PROSECUTORIAL POWER IN AN ADVERSARIAL SYSTEM: LESSONS FROM CURRENT WHITE COLLAR CASES

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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.”¹ Sixty years later, Judge Gerard Lynch raised the prosecutor’s standing when he remarked that federal prosecutors perform “the role of god.”² Current white collar criminal prosecutions suggest that characterizing federal prosecutors as gods is the better description. Riding a tide of public outrage following discovery of massive fraud at Enron and other firms, prosecutors have attained something akin to heroic status.³

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.


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.\(^4\) 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.\(^5\) 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.\(^6\) 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 Feeney Amendment. 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. Of course, the normative implication might run the other way – non-white collar criminals should

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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 ___. Those penalties, however, may be relatively less severe than those accorded other crimes.
have access to effective counsel and be subject to less harsh punishment. 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 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, which identifies the sources of prosecutorial power, 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. While agreeing with this assessment, I would add that it does

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, 857 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).

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 counter-weight to prosecutorial power. Moreover, federal prosecutors exercise far greater power over sentences. Thus, even in white collar cases, adversarial parties who stand roughly equal before a neutral factfinder – prerequisites of an adversarial system – exist only as 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, 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. Of these, forty-seven cases were disposed of by August 2003. All but one case, that of Arthur Andersen, was resolved by a guilty plea.

An update of Professor Brickey’s summary through May 2004 indicates that eleven more defendants were tried, and four others pleaded guilty. Of the fifty-eight cases disposed of

11 See Brickey, From Enron to WorldCom, supra note ___ at 382-40.

Prosecutors have indicted more business executives since November 2003. See, e.g., Alex Berenson, 3 Plead Guilty in Computer Associates Case, N.Y. Times, April 9, 2004 at C1; Reliant and 4 Officers Indicted in California Energy Shortage, N.Y. Times, April 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, ___ Buffalo Crim. L. Rev. ___ (2004) (Table 1) (stating that as of November 2003, the number of indicted individuals had risen to 109).

12 See Brickey, From Enron to WorldCom, supra note ___.

13 See id.

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.
through May 2004, fifty defendants, or 86.2 per cent, 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. While preparing for an SEC inquiry into its audit of Enron’s financial statements, Andersen’s lawyers discovered that thousands of emails and documents were missing or destroyed. In January, 2002, the firm reported that David Duncan, the Andersen partner in charge of the Enron


15 See id.


account, had instructed employees to destroy documents relating to Andersen’s work at Enron. Two months later, Andersen and Duncan were each charged with one count of obstructing justice. In June, a jury found the firm guilty. By then, market forces had stripped the firm of its value and future earnings, and Andersen was formally sentenced to a $500,000 fine.

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. These guidelines do not overly constrain the discretion to charge

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 (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.


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 available at http://www.usdoj.gov/eousa/foia_reading_room/usam/title9. 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.
corporations, and, in any case, are not enforceable.\textsuperscript{23} 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.\textsuperscript{24} Negotiations to settle the matter without an indictment continued for almost another month, but Andersen was ultimately indicted on March 14, 2002.\textsuperscript{25} Even after Duncan pleaded guilty and agreed to cooperate in the case against Andersen,\textsuperscript{26} Andersen’s lawyers sought to resolve the matter, but ultimately the parties proceeded to trial.\textsuperscript{27}

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.\textsuperscript{28} The standard for liability under this doctrine is similar to the


\textsuperscript{24} See Eichenwald, supra note \underline{___} (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.

\textsuperscript{25} See id. (describing prosecutor’s efforts as “unusually aggressive”).

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

\textsuperscript{27} See Eichenwald, supra note \underline{___}.

\textsuperscript{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).
standard used to establish tort liability. If an agent, such as David Duncan, commits a crime while acting within the scope of his authority and for the benefit of the corporation, the firm may be found guilty of the agent’s offense. 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 a term of punishment. Collateral consequences that affect business firms generally include class-action civil suits, enforcement actions by regulatory agencies, and being barred from government contracts. 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

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

\[30\text{ 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\text{ Parallel civil proceedings are also brought against individual defendants. See Brickey, From Enron to WorldCom, supra note ___ 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 ___ at 1236-37.}
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. 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. 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.” 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.

32 See Eichenwald, supra note ___. 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 an 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 ___ (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 (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,
Even though such indictments are not routine, the power to indict, combined with collateral consequences and 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. 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.

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).

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 restructuring, the impact on employees – would be “too substantial.” See Oesterle, supra n. 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).


See Thompson Memo, supra note at part 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.
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.

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 business woman, a celebrity who is at once credited and ridiculed for reviving the public’s interest in aesthetic domestic arts. The initial inquiry focused on whether Stewart had engaged in insider trading when she sold 3,928 shares of ImClone stock. 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 – 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

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 ________).

40 Waskal pleaded guilty to charges of insider trading and is currently serving a seven year sentence. See Brickey, From Enron to WorldCom, supra note ___ at 392.
from the FBI, the SEC, and the U.S. Attorney’s office in two interviews. Stewart also assured shareholders of her company that she was innocent of any wrongdoing.

Ultimately, Stewart was not charged with insider trading, but with two counts of making false statements during interviews with government investigators, one count of obstructing an agency proceeding by making false statements before SEC investigators, and conspiring to commit those offenses. She was also charged with securities fraud, based on her statements to shareholders that disclaimed criminal conduct, 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. The jury found Stewart guilty of all four obstruction counts.

41 See Indictment, supra note ___. 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 (MCG), S.D. N.Y. filed __________). 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.


43 See Indictment, supra note ___.

44 See id.


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.\textsuperscript{47} The prosecutor’s discretion regarding specific charges emanates from and is enhanced by the federal criminal code. At once broad and deep,\textsuperscript{48} 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.\textsuperscript{49} The code is deep in the sense that several offenses often apply to the same substantive

\textsuperscript{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 (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 supra, n. 56 (noting controversy regarding the securities charge).


\textsuperscript{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 unlimited discretion in defining the kind of behavior 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 [hereinafter Mail Fraud], 31 Harv. J. On Leg. 153, 178-79 (1994); Ellen S. Podgor, Mail Fraud: Opening Letters, 43 S.C. L. Rev. 223; 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, 386 F.3d 92 (2d Cir. 2002), aff’d on alternate grounds sub nom United States v. Rybicki, 2003 WL 23018917 (2d Cir. 2003) (en banc), they
have rejected the argument that the honest services amendment to the mail fraud statute is unconstitutional. See e.g., Rybicki, supra.

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. The relevant rule, Rule 10b-5, is hardly more specific; it makes unlawful “any untrue statement of a material fact or engaging in any act which operates as a fraud or deceit . . . in connection with the purchase or sale of any security.” This conduct becomes criminal when the violation is “willful.” 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.

In drafting such broad provisions, Congress may have intended that the courts, through the

have rejected the argument that the honest services amendment to the mail fraud statute is unconstitutionally vague. See e.g., Rybicki, supra.


51 17 C.F.R. § 240.10b-5.


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).

adjudication of specific conduct, define terms such as “deceptive device,” “willfully,” “materially,” and “in connection with.”\textsuperscript{54} 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.\textsuperscript{55}

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,\textsuperscript{56} the trial court

\textsuperscript{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 U.C.L.A. 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 (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 (5th Cir. 1997) (en banc) (“We must next find the meaning of honest services as used in this federal statute”).

\textsuperscript{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 ___; Solan, supra note ___; J. Kelly Strader, The Judicial Politics of White Collar Crime, 50 Hastings L.J., 1199, 1252-55 (1999); Stuntz, Pathological Politics, supra note ___; see also Moohr, Mail Fraud, supra note ___ at 178-79 (noting process in context of the mail and wire fraud statutes).

\textsuperscript{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 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); Wash. Post, June 19, 2003 (quoting David E. Marder,
denied the motion to dismiss the charge,\textsuperscript{57} 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.\textsuperscript{58}

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.\textsuperscript{59} In some cases, neither prosecutors nor courts know whether the conduct at issue is encompassed by the criminal law.\textsuperscript{60}

Whether conduct is criminal can depend on the actor’s state of mind,\textsuperscript{61} the egregiousness of the

\textsuperscript{57}See United States v. Stewart, Memorandum of Law in Support of Martha Stewart’s Omnibus Pre-Trial Motions, (S.D.N.Y. filed Oct. 6, 2003) (arguing the securities fraud charge violated due process and infringed First Amendment rights).

\textsuperscript{58}See United States v. Stewart (S.D. N.Y. Feb. 27, 2004) available at www.findlaw.com. (ruling that 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).

\textsuperscript{59}See Brown, 70 F.3d 1550; United States v. Emery, 34 F.3d 911 (7th Cir.1994); United States v. Handakas, 386 F.3d 92 (2d Cir. 2002), aff’d on alternate grounds sub nom United States v. Rybicki, 2003 WL 23018917 (2d Cir. 2003) (en banc); United States v. Jain, 93 F.3d 436 (8th Cir. 1996).

\textsuperscript{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, 96 Va. L. Rev. 1871, 1883 (2000) (noting that the issue in white collar criminal law is the boundaries of an offense).

\textsuperscript{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).
conduct and resulting harm, and is sometimes a matter of degree. 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. The three crimes that Stewart was convicted of, false statement, obstruction, and conspiracy 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

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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 depends on circumstances).

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 (Steven, J., dissenting) (noting there are “at least 100 federal false statement statutes”); Jeffrey Standen, An Economic Perspective On Federal Criminal Law Reform, 2 Buffalo Crim. L. Rev. 249, 290 (1998) (reporting his personal count of 325 offenses involving fraud).


commit perjury. 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 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 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 United States Sentencing Guidelines Manual (2003) [hereinafter USSG], Part D, §§ 3D1.1 to 3D1.5 (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.


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 the federal criminal code enhances prosecutors’ authority in discharging their investigative and charging functions. Other similarities between the cases is 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.\(^{70}\) The power of prosecutors to obtain plea bargains and cooperation agreements is most clearly illustrated by the cases against the Enron executives.

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.\(^{71}\)

\(^{70}\) 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 n. ___ at ___ (criticizing “sideshow” prosecutions as a way to sate public pressure for justice and to avoid the risk of losing a “main show” prosecution). But see, Brickey, ____________, supra n. ___ at 922-31 (defending the decision to indict Andersen).

\(^{71}\) 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 97 (Nancy B. Rapoport & Bala G. Dharan, eds.,
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. 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. 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 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, 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

2004) supra note ___. Reportedly, “even the IRS did not understand them.” Brickey, From Enron to WorldCom, supra note ___, at 373.

72 See Brickey, From Enron to WorldCom, supra note ___, at 386-88. The charges included conspiracy, fraud, false statements, and money laundering. Id.

73 See Moohr, Updated Summary, supra note ___.

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

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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.


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.

Andrew and Lea Fastow negotiated agreements under which Lea would serve five months in prison and five months in home detention and Andrew Fastow would plead guilty to two counts of conspiracy, serve 10 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-C.F.O. of Enron and Wife Plead Guilty, N.Y. Times, Jan. 15, 2004. Judge Hittner refused, at the April sentencing hearing, to follow the plea arrangement, and Lea Fastow withdrew her plea. See Mary Flood and Purva Patel, Lea Fastow Opt for Jury Trial, Hous. Chron., Apr. 8, 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.

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.”
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.\textsuperscript{80}

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.\textsuperscript{81} 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 because prosecutors have an incentive to forego long prison terms when they can obtain information and

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Eichenwald, supra note __.
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\textsuperscript{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, From Enron to WorldCom, supra note ___ at 371-372 (explaining that the same strategy was used in the prosecution of executives at Adelphia and at an earlier stage in the WorldCom investigation).

\textsuperscript{81} See Lynch, supra note ___ at 2132.
testimony that leads to actors higher in authority. The 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. The Guidelines also increased the influence of prosecutors over sentencing without a trial as well as after conviction. The prosecutor exercises influence over

82 New DOJ policies, mandated by the Feeney amendment may limit federal prosecutors’ authority to obtain plea bargains. See Ashcroft Memorandum, supra note ___. 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.

83 See USSG ch.1, pt. A(4)(d) (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).


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,
the sentences that follow conviction, largely because the federal prosecutor has inherited the discretion that was once the court’s. 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 recognizing 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.

The prosecutors’ 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. This calculation, implemented by the Guidelines’ loss table, can

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authorizing prosecutors to recommend a departure from the guideline range based on substantial assistance. See USSG, § 5K1.1. The court cannot depart 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 USSG § 5k2.0 (policy statement). Most recently, Congress further limited judicial discretion when it enacted the Feeney Amendment. See supra note ___.

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 ___; 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 wants); Mary Flood & Purva Patel, Lea Fastow Opt for Jury Trial, Houst. Chron., April 8, 2004, at A1 (characterizing Judge Hittner as “combative” and citing criticism that the decision was a “miscalculation of the judge”).

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

drastically increase the prison sentence. In November 2001, the Commission revised the loss

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 pled guilty and
agreed to cooperate with prosecutors, testified against him. Based on an estimate of investor
losses of $100 million, Olis was sentenced to over 24 years in prison. The sentence is
(88 See USSG § 2B1.1 (combining losses 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 USSG § 2B2.2, cmt. n.2.

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

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 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
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 additional findings.” Id. at 2537 (original emphasis).


A holding that Blakely applies to the Guidelines’ enhancement provisions will result in a 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 doubt any facts that enhance sentences. In the case of Jamie Olis, a jury would have to find, beyond a reasonable doubt, that investor’s 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 reduce prosecutors’ ability to leverage plea bargains.

91 See Goldberg, supra note __. See also Bowman, supra note __ at 86 - ___ (providing loss tables before and after the 2001 amendments to the Guidelines); Moohr, An Enron Lesson, supra note ___ at 954 (noting that prison sentence for attempted murder and torture is twenty years). As this example illustrates, the prosecutor’s power to offer plea bargains can undermine the rationale of guideline sentencing, to achieve uniform sentences for similarly situated defendants.
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 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. Before trial, the prosecutor’s authority to charge or not, to choose charges, to indicted 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

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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 individual executives leads to an inference of 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 trial 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. The following comparative inquiry emphasizes 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

93 See Lynch, supra note ___
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. Modern adversarial and inquisitorial systems are not as distinct as they once were. 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. A second complexity is that there is 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

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system, actual practices within a system are likely to deviate from the formal model. 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.

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. Reflecting the accusatory 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. In an ideal adversarial system, the trial is the centerpiece of a broader process. Truth in the adversarial

97 See Thomas Weigend, Criminal Procedure: Comparative Aspects, in Joshua Dressler, ed., Encyclopedia of Crime and Justice 444 (____) (noting that “practice can be radically different from the letter of the law and institutions may be quite unlike what they seem on paper”).


98 See Frase & Weigend, supra note ___, 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 ___ at 1018 (noting that French system is the “most typical of a pure inquisitorial model”); see also Frase, Comparative Criminal Justice, supra note ___ (explaining that focusing on one national system, rather than the inquisitorial system as a whole, is a preferable analysis).


100 Goldstein, supra note ___, at 1017 (explaining further that the adversarial system is reactive and the inquisitorial system is proactive).
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.\textsuperscript{101} 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.\textsuperscript{102} 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 role was traditionally constrained by the equality accorded the parties,\textsuperscript{103} by the jury trial, and, later, by defendant’s constitutional rights. In the inquisitorial system, state actors traditionally dominated the proceedings, conducting the investigation and managing trial and sentencing.

\textbf{B. The Institutional Settings}

\textsuperscript{101} In France, for example, state control of the criminal process was in place by the sixteenth century. See Reichel, supra note ___, at 130.

\textsuperscript{102} See Weigend, supra note ___, at 445.

\textsuperscript{103} See Reichel, supra note ___, at 132.
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.¹⁰⁴ 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.¹⁰⁵ Federal prosecutors are subject to minimal supervision and are authorized to make independent decisions that, with few exceptions,¹⁰⁶ are not subject to approval or direction. Independence and flexibility are prized in

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¹⁰⁴ Specifically, individual prosecutors must submit written reports that conform to the written orders of supervisors. See Frase, Comparative Criminal Justice, supra note ___, at 559.

¹⁰⁵ See Charles F.C. Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement, 655 Geo. L.J. 1171, 1201-05 (1977) (discussing decentralized decision-making); Kahan, supra note ___, 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).

¹⁰⁶ 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); see also § 9-110.200 (providing guidelines regarding RICO charges).
the belief that federal prosecutors should be free to respond to local circumstances, which inevitably results in variations among field offices. Although federal prosecutors are guided by institutional knowledge and policy, 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. Successful candidates then complete a two year educational program, which includes three internships, during which they receive a salary. A prerequisite for entry into this program is a commitment to remain in the magistracy for at least ten years. Prosecutors, examining magistrates, and trial judges are all

107 See Panel Discussion, supra note ___, at 682 (discussing the independence of district offices from Washington).

108 See generally Ellen S. Podgor, The Ethics and Professionalism of Prosecutors in Discretionary Decisions [hereinafter 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 ___ 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.

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

110 See Frase, Comparative Criminal Justice, supra note ___ at 561. A law degree in Europe is an undergraduate degree, taking three to five years to complete. Id.

111 Id.

112 Id.
members of the magistracy, sharing the same professional training and belonging to common professional associations. Prosecutors sometimes even change course, becoming judges.\textsuperscript{113} 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 four year term.\textsuperscript{114} Appointment is a political act, and is often the product of political alliances.\textsuperscript{115}

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.\textsuperscript{116} 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.\textsuperscript{117} 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.

\textsuperscript{113} See Langbein & Weinreb, supra note ___, at 1559.

\textsuperscript{114} See 28 U.S.C. § 541. Candidates are nominated by the state’s senators, with deference given to the choices of senators who are in the administration’s political party.

\textsuperscript{115} See Ruff, supra note ___, at 1205. The presidential appointment is not merely symbolic; it supports the independence of prosecutors from the Department of Justice). Id.

\textsuperscript{116} See Frase, Comparative Criminal Justice, supra note ___ at 563 (noting long-term nature of the career is one function of the two year training program and ten year obligation).

\textsuperscript{117} See Rudolf B. Schlesinger, Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience, 26 Buff. L. Rev. 361 (1976-77).
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.118 There is some evidence that uncertainty about future career prospects may influence prosecutors to seek the credentials that accrue from prosecuting high-profile cases.119 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,120 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 the absence of 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 ninety-

118 See Mooehr, Mail Fraud, supra note ___ 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 Guiliano, former mayor of New York City.


120 See Rakoff, supra note ___ at 178 (noting it is “an unusual” prosecutor who is not pleased by positive media coverage that might lead to political power).
five per cent of defendants in the United States’ federal system plead guilty before trial, 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.

1. The Investigative Function

The investigation is the primary focus of an inquisitorial system; in federal cases involving white collar crimes, as the discussion of current cases indicated, the investigation is also of primary importance. 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. In both systems, prosecutors direct the inquires of enforcement agents, assess

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121 See Fisher, supra note ___ at 223 (stating that, in 2001, 94% 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%. See George Fisher: A Practice As Old As Justice Itself, N.Y. Times, Sept. 28, 2003, at sec. 4, p. 11.

122 See Langbein & Weinreb, supra note ___, at 1553 (noting that the actual investigation may be delegated to the police).
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. The dossier includes all the evidence in the case, exculpatory, as well as inculpatory. It typically contains police reports, police interviews, interviews conducted by the magistrate (including interviews of the defendant), 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


124 See Langbein & Weinreb, supra note ___, at 1548-49.

125 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 ___, at 365.

126 See Langbein & Weinreb, supra note ___ 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).
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. A French prosecutor has broad authority to charge or to dismiss the case, 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. The multi-stage investigatory process is governed by the judicial magistracy and is marked by formal requirements.

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

127 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).

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

129 See Langbein & Weinreb, supra note __, at 1551-59; see also John Hatchard, et al., eds, Comparative Criminal Procedure 2 (1996) (noting that the institution of the examining magistrate has been eliminated in Germany and Italy and debated in France).

130 See Goldstein, supra note __, at 1019.
supervision of the Department of Justice.\textsuperscript{131} 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.\textsuperscript{132} 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 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 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.\textsuperscript{133} In contrast, the federal prosecutor,

\textsuperscript{131} See supra text accompanying note ___ (noting independence of federal prosecutors).

\textsuperscript{132} See Frase, Whole Truth, supra note ___.

\textsuperscript{133} In addition, structural properties such as inability to subpoena depositions make independent investigation problematic. See Schlesinger, supra note ___, at 365
independent and operating without supervision, is freer to act on any unconscious bias that can result from a close association with investigation.\textsuperscript{134} 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 \textit{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 counterbalancing 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.

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

\textsuperscript{134} See Lynch, supra note \textemdash, at 2123 (noting that a prosecutor can become “wedded to her own case”).
adversarial and the inquisitorial systems have broad authority over initial charging decisions. For instance, both prosecutors may charge the accused with less serious crimes.\footnote{135}{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, Comparative Criminal Justice, supra note __, at 615, n. 464.}

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.\footnote{136}{This second-level investigation is no mere formality. In 1980, examining magistrates dismissed twenty per cent of referred cases for insufficient evidence.} If the examining magistrate agrees that the charges are justified, the matter is referred to the indicting chamber,\footnote{137}{See supra text accompanying notes __. If the magistrate does not agree to press charges, the investigation may be continued.} where the case is reviewed by three judges who may dismiss or order trial on lesser charges.\footnote{138}{See id. (noting that the prosecutor may appeal the magistrate’s refusal to refer the matter to the indicting chamber).} 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,\footnote{139}{See id. at 625 n. 462 (noting that the indicting chamber almost always approves the felony charges recommended by the examining magistrate).} and, on the whole, is
“significantly more restrained” than in the federal adversarial system.\textsuperscript{141}

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.\textsuperscript{142} 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.\textsuperscript{143} Thus, the grand jury is theoretically positioned – as is the examining magistrate – to constrain the enthusiasm of a prosecutor for formally charging the accused.\textsuperscript{144} 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.\textsuperscript{145}

In most cases, the grand jury depends on the prosecutor for information, acts on evidence

\textsuperscript{141} Id. at 611 (emphasis in the original).

\textsuperscript{142} 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”).


\textsuperscript{144} 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 (1983). 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.

\textsuperscript{145} 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. 2002) (referring to indictment of the “proverbial ‘ham sandwich’”).
provided by the prosecutor, and does not conduct an investigation that is independent of the prosecutor’s like that undertaken 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. Although a prosecutor may present exculpatory evidence to the grand jury in order to test the strength of a case before trial, 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

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


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. Attorney’s Manual § 9-11.233. Even this low standard is not enforceable.

148 See Podgor, Discretionary Decisions, supra note ___, at 1516 (noting also that the prosecutor who “seeks justice” would clearly want to present full information to the grand jury).
again distinguishes the two systems. The victim of a crime, or indeed any French citizen, may file criminal charges directly with the court, a practice that has the effect of encouraging prosecutors to file charges. The procedure is significant because, unlike the federal prosecutor, the French prosecutor may not drop or reduce the severity of charges once they have been filed. 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. 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

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149 See Weigend, supra note ___, at 449. This is a speedy, inexpensive, and efficient course that allows victims to seek damages through criminal proceedings rather than by suing in civil court.

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

151 See Frase, Comparative Criminal Justice, supra note ___, 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).

152 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).
against indictment or over charges, neither official is obliged to grant the interview, much less consider the request.

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.

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. Over-all, guilty pleas are such an integral part of the federal adversarial system that ninety-five percent of defendants forego trial. In the current enforcement effort, of the fifty-eight cases that reached conclusion as

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153 See Lynch, Panel Discussion, supra note ___ at 696-97 (remarking that many defense lawyers do not approach prosecutors).

154 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 ___. Mr. Chertoff reportedly agreed “to sleep on” the defense request, but ultimately filed charges. Id.

155 See supra text accompanying note ___. 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)
of May 2004, fifty, or 86.2% ended with guilty pleas.\textsuperscript{156}

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.\textsuperscript{157} Professor Goldstein, writing in 1973, unequivocally stated that guilty pleas were nonexistent in inquisitorial systems.\textsuperscript{158} Some commentators agree, noting that a guilty plea is viewed by Europeans as “contrary to practice and to professional ethics alike.”\textsuperscript{159} 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.

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.\textsuperscript{160} Nonetheless, there is little evidence that inquisitorial prosecutors (critiquing plea bargains).

\textsuperscript{156} See supra text accompanying note \textsuperscript{__}.

\textsuperscript{157} See generally Langbein & Weinreb, supra note \textsuperscript{__} (critiquing conclusion of Goldstein & Marcus that plea bargaining does not exist in inquisitorial systems); Dubber, supra note \textsuperscript{__} (critiquing work of Langbein on German system on much the same ground); Frase, Comparative Criminal Justice, supra note \textsuperscript{__}, at 626-47 (reviewing the debate).

\textsuperscript{158} See Goldstein, supra note \textsuperscript{__} 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).

\textsuperscript{159} See Langbein & Weinreb, supra note \textsuperscript{__}, at 1557.

\textsuperscript{160} See Frase, Comparative Criminal Justice, supra note \textsuperscript{__} at 623-24 (concluding that limitations on the discretion of French prosecutors would not prevent resolving a case by filing
engage in explicit bargaining with defense attorneys over filing, reducing, or dropping charges. 161

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. 162

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. 163 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. Instead, the prosecutor effectively decides the ultimate penalty that will be imposed. The absence of an adversarial determination of guilt or innocence because of plea bargaining is similar to the absence of an adversarial


161 See Weigend, supra note ___, 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 that American forms of sentence bargaining. Id. at 636.

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

163 This is not to suggest that an inquisitorial judge’s authority at trial is unlimited. See Frase, Comparative Criminal Justice, supra note ___, at ___.

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determination at an inquisitorial trial.\textsuperscript{164} 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.\textsuperscript{165} 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

\textsuperscript{164} See Lynch, supra note ___ at 2119.

\textsuperscript{165} See id, supra note ___; Kahan, supra note ___.
prosecutor, on the other hand, works 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, hierarchal 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.\footnote{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”); Goldstein, supra note \_\_\_ at 1018 (noting tendency to misjudge the inquisitorial system because of reliance on an ideal, rather than the actual, adversarial system).} 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
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 ___, at 596-97 (noting link between excessive sentences and prevalence of plea bargaining in American courts).

Today’s policymakers, however, primarily and routinely rely on the deterrence rationale, and the following discussion considers whether reliance on investigation rather than

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. Today’s policymakers, however, primarily and routinely rely on the deterrence rationale, and the following discussion considers whether reliance on investigation rather than
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).


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. 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. 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

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).
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.\textsuperscript{172} Olis’ former boss, who pled 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.\textsuperscript{173} Three offenders, who appear to have engaged in accounting frauds that caused similar losses, received drastically different sentences.\textsuperscript{174}

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.\textsuperscript{175} Current prosecutions undoubtedly express societal condemnation; news accounts of

\textsuperscript{172} See supra text accompanying notes ___ (discussing Olis case); note ___ (discussing the Blakely decision).

\textsuperscript{173} See Goldberg, supra note ___.

\textsuperscript{174} In the 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 24 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 stand unexplained and unjustified.

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. But white collar criminal enforcement speaks to two groups, 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. 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. Judgment through trial can also have a moralizing effect on the business community, strengthening inhibitions and stimulating habits of law-abiding conduct.

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179 See id. at 469; see also Robinson & Darley, The Role of Deterrence, supra note ___.

180 See Andenaes, supra note ___ at 179-80.
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.\textsuperscript{181} 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 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.

\textbf{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

\textsuperscript{181} See generally, Robinson & Darley, Utility of Desert, supra note ___; 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 his or her sense of right and wrong”).
that certain conduct violates the law.\textsuperscript{182} 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 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

\textsuperscript{182} 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, Self-Defeating Crimes, supra note ___ at 1886. Like democracy, however, a public trial is better than the alternative.
govern the business conduct at issue.\textsuperscript{183} 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.\textsuperscript{184} Resolving criminal matters through plea bargaining rather than through trial thus squanders an opportunity to communicate the content of the statutes that govern business conduct.\textsuperscript{185}

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

\textsuperscript{183} 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 some kind of 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 enforcement action against Stewart, but that venue is arguably not as effective as the public trial. See supra note ___

\textsuperscript{184} The plethora of articles in business publications and newspapers regarding what constitutes insider trading testifies to this sort of confusion.

\textsuperscript{185} 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 ___; 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).
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.\textsuperscript{186} 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,\textsuperscript{187} white collar cases were still a high priority in 2003.\textsuperscript{188} Notwithstanding such concerns, if the quasi-inquisitorial system does not effectively further the goals of criminal law, it may not be an effective way to spend tax dollars.\textsuperscript{189} 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

\textsuperscript{186} See Lynch, supra note ___ at 2143 (concluding that the existing system is the one we are willing to finance).


\textsuperscript{188} Between 2002 and 2003, the percent of federal agents assigned to white collar cases fell only slightly, from 26% to 24%. But see Susan 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).

\textsuperscript{189} 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, An Enron Lesson, supra note ___ at 973.
criminal justice system for what it is – a quasi-inquisitorial system that incorporates a concern for defendants’ rights. Working with what exists is probably preferable to attempting to restore an ideal system that is unattainable. A return to an ideal adversarial system is unattainable largely because 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. Moreover, 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. Although this is promising on its merits, Congress has moved in the opposite direction by increasing penalties for white collar crimes. A third possibility ________________

190 See Lynch, supra note ___, at 2141; Kahan, supra note ___. 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.

191 See Lynch, supra note ___, at 2142 (noting certain advantages of the present system).


Limiting the power to negotiate plea bargains may also be opposed by the defense bar because prosecutorial authority over sentencing sometimes mitigates the severe penalties required by the law and the Guidelines.
is to reverse the practice of relying on criminal law in situations that seem adequately covered by civil and administrative remedies. 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. Some suggestions that address the imbalance produced by prosecutorial power reflect the safeguards that constrain prosecutorial power in inquisitorial systems. For instance, it has been suggested that defendants be given greater discovery rights so they have access to evidence held by prosecutors before they engage in any negotiation over a plea. The

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193 See Stuntz, Pathological Politics, supra note ___ 512-23. Professor Stuntz argues that the best solution is for the courts to constitutionalize substantive criminal law by basing judicial interpretations of criminal laws on due process. Id. at 587-88.

194 One aspect of an inquisitorial system, the hierarchal 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 ___; 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, 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, sec. WK at 10.

195 See Frase, Comparative Criminal Justice, supra note ___ at ___; Lynch, supra note ____, 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
defendant’s right to examine the evidence that the state will use at trial is a cornerstone of the French inquisitorial system.

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. See Lynch, supra note ___ at 2135-36; Podgor, Discretionary Decisions, supra note ___ 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).

Other commentators have appealed more directly to the inquisitorial model. 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. 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

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prosecutors before being charged. See supra at 2148-49. As noted, federal offenders may seek an interview with prosecutors or their supervisor, but this practice is not an enforceable right.

196 See Lynch, supra note ___ at 2135-36; Podgor, Discretionary Decisions, supra note ___ 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).


198 See generally Frase, Criminal Justice, supra note ___ . 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.
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, hierarchal process. Thus, the federal white collar criminal justice system not only fails to correspond to our adversarial ideal, it also lacks safeguards that are inherent in the inquisitorial counterpart. Moreover, federal prosecutors exercises far greater power over plea bargains and sentences. The combination of relying on inquisitorial investigation and plea bargaining 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.