pleas in serious crimes remains an exception, although the extent to which it exists is a contested issue.<sup>156</sup> Professor Goldstein, writing in 1974, unequivocally stated that guilty pleas were nonexistent in inquisitorial systems.<sup>157</sup> Some commentators agree, noting that a guilty plea is viewed by Europeans as “contrary to practice and to professional ethics alike.”<sup>158</sup> Because defendants do not formally plead guilty or innocent in an inquisitorial system, it is literally impossible to strike a plea bargain. Recall also that French prosecutors may not drop or reduce pending charges.

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154. See *supra* note 120. Given the universality of the plea bargain, it is startling to note that as recently as 1973, a presidential commission proposed abolishing the guilty plea. The commission reasoned that plea bargaining left too much of the public interest to the parties. National Advisory Comm’n on Criminal Justice Standards and Goals, *The Courts* 46-49 (1973); see also Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1025 (1984) (critiquing plea bargains).

155. See *supra* text accompanying note 15.

156. See generally Langbein & Weinreb, *supra* note 96 (critiquing conclusion of scholars who claimed that plea bargaining does not exist in inquisitorial systems); Dubber, *supra* note 96 (critiquing work of Langbein on German system on much the same ground); Frase, *supra* note 93, at 626-47 (reviewing the debate).

157. See Goldstein, *supra* note 94, at 1019 (noting plea bargains are contrary to the state’s obligation in inquisitorial systems to enforce the law on the books and to ensure that the facts support the charge).

158. See Langbein & Weinreb, *supra* note 96, at 1557.

More recent comparative commentary concedes that earlier scholarship may have understated the extent of plea bargaining in inquisitorial systems. Professors Frase and Weigend point out that the inquisitorial prosecutor's unreviewed decision to charge a lesser offense is tantamount to a guilty plea.<sup>159</sup> Nonetheless, there is little evidence that inquisitorial prosecutors engage in explicit bargaining with defense attorneys over filing, reducing, or dropping charges.<sup>160</sup> The potential for trading leniency for an admission of guilt in the French system is limited because every defendant receives adjudication and because sentencing authority is vested in the court.<sup>161</sup> Taking into account current commentary on guilty pleas in inquisitorial systems, it remains obvious that plea bargaining is not prevalent in the French system as it is in the federal adversarial system.

Nonetheless, the practice of plea bargaining in the federal system is, in one sense, similar to the inquisitorial trial. The modern inquisitorial trial dominated by the judge (although it now may include lay jurors) is not as adversarial as is a federal trial. The judge largely controls the procedure by deciding on the order of evidence and by questioning witnesses.<sup>162</sup> The inquisitorial judge, who votes on guilt and on sentencing, may influence the decisions of lay jurors. Similarly, the federal practice of using guilty pleas to resolve a criminal matter is also not adversarial because the decision is not made by an objective third party. The absence of an adversarial determination of guilt or innocence because of plea bargaining is similar to the

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159. See Frase, *supra* note 93, at 623-24 (concluding that limitations on the discretion of French prosecutors would not prevent resolving a case by filing lesser charges); see also Weigend, *supra* note 96, at 453-55 (explaining French practice of trying felony cases in a lower court that employs an abbreviated process and that may result in a more lenient sentence). As to sentence bargaining, Frase notes that tacit bargains over sentences may exist, but are subject to fewer abuses than American forms of sentence bargaining. *Id.* at 636.

160. See Frase, *supra* note 93, at 627.

161. See Weigend, *supra* note 96, at 453 (noting that ideal inquisitorial system requires a full investigation of facts even when defendants confess).

162. This is not to suggest that an inquisitorial judge's authority at trial is unlimited. See Frase, *supra* note 126, at 169-73.

absence of an adversarial determination at an inquisitorial trial.<sup>163</sup> Neither the inquisitorial trial, which may simply confirm the results of the investigation, nor the federal plea-bargained disposition is an adversarial event.

*D. Reevaluating the Adversarial System*

Current white collar cases illustrate the inquisitorial nature of the federal criminal justice system and second the conclusions of Judge Lynch and Professor Kahan that the system has a decidedly administrative cast that is controlled by the executive branch.<sup>164</sup> The federal process for dealing with white collar crimes is strikingly similar to the French inquisitorial model. Both systems rely on a non-adversarial investigation, and, in the federal system, the investigation is likely to culminate in resolution through a plea bargain. In both systems, the government presence dominates the proceeding; the central actor in the federal system is the prosecutor, a representative of the state. There are, however, significant differences between the two systems that lead to an even more sobering conclusion.

In an inquisitorial system prosecutorial power is exercised within an institutional setting that imposes formal and informal limitations on its use. Even if inquisitorial prosecutors were not supervised in practice to the extent suggested by their theoretical model, actual supervision would still far exceed that in the federal system. The inquisitorial resolution of a criminal matter proceeds in formal stages, and at every transition from one stage to the next a written work product is evaluated by others, who are likely to be more objective than an investigating prosecutor. As a civil servant whose goal is to ascertain the truth of an historical event, the incentive of an inquisitorial prosecutor is to dispassionately evaluate facts. The federal prosecutor, on the other hand, works

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163. See Lynch, *supra* note 10, at 2119.

164. See *id.*; Kahan, *supra* note 55.

within a decentralized system and is not generally responsible to superiors. Moreover, the federal prosecutor is expected to employ adversarial techniques to resolve a criminal matter; the drive to resolution is not objective or impartial. The incentive to develop future career opportunities may also lead prosecutors to focus on the result, rather than on the process of resolution. Thus, the federal system operates without the inherent checks of the inquisitorial system's multi-stage, continuously supervised, hierarchical process. The federal system offers no effective counterbalance to prosecutorial power, whereas in an inquisitorial system prosecutorial power is constrained by the institutional framework of the system. Our white collar criminal justice system not only fails to correspond to our adversarial ideals, it also fails to meet the standards of the inquisitorial counterpart.

These conclusions may seem counterintuitive. The inquisitorial system lies outside our common law history and is generally viewed as contrary to our traditions and values. American lawyers value the adversarial system, instinctively distrusting the inquisitorial process. This attitude is reflected in the subtext of the comparative literature—an effort to overcome the view that any affinity between the systems is contrary to our common law adversarial tradition and to the Constitution.<sup>165</sup> And yet, for all practical purposes, criminal lawyers practicing in the federal system operate within a largely inquisitorial system. The accepted procedure of resolving a criminal matter through investigation and guilty pleas is contrary to the premise of the adversarial system, that defendants receive an adversarial trial before a jury. For defendants who plead guilty there is no adversarial testing of guilt or innocence, and sentence is imposed without a jury

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165. See Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Penn. L. Rev. 506, 569 (1973) (noting that comparisons between adversarial and inquisitorial systems “often purport[] to represent the distance between the old continental inquisitorial procedure at its historic worst, and a variable selection of somewhat idealized features of modern American criminal proceedings”).

evaluation of evidence and witnesses. In practice, a trial is an exception as most criminal matters are resolved without an adversarial hearing.

What are the consequences of relying on a quasi-inquisitorial approach in a criminal justice system that values an adversarial ideal? Although this issue could be analyzed from several perspectives, a fundamental question is whether a quasi-inquisitorial system effectively furthers the goals of criminal law. A quasi-inquisitorial criminal justice system may have disadvantages and hidden costs that undermine the goals of criminal law and are thus inconsistent with it.<sup>166</sup>

### III. THE INQUISITORIAL APPROACH AND THE GOALS OF CRIMINAL LAW

Nominally, the criminal law encompasses two goals: the consequentialist's objective of preventing harm through deterrence and the retributivists's goal of imposing just, proportional deserts.<sup>167</sup> Today's policymakers, however, primarily and routinely rely on the deterrence rationale,<sup>168</sup> and the following discussion considers whether reliance on investigation rather than trial is an effective long-term strategy for deterring white collar crimes. Focusing on the deterrence goal is appropriate also because of the commonplace assumption that white collar offenders are

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166. This is not to suggest that the inquisitorial systems of continental Europe are inconsistent with the goals of the criminal laws of those countries, even when those goals are similar to ours. All aspects of those systems have to be considered in reaching any judgment, including their strikingly less harsh punishment schemes. See Dubber, *supra* note 96, at 596-97 (noting link between excessive sentences and prevalence of plea bargaining in American courts).

167. 1 Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* § 1.5 (2d ed. 1986); Paul H. Robinson, *Criminal Law* § 1.2 (1997).

168. See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 *U. Chi. L. Rev.* 1 (2003) (chronicling the loss of confidence in retributive goals); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 *Geo. L.J.* 949, 956 (2003) (noting that lawmakers of the past four decades have relied primarily on goal of deterrence).

rational actors who calculate the costs and benefits of criminal activity.

An inquisitorial process would seem to be an efficient way to achieve deterrence. One way of achieving deterrence is to punish harshly those offenders who are apprehended.<sup>169</sup> The Andersen, Martha Stewart, and Enron cases illustrate that strategy; successful investigations that end in indictments and plea bargains provide an example that should deter others from engaging in similar conduct, and at less cost than trials. Indeed, the deterrent purpose of the current rash of cases has not gone unnoticed.<sup>170</sup> But the current enforcement effort also encompasses unintended consequences and serious disadvantages.

#### A. *Deterrence and Inconsistent Sentences*

The emphasis on investigation, coupled with the federal prosecutor's power to arrange guilty pleas, can easily result in inconsistent sentences. For example, the sentence received by Jamie Olis was almost five times as long as that of his boss and was two and a half times as long as that of Andrew Fastow, who, unlike Olis, amassed a personal fortune at the expense of investors.<sup>171</sup> Olis's

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169. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968); A. Mitchell Polinsky & Steven Shavell, *Public Enforcement of the Law*, in 5 *Encyclopedia of Law and Economics* 307 (Boudewijn Bouckaert & Gerrit De Geest eds. 2000). But see *Judgement Under Uncertainty: Heuristics and Biases* (Daniel Kahneman et al. eds., 1982); Donald C. Langevoort, *The Organizational Psychology of HyperCompetitions: Corporate Irresponsibility and the Lessons of Enron*, 70 *Geo. Wash. L. Rev.* 968 (2002); Moohr, *supra* note 6, at 973-75 (applying the work of behavioral economists to white collar crimes and concluding that criminal law plays only a limited role in deterring corporate misconduct).

170. See e.g., Alex Berenson, *Guilty Verdicts Give Executives a New Focus: Risk of Prison*, *N.Y. Times*, Mar. 8, 2004, at C1 (noting message sent by prosecutors and juries about white collar crime that will make executives "think twice"); Jonathan D. Glater, *Deterrence Strategy: Prosecutors Send a Message. Are Executives Listening?*, *N.Y. Times*, Mar. 14, 2004, § 4, at 4; Jeffrey L. Seglin, *The Jail Threat is Real. So, Will Executive Behave?*, *N.Y. Times*, July 20, 2003, § 3, at 4.

171. See *supra* text accompanying notes 89-91 (discussing Olis case); note 90

former boss, who pleaded guilty and testified against Olis will serve five years, and Fastow is likely to serve a ten year sentence under his plea and cooperation agreements.<sup>172</sup> Three offenders, who appear to have engaged in accounting frauds that caused similar losses, received drastically different sentences.<sup>173</sup>

Inconsistent sentences risk forfeiting the moral authority of the criminal law, most pointedly within the group one aims to deter. Criminal laws and their enforcement express the community's condemnation of certain conduct and stigmatize the actor who engages in that conduct. They also communicate to the public the substantive values that are embodied in the statutes.<sup>174</sup> Current prosecutions undoubtedly express societal condemnation; news accounts of perp walks and press releases documenting guilty pleas probably assuage public outrage and placate the community. In addition, those prosecutions may fulfill the political goal of this particular enforcement effort, to reassure the investing community and restore the integrity of the securities market.<sup>175</sup> But

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(discussing the *Blakely* decision).

172. See Goldberg, *supra* note 89.

173. In its affront to fairness, the Olis case suggests that the pursuit of deterrence sacrifices retribution's goal of just and proportional punishment. Which sentence is appropriate—the twenty-four year sentence of Olis, the five year sentence of Olis' superior, who testified against him, or the probable ten year sentence of Andrew Fastow, who also pled guilty and agreed to cooperate with prosecutors in investigating the wrongdoing of his colleagues? The stark inconsistency of sentences such as those given Olis, his boss, and Andrew Fastow seems too great to be justified by individual characteristics of the defendants and stands unexplained and unjustified.

174. See Johannes Andenaes, *General Prevention—Illusion or Reality*, 43 *J. Crim. L. & Criminology* 176, 179-80 (1952) (discussing communicative function of criminal law); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 *Crime & Just.: A Review of Research* 1, 31 (Michael Tonry ed., 1996) (distinguishing between the expressive and communicative functions of criminal law).

175. See Robert W. Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40 *Hous. L. Rev.* 1 (2003) (reviewing legislative history of Sarbanes-Oxley Act); Stephen Labaton, *Handcuffs Make Strange Politics, You Say? But Not in Washington*, *N.Y. Times*, Aug. 2, 2002, at C1 (noting that public opinion made it impossible to side-step reform efforts); see also Preface to Sarbanes-Oxley Act of 2002, *Pub. L. No. 107-204*, 116 *Stat.* 745 (2002) (stating that the legislation's

white collar criminal enforcement speaks to two groups,<sup>176</sup> the general public and a set of specific individuals who, because of their jobs and authority, are in positions to defraud investors and clients.

When the business community views the law as morally credible, deterrence is furthered in two ways. Social pressure is brought to bear on the potentially deviant executive who is probably motivated to avoid the stigma of conviction.<sup>177</sup> The incentive to avoid that stigma is more likely to motivate law-abiding conduct when the community and the actor agree that condemnation is deserved.<sup>178</sup> Judgment through trial can also have a moralizing effect on the business community, strengthening inhibitions and stimulating habits of law-abiding conduct.<sup>179</sup>

Thus, morally credible enforcement procedures are an effective way to reinforce social norms, making it more likely that individuals will internalize those norms and become self-governing individuals who instinctively obey the law.<sup>180</sup> Sentences that are viewed as inconsistent or as not reflecting the seriousness or harm of the conduct raise doubts about fairness and do not produce respect for the law or for its enforcement. Distrust and cynicism follow when, as in the *Olis* case, the cooperating witness who apparently authorized unlawful conduct is spared nineteen years of the sentence mandated by the Sentencing

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purpose was to protect investors by improving the accuracy and reliability of corporate disclosures relating to securities laws).

176. See Henry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 *Stan. L. Rev.* 197, 207 (1965) (noting existence of distinct publics).

177. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. Rev.* 453 (1997) (noting that the deterrent effect of sentences may be undermined when the community views punishment as disproportionate and unjust).

178. See *id.* at 469; see also Robinson & Darley, *The Role of Deterrence*, *supra* note 168.

179. See Andenaes, *supra* note 174, at 179-80.

180. See generally, Robinson & Darley, *The Utility of Desert*, *supra* note 177; Tom R. Tyler, *Why People Obey the Law* 64 (1990) (noting the most important reason for complying with the law is that it “accords with [a person’s] sense of right and wrong”).

Guideline's loss table. As a result of such gross discrepancies, members of the business community may understandably lose respect for the legal system. This is more likely to happen when sentences are allocated through a quasi-inquisitorial process because the business public has no way to determine if sentences are truly inconsistent or if the conduct merited the discrepancies.

*B. Deterrence and the Educative Effect of Enforcement*

An inquisitorial process in which guilt is established and punishment assigned without an adversarial trial also implicates the educative effect of enforcement. Optimal deterrence requires that the rational actor understand what conduct is prohibited by criminal law. If we are serious about preventing future corporate misconduct and business fraud, it would be wise to inform the business community, as specifically as possible, about the kind of conduct that is prohibited by the written statutes. The idea is simple; when people understand that the conduct they are considering is criminal, they are less likely to engage in it or even to consider it in the first place. The trial, which showcases evidence of a particular course of conduct, announces and explains that certain conduct violates the law.<sup>181</sup> For that more specific communicative task, a trial is superior to press conferences. Indeed, media coverage of perp walks and plea bargains are very weak substitutes for public trials in which a jury from the community decides guilt or innocence. A jury's imposition of stigma after determining that the offender violated the law

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181. Although public trials can mitigate the problem of vague prohibitions, they are not a panacea. Using a common law methodology for expanding criminal statutes implicates ex post facto and other due process issues. Nevertheless, open trials are superior to secret plea bargains because such constitutional issues are at least open for discussion and resolution. Nor is this to suggest that the trial process is not without significant problems. Professor Stuntz suggests that trials in white collar criminal cases have an inherent tendency to focus on marginal issues and may "work[] against the very norms [the criminal law] seeks to enforce." Stuntz, *supra* note 60, at 1886. Like democracy, however, a public trial is better than the alternative.

communicates a more complete message, making it both effective and educative. In the final analysis, resort to disposition through inquisitorial investigation and plea bargaining, though seemingly efficient, may actually forfeit a method of strengthening deterrence in the business community.

This point is especially relevant in the context of white collar crimes because, as the securities charge against Martha Stewart demonstrates, the statutes do not provide clear guidance. The hazy line between aggressive business tactics and criminal fraud moves as courts apply the laws to different circumstances. For the same reason, many white collar criminal statutes do not provide sufficient guidance to prosecutors and fact finders as they determine whether the conduct at issue is, in fact, a crime.

Convictions in white collar cases that are expeditiously achieved through an investigative process and plea bargaining do not instruct the relevant community about the standards that govern the business conduct at issue.<sup>182</sup> By foregoing trial, prosecutors lose an opportunity to reinforce the standards of lawful business conduct in the minds of those who are most likely to engage in such conduct. This decision is decidedly problematic when charges are based on novel interpretations of statutes. The absence of a public explanation of why the conduct was considered criminal in the first place creates confusion about the legal standard.<sup>183</sup> Resolving criminal matters

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182. Arguably, trial on ancillary charges has many of the same drawbacks. Despite Arthur Andersen's conviction for obstructing justice, accountants may still not understand the standard for assessing an accounting firm's criminal liability when it fails to discover or aids a client's deception about its actual financial condition.

The conviction of Martha Stewart for lying to investigators suggests that the underlying conduct—selling stock on the basis of certain nonpublic information—was criminal. But because that offense was not charged and tried, those in a position to violate insider trading regulations are not able to determine whether a prospective trade based in similar circumstances violates insider trading law. The issue may be clarified by the SEC's civil enforcement action against Stewart, but that venue is arguably not generally as effective as the public trial. See *supra* note 42.

183. The plethora of articles in business publications and newspapers

through plea bargaining rather than through trial thus squanders an opportunity to communicate the content of the statutes that govern business conduct.<sup>184</sup>

In sum, securing deterrence goals at low cost by relying on an inquisitorial process produces hidden costs that undermine its effectiveness in achieving deterrence. So the gains in efficiency and cost effectiveness may well be illusory. Forfeiting trial ultimately damages the deterrent effect that aggressive enforcement is supposed to achieve and does not communicate social norms to the relevant business public. The prospects for reversing these effects of prosecutorial power, however, are not promising.

### *C. Restoring the Adversarial Ideal*

Restoring the adversarial system is problematic for several reasons. Obviously, any reform that includes more trials will require increased funding of the judicial system. Trials are bound to be more expensive than negotiated plea bargains, and reform may be moot if the existing enforcement system is the only alternative that citizens are willing to pay for.<sup>185</sup> The competing demand of domestic terrorism may also lead eventually to less enforcement of white collar crimes. So far that has not happened; although investigations of other types of crimes have decreased,<sup>186</sup> white collar cases were still a high priority in 2003.<sup>187</sup> Notwithstanding such concerns, if the quasi-

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regarding what constitutes insider trading testifies to this sort of confusion.

184. Trials have other virtues, such as ensuring that decisions are transparent, serving the public's interest in monitoring government enforcement efforts, and producing precedent and legal rules. See Fiss, *supra* note 154; David Luban, *Settlements and the Erosion of the Public Realm*, 83 *Geo. L.J.* 2619 (1995); William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 *J. Legal Stud.* 235 (1979).

185. See Lynch, *supra* note 10, at 2143 (concluding that the existing system is the one we are willing to finance).

186. See Gary Fields & John R. Wilke, *The Ex Files: FBI's New Focus Places Big Burden on Local Police*, *Wall St. J.*, June 30, 2003, at A1 (noting that the FBI brought 944 new drug cases in 2002, compared to 1,825 in 2000).

187. Between 2002 and 2003, the percent of federal agents assigned to white collar cases fell only slightly, from 26 percent to 24 percent. But see Susan

inquisitorial system does not effectively further the goals of criminal law, it may not be an effective way to spend tax dollars.<sup>188</sup> But even putting aside the financial issue, reforming the present system raises questions about how to effect change.

Any attempt to restore a more adversarial process should begin by recognizing the federal criminal justice system for what it is—a quasi-inquisitorial system that incorporates a concern for defendants' rights.<sup>189</sup> A truly adversarial system would necessitate a significant reduction in prosecutorial authority. Were there agreement on that point, it would still be difficult to conceive how such a change could be accomplished. The sources of prosecutorial power overlap and reinforce one another, providing a network of broad authorizations to prosecutors; there is no single action that will restore a more balanced approach. Dismantling that network is a complex endeavor that would require reversing many policy decisions—some of which are well-founded.<sup>190</sup> Some aspects of prosecutorial power are constructive, such as the ability to pierce the secrecy and complexity of business frauds.

A second, less direct avenue toward reform is to reconsider the harsh penalties that, combined with the Sentencing Guidelines, give prosecutors leverage to secure guilty pleas and give defendants a reason to avoid trial.<sup>191</sup>

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Levine, *Indignation but Few Indictments: Md.'s U.S. Attorney Challenged by Limited Resources, Competing Agendas*, Wash. Post, Dec. 2, 2003, at B1 (discussing impact of terrorism efforts on white collar prosecutions).

188. Congress indicated a willingness to allocate enforcement funds when, reacting to public sentiment, it increased funds to enforce the Sarbanes-Oxley Act and other laws. See Moohr, *supra* note 6, at 973.

189. See Lynch, *supra* note 10, at 2141; Kahan, *supra* note 55. In contrast to Judge Lynch, who perceives a need to limit the administrative model, Professor Kahan would embrace it and delegate the responsibility to interpret criminal statutes to the Department of Justice.

190. See Lynch, *supra* note 10, at 2142 (noting certain advantages of the present system).

191. See Markus Dirk Dubber, *Toward a Constitutional Theory of Crime and Punishment*, 55 *Hastings L.J.* 509 (2004) (presenting a theoretical framework for the development of a constitutional law of crime and punishment). Limiting the power to negotiate plea bargains may also be opposed by the defense bar because

Although this is promising on its merits, Congress has moved in the opposite direction by increasing penalties for white collar crimes. A third possibility is to reverse the practice of relying on criminal law in situations that seem adequately covered by civil and administrative remedies.<sup>192</sup> Decriminalization would reduce the number of federal charges that give prosecutors leverage to negotiate plea bargains. In the present climate, that, too, is probably unacceptable.

Perhaps the most fruitful approach is to use the inquisitorial model as a starting point for incremental change.<sup>193</sup> Some suggestions that address the imbalance produced by prosecutorial power reflect the safeguards that constrain prosecutorial power in inquisitorial systems. For instance, defendants could be given greater discovery rights so they have access to evidence held by prosecutors before they engage in any negotiation over a plea.<sup>194</sup> The defendant's right to examine the evidence that the state will use at trial is a cornerstone of the French inquisitorial system.

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prosecutorial authority over sentencing sometimes mitigates the severe penalties required by the law and the Guidelines.

192. See Stuntz, *supra* note 48, at 512-23.

193. One aspect of an inquisitorial system, the hierarchical bureaucracy that provides supervision and a career path to continental prosecutors, is probably unacceptable here. The furor that greeted Attorney General Ashcroft's recent efforts to impose central control over charging and sentencing decisions is indicative of the significant value placed on prosecutorial independence and the difficulty of balancing local circumstances and federal uniformity. See Ashcroft Memorandum, *supra* note 69; Adam Liptak & Eric Lichtblau, *New Plea Bargain Limits Could Swamp Courts, Experts Say*, *N.Y. Times*, Sept. 24, 2003, at A23 (reporting reaction to Ashcroft's memo). But see Stephanos Bibas, *Criminal Law: The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 *J. Crim. L. & Criminology* 295, 301-02 (2004) (noting that restricting plea bargaining "clamps down on prosecutorial manipulation of facts and acquiescence in departures" and improves the balance of power between prosecutors and defendants).

It should be noted that much of the controversy was due to the requirement that prosecutors report to the DOJ the names of judges who departed from the Guidelines. See Editorial, *Blacklisting Judges*, *N.Y. Times*, Aug. 10, 2003, § 4, at 10.

194. See Lynch, *supra* note 10, at 2147-48 (noting powerful right of defendants to know the evidence against them).

Judge Lynch also suggests that defendants be accorded a formal right to be heard by prosecutors before being charged. See *id.* at 2148-49.

Other recommendations for reforming the federal adversarial system incorporate the disinterested professionalism of inquisitorial prosecutors. For instance it is urged that prosecutors be encouraged to recognize their quasi-judicial function and obligation to reach the fairest possible results.<sup>195</sup> Re-characterizing the federal prosecutor as a neutral, objective official echos one of the safeguards of the inquisitorial system. Other commentators have appealed more directly to the inquisitorial model.<sup>196</sup> Professor Frase persuasively urges adapting discrete procedures from inquisitorial systems, noting that this tactic is most productive in those areas where the systems are most similar.<sup>197</sup> In light of the many congruities with the French system, closer examination of inquisitorial practices is likely to provide other insights for dealing with the imbalance between prosecutor and defendant that now characterizes the federal system.

#### CONCLUSION

The application of prosecutorial power in current white collar enforcement efforts departs in significant ways from the adversarial ideal. Like the French inquisitorial system, the federal system of enforcing white collar crimes resolves the vast majority of cases without adversarial process and, surprisingly, operates without the checks on prosecutorial power that characterize the inquisitorial system's multi-stage, continuously supervised, hierarchical process. Thus, the federal white collar criminal justice system not only fails to correspond to our adversarial ideal, it also lacks

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195. See *id.* at 2135-36; Podgor, *supra* note 107, at 1531-34 (suggesting an educational approach to increase prosecutors' understanding of the ramifications and appearance of inequities that result from inconsistent and abusive decisions).

196. See Bennett L. Gershman, *The New Prosecutors*, 53 *U. Pitt. L. Rev.* 393 (1992); Myron Moskowitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 *Vand. J. Transnat'l L.* 1121 (1995); Pizzi, *supra* note 95.

197. See generally Frase, *supra* note 93. For instance, he argues that the screening process in the French system, which results in more accurate charges, is worth further study. *Id.* at 617.

safeguards that are inherent in the inquisitorial counterpart. Moreover, federal prosecutors exercise far greater power over plea bargains and sentences. The combination of relying on inquisitorial investigation and plea bargaining results in a system that belies adversarial values.

This system places many members of the business community in a quandary and may not be an effective way to achieve deterrence. Given current enforcement efforts, business executives well understand the threat of prosecution and punishment, yet they may not understand the standards that trigger them. Such a frustrating circumstance can alienate the very community on whom we depend to restore confidence in corporate conduct and the securities markets. Relying on inquisitorial investigation and non-adversarial plea bargains limits effective deterrence by failing to enunciate a standard and by producing inconsistent sentences. These pernicious effects may eventually undermine confidence in the criminal justice system and in the criminal law.

In sum, the quasi-inquisitorial federal system, dominated by the prosecutor, is not an entirely effective vehicle for achieving deterrence and may ultimately impair the deterrent effect that aggressive enforcement is supposed to achieve. This prospect justifies and gives force to efforts to restore a better adversarial balance. Such efforts might begin by examining characteristics of the inquisitorial system that could be adapted most readily to the federal criminal justice system.