

REGULATION BY PROSECUTOR

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ABSTRACT

Prosecutors exercise broad power and nearly unchecked discretion. A distinctive and underappreciated aspect of prosecutorial authority lies in the ability to impose plea terms that effectively ensconce the prosecutor as a regulator. This phenomenon is clearest in corporate settlements mandating prospective changes to internal governance subject to ongoing prosecutorial review. Prosecutorial control of corporate governance, however, represents merely an extension of a longstanding practice. Prosecutors have often demanded prospective and remedial terms to resolve a wide array of criminal cases, including traditional cases against individuals. Such terms include bars from employment, compelled apologies, and bans from public office. Regulation by prosecutor is a predictable consequence of expansive criminal laws, the practical realities of plea bargaining, and the perceived failure of regulators; as such, it is unlikely to change. The question remains whether and how it might be governed. This Article represents a first step toward describing the breadth of the phenomenon, identifying its benefits and costs, and considering paths forward.

INTRODUCTION

In the popular imagination, prosecutors investigate crimes and advocate for punishment. The real function of prosecutors, however, is continually expanding.¹ Recently, in the context of corporate crime, the expansive prosecutorial function has come under renewed scrutiny as prosecutors are resolving criminal investigations via remedial measures that resemble regulation more than punishment.

It is now routine for a corporate defendant to settle a criminal investigation by agreeing to remedy internal compliance and governance mechanisms. Some

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1. See Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1126 (2005) (“During the past half century, the prosecutor has emerged as the empire builder of the American criminal justice system. Taking advantage of legislative efforts to limit judicial discretion, the prosecutor’s office has siphoned revenue, power, and control from the bench and has become the principal actor responsible for determining case outcomes and sentences for criminal defendants.”).

corporate settlements go further by mandating ongoing monitoring.² And a few go even further, including terms that govern not only compliance and governance, but also more purely regulatory matters such as workplace safety and environmental practices.³ In all these cases, the prosecutor remains the de facto arbiter, assuming a role of prospective governance different in kind from that of an advocate. In this way, prosecutors have expanded from serving only as post hoc adjudicators to also working as ex ante governors. That is, prosecutors have become regulators.

This Article suggests that while the prosecutorial shift to a regulatory function is important, it is neither new nor limited to the corporate sphere. Prosecutors have exercised something like an ongoing regulatory power over defendants in a wide array of non-corporate cases for a long time. This power is amplified and more obvious in the corporate context, if only because its impact is more widespread, but the practice is not fundamentally new.

Recognizing the scope of prosecutorial regulatory power is important because prosecutors enjoy broad and near unfettered discretion. That discretionary power has been justified largely, if not entirely, in the context of prosecutors' more traditional adjudicative role. To recognize that prosecutors exercise an additional function, as prospective arbiters of something like individualized regulations, invites further consideration of how prosecutors ought to be governed.

Corporate criminal law is a useful lens through which to view criminal law and process more generally, in part because the two are an uncomfortable fit. Corporations have always represented a theoretical challenge for criminal law. The criminal law is distinctively moral and condemnatory, yet these concepts are difficult to apply to the corporate form.⁴ Likewise, the archetypal criminal sanctions involve deprivation of liberty and corporal punishment, neither of which are applicable to corporations. The question of what exactly we are doing by applying criminal law to corporations is as old as it is familiar.⁵

Because blame and punishment hang awkwardly on the corporate frame, corporate criminal law enforcement emphasizes remediation.⁶ Rather than just seeking to punish the corporation, prosecutors seek to reform it. Corporations are still fined for criminal misconduct, but there is an emphasis on good governance and

2. Veronica Root, *Constraining Monitors*, 85 *FORDHAM L. REV.* 2227, 2230 (2017) ("In an enforcement monitorship, the monitor acts as an agent of the government . . . and ensures that the monitored organization complies with the government's specifications.").

3. See *infra* Section II(B).

4. Moral desert is most commonly understood as contingent on certain capacities, and while philosophers differ as to what capacities are necessary, most would include autonomy. Michael Moore describes the kind of autonomy necessary (although not necessarily sufficient) for desert as the "capacity to choose and cause the realization of one's choice." MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 612 (1997).

5. John C. Coffee, Jr., "*No Soul to Damn: No Body to Kick*": *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 *MICH. L. REV.* 386, 386 (1981).

6. And, more controversially, expression. See Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 *HASTINGS L. J.* 1, 30 (2012).

compliance: the corporate mechanisms by which future misconduct can be minimized if not avoided.

While the moral status of corporations may be questioned, the legal concept of guilt is not.⁷ Corporations do commit crimes. More precisely, human beings serving as agents of the corporation commit crimes within the scope of their agency. When this happens, the law is clear: the corporation can be held criminally liable.⁸

Most often criminal action on behalf of the corporation results in a negotiated settlement, not a contested conviction. Few days pass without headlines describing the fines some corporation has agreed to pay to resolve allegations of criminal conduct. Volkswagen incurred billions in fines when it was discovered the company had equipped cars with emissions-cheating software designed to evade Clean Air Act requirements.⁹ Wells Fargo paid \$185 million in fines when it was revealed that over 5,300 sales personnel had been terminated for creating sham accounts for customers in an effort to meet unrealistic sales quotas.¹⁰ And although the investigation into Equifax's historic loss of sensitive consumer data has not yet resolved, in the months following the breach, the company's shares lost thirty-five percent of their value,¹¹ and some experts expect an historically large fine.¹²

News of a large corporation being convicted of a crime is less frequent, but it happens. For example, Quality Egg LLC actually pled guilty to bribing a public official and introducing misbranded and adulterated food into interstate commerce.¹³ News of a large corporation being tried for a crime is less frequent still.¹⁴ In this

7. Interstitially, there is the question of collective action. For more on collective action and moral status, see David Copp, *Collective Actions and Secondary Actions*, 16 AM. PHIL. Q. 177, 185 (1979) (“[T]he actions of collectives are constituted by actions of persons, and a collective is not a self-sufficient agent. Not being a self-sufficient agent, moreover, it follows that a collective is not a self-sufficient *moral* agent.”).

8. See N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909) (stating that corporations may be held criminally liable for acts of an agent).

9. Hiroki Tabuchi, Jack Ewing, & Matt Apuzzo, *6 Volkswagen Executives Charged as Company Pleads Guilty in Emissions Case*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/business/volkswagen-diesel-vw-settlement-charges-criminal.html> (“The automaker is set to pay \$4.3 billion in criminal and civil penalties in connection with the federal investigation, bringing the total cost of the deception to Volkswagen in the United States, including settlements of suits by car owners, to \$20 billion—one of the costliest corporate scandals in history.”).

10. Michael Corkery, *Wells Fargo Fined \$185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), <https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html>.

11. Tara Siegel Bernard, *Prosecutors Open Criminal Investigation Into Equifax Breach*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/business/equifax-breach-federal-investigation.html>.

12. See, e.g., Martin Vlcek, *Equifax Could Face a \$2.75B Bill*, SEEKING ALPHA (Sept. 16, 2017), https://seekingalpha.com/article/4107442-equifax-face-2_75b-bill?page=2.

13. Press Release, U.S. Dep't of Justice, *Quality Egg, Company Owner and Top Executive Sentenced in Connection with Distribution of Adulterated Eggs* (Apr. 13, 2015), <https://www.justice.gov/opa/pr/quality-egg-company-owner-and-top-executive-sentenced-connection-distribution-adulterated>.

14. The streamlined system of justice seemingly available to corporations was the subject of Judge Young's recent rejection of a proposed plea agreement between the United States and Aegerion Pharmaceuticals. See *United States v. Aegerion Pharm.*, 280 F. Supp. 3d 217 (D. Mass. 2017). Aegerion was accused of having engaged in “a series of unfair and deceptive acts, including outright fraud, which pervaded corporate management, all designed to increase the use of [a profitable drug] in circumstances where such treatment was

way corporations are like people: they plea bargain in criminal cases.¹⁵ Indeed, corporations resolve criminal cases by settlement with greater frequency than people.¹⁶ This fact should be unsurprising. People go to prison, but corporations just pay fines. The whole enterprise is inherently less dramatic and hence more amenable to resolution by settlement.

Since 2001, federal prosecutors have increasingly relied on Deferred and Non-Prosecution Agreements (D/NPAs)—basically contractual settlements prior to prosecution—to revolve corporate criminal investigations. With more use, D/NPAs have introduced new and broader terms aimed at reform rather than retribution.

Whereas prosecutors traditionally work toward imposing retroactive retribution, D/NPAs demand prospective remediation. It is not uncommon for prosecutors to mandate changes to corporate governance in corporate settlements.¹⁷ Many have suggested this shift has expanded, perhaps improperly or imprudently, the function of prosecutors. For example, Jennifer Arlen and Marcel Kahan argue that corporate law enforcement has “transform[ed] prosecutors into firm-specific quasi regulators.”¹⁸

The seeming novelty is that prosecutors impose prospective, defendant-specific rules, and subsequently serve as the de facto arbiter of compliance. This practice, however, extends well beyond the corporate context. Prosecutors generally have wide discretion over when and whether to notice a probation violation,¹⁹ and in this

not medically indicated.” *Id.* at 218. Judge Young rejected the plea, maintained the original trial date, and lamented what he describes as a “[t]wo-[t]ier [c]riminal [j]ustice [s]ystem.” *Id.* at 221.

15. Of all federal felony cases terminated in FY2016, over 90 percent resulted in conviction and less than 4 percent went to trial. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2016 7 (2016), <https://www.justice.gov/usao/page/file/988896/download>.

16. See Gideon Mark, *The Yates Memorandum*, 51 U.C. DAVIS L. REV. 1589, 1607 (2018) (noting “the greater propensity of individuals to refuse to settle compared with corporations”).

17. See Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 BUS. LAW. 61, 62 (2015) (“The increasing use of Non- and Deferred Prosecution Agreements . . . has enabled federal prosecutors to incrementally expand their traditional role, exemplifying a shift in prosecutorial culture from an ex-post focus on punishment to an ex-ante emphasis on compliance.”).

18. Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 327 (2017); see also Peter Spivack & Sujit Raman, *Regulating the “New Regulators”: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008). Arlen and Kahan note that these remedial corporate settlements are distinguished from traditional prosecutions and traditional regulations by two factors: the *post hoc* determination of penalties for substantive violations renders them not-quite-regulatory, and the potential for probationary violations absent any substantive harm render them not-quite-prosecutorial. Arlen & Kahan, *supra* note 18, at 327. Drawing attention to the relationship between prosecution and regulation is not new. It has been more than 35 years since Roberta Karmel published her critique of a shift toward a prosecutorial stance at the traditionally regulatory Securities and Exchange Commission. See ROBERTA S. KARMEL, *REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VERSUS CORPORATE AMERICA* (1981). The instant article considers nearly the inverse point: the seizing of regulatory authority by prosecutors.

19. Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 329 (2015) (describing the “wide discretion afforded to probation officers and prosecutors about if and when to file a formal probation violation”).

way prosecutors serve as arbiters of the terms they impose during the plea-bargaining process.²⁰ As the terms of probation have expanded, so has the potential regulatory role of prosecutors. Accordingly, prosecutors now regulate such matters as whether a former-defendant may run for office, return to particular employment, or be deemed to have offered sufficient public apologies. In each case, these powers are limited to a single person and not a large, public corporation, but the powers are similar to those exercised in the corporate context. They are prospective, remedial, and checked only in a limited manner. Prosecutors are regulators in all sorts of cases.

Viewed in context, the shift toward regulation through D/NPAs is properly understood not as something new. Rather, the corporate regulatory shift continues a longstanding trend of prosecutors shifting their emphasis from retrospective punishment to prospective remedies. While prosecutors do enjoy broad power to regulate corporations through D/NPAs, that power is not fundamentally different from the power prosecutors generally exercise in criminal cases. Rather, the expansive power exercised by prosecutors in these corporate settlements follows the same trend in more traditional cases.

This Article proceeds in five sections. Section I introduces the traditionally retributive prosecutor in America. Section II introduces examples of forward-looking, remedial, and regulatory terms demanded by prosecutors in corporate settlements, and describes how these terms differ at least in effect from those described in individual cases. Section III provides examples of prosecutors branching beyond their retributive function by imposing in forward-looking remedial terms as means of resolving criminal matters. These examples involve non-corporate scenarios, thus establishing that the trend observed in D/NPAs is not entirely new. Section IV identifies factors contributing to the shift in prosecutorial authority, including expansive criminal laws, the law of probation and plea bargaining, regulatory failures, and a public demand for expressive justice. Finally, Section V assesses the benefits and costs of using prosecutorial regulation as a mechanism of social control.

It is important to recognize these benefits and costs. Regulation by prosecutor, it turns out, is a sufficiently broad phenomenon as to defy singular judgment. Moreover, and contrary to recent criticisms about a newfound expansion of prosecutorial authority in the corporate context, the shift is well-established and too entrenched to anticipate significant change. The regulatory state of prosecutions is the predictable consequence of plea bargaining, discretion, and regulatory failure; to prevent it, one would need to address one or more of these preconditions. A more realistic and likely response would be better supervision of the prosecutorial function more tailored to the modern role of prosecutors as regulators.

20. Courts formally set the terms of probation, but the prosecutor frequently dictates these terms as required components of a plea agreement. See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 942 (2000) (giving a historical overview of the argument that "probation grew up in symbiosis with prosecutorial plea bargaining").

I. PROSECUTORS: FROM PUNISHERS TO REGULATORS

Prosecutors as we know them are an American contribution to common law.²¹ At the time of our founding, private prosecutions were the British norm.²² At common law, the criminal justice system functioned when a victim appeared before a court to make a claim.²³ Public prosecutions are an innovation dating to colonial times.²⁴ Today, American criminal justice is thoroughly public and professionalized.²⁵

The public prosecutor traditionally had two roles: first, to investigate potential crimes, and second, to try them before the court.²⁶ Inherent in the latter was the power to not try a case before the court: declination.²⁷ As it turned out, prosecutorial authority and influence was enhanced more by the power not to prosecute than the power to prosecute. In a system without discretion, prosecutors would be mere advocates. In our system, however, prosecutors have nearly²⁸ unfettered discretion

21. See John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 3, 5 (John L. Worrall & M. Elaine Nugent-Borakove, eds., 2008) (“Public prosecution is not a result of our British common law heritage.”).

22. See Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100 (1976).

23. *Id.* (“The aggrieved victim, or an interested friend or relative, would personally arrest and prosecute the offender, after which the courts would adjudicate the matter much as they would a contract dispute or a tortious injury.”); see also John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 263 (1979) (describing criminal cases in London during the 1730s, where prosecutions were “in practice virtually never” conducted by a lawyer).

24. See Worrall, *supra* note 21, at 6 (“By 1704, Connecticut adopted a system of public prosecution, and other colonies soon followed.”); see also Walter M. Pickett, *The Office of Prosecutor in Connecticut*, 17 AM. INST. CRIM. L. & CRIMINOLOGY 348, 352 (1926) (“Historically, the office of State’s Attorney traces back to the King’s or Queen’s attorney of colonial days. . . . In 1704 the ‘attorney’ for the Queen is required to ‘prosecute and implead in the law all criminal offenders, and do all things necessary or convenient as an attorney to suppress vice and immoralities.’”) (quoting 4 Colonial Records, 468). There are earlier examples of public prosecutors. Langbein identifies justices of the peace under Marian law as having served a prosecutorial function for serious crimes. See John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEG. HIST. 313, 318 (1973).

25. Recent legislative efforts to bolster the role and status of victims in the criminal process can be understood as a reaction against the professionalization of law enforcement. See Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 B.Y.U. L. REV. 835, 841 (2005) (“The crime victims’ rights movement developed in the 1970s because of a perceived imbalance in the criminal justice system.”).

26. Langbein, *supra* note 24, at 313.

27. See *id.*

28. The Supreme Court has taken care to avoid the conclusion that prosecutorial discretion is plenary; it is not. “[A]lthough prosecutorial discretion is broad, it is not ‘unfettered.’” *Wayte v. United States*, 470 U.S. 598, 608 (1985). The Constitution applies, and it at least theoretically limits the exercise of discretion. *Id.*; *United States v. Batchelder*, 442 U.S. 114, 125 (1979) (“Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints.”). These limits, however, are narrow in scope and extraordinarily difficult to prove. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present ‘clear evidence to the contrary.’”); see also Ellen S. Podgor, “What Kind of A Mad Prosecutor” Brought Us This White Collar Case, 41 VT. L. REV. 523, 524 (2017) (“It is not prohibited for prosecutors to act arbitrarily, and few defendants have succeeded in the dismissal of an indictment absent a showing that the alleged conduct did not match the crime charged or was a result of vindictive action.”).

to decline particular charges or cases. The discretion to decline fuels plea bargaining, and plea bargaining shifts authority from courts to prosecutors.²⁹

Traditional criminal sanctions take the form of punishment: prison and fines. These penalties are imposed to “deliver just deserts and communicate moral condemnation.”³⁰ Imprisonment can also be used as a mechanism of education, prevention, or rehabilitation;³¹ however, prison is dominantly punitive in purpose and effect. Contrast that with settlement terms mandating changes to corporate governance, forbidding future employment, compelling speech, foreclosing runs for office, or imposing substantive regulations; these terms are more regulatory. The intent and function of such terms is not to deliver just deserts or communicate moral condemnation;³² rather, these terms aim to protect the public and/or improve the defendant.

That retributive punishment is central to the function of the prosecutor should not be surprising. Retribution is fundamental to most theories of punishment. This is not to say retribution must be the core goal of punishment; many have argued otherwise. Some maintain that punishment ought to be imposed if it is deserved.³³ Others respond mere desert is insufficient to justify punishment.³⁴ But a near-

29. Sentencing guidelines amplify this shift as prosecutors and defense counsel could more accurately predict the consequence of particular exercises of authority. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1424 (2008) (“Although it was not the goal either of sentencing reformers or of Congress, the actual result of the Guidelines regime that took effect in late 1987 was to transfer sentencing authority not to the U.S. Sentencing Commission, but to federal prosecutors in general and—particularly in recent years—to Main Justice.”); see also George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 874 (2000) (describing the rise of plea bargaining in Massachusetts liquor and capital cases as enabled by remedial schemes that augmented the power of discretion: “By depriving judges of almost all sentencing discretion in liquor-law cases, the legislature had assured that prosecutors could—by overcharging, selectively nol prossing, and manipulating the amount of costs—dictate the defendant’s sentence.”); Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1678 (2017) (“Over the course of four centuries, professionals have displaced this democratic morality play with a bureaucratic plea bargaining machine.”).

30. Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 580 (2012).

31. See 18 U.S.C. § 3553(a)(2)(B), (C)–(D) (2012). Under federal law, prison’s rehabilitative function is limited by statute. See *Tapia v. United States*, 564 U.S. 319, 321 (2011) (“[T]he Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation.”).

32. Indeed, if one’s primary goal were to impose retribution and judgment, these penalties would be relatively poor ways of doing so. See *infra* Section II.

33. See, e.g., IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 198 (T. & T. Clark, 1797) (“Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in prison ought to be executed before the resolution was carried out.”); see also MOORE, *supra* note 4, at 33 (“Retributive justice demands that those who deserve punishment get it.”).

34. See H. L. A. HART, *Murder and the Principles of Punishment: England and the United States, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 54, 80–81 (2d ed. 2008) (“[T]he moral basis of [the claim that desert as a limit] must be imposed on the pursuit of the utilitarian goal need not be, and in most ordinary persons’ minds is not, a recognition that the fundamental justification of punishment is other than the pursuit of the utilitarian goal.”).

universal principle maintains that punishment that is not deserved cannot be justified.³⁵

Accordingly, whether one justifies the distribution of punishment according to retributive or consequentialist principles,³⁶ there is near consensus that retribution is necessary for punishment.³⁷ Suffering may be imposed for reasons other than retribution, but absent some retributive purpose the imposition of suffering is something other than punishment. To inflict suffering on another for no reason is cruelty, not punishment. Similarly, to inflict suffering on another solely to help her is not punishment. When I compel my students to read, or my children to practice piano, I am intentionally causing them to suffer. That I inflict this suffering with the purpose of helping those subjected to it distinguishes my action from mere cruelty. But this infliction of suffering cannot be considered punishment; the suffering is not being inflicted *for* a prior wrong.³⁸ “Punishment, unlike torture, is by its nature exacted *for* something (viz. for some wrong or supposed wrong).”³⁹ If the imposition of suffering is not imposed, at least in part, for a prior wrong, it is not punishment.

Many of the most severe instances of suffering intentionally imposed at law are not punishment.⁴⁰ The dangerous sex offender is civilly detained—perhaps for life—not for a past transgression, but to prevent future wrongs.⁴¹ The defendant acquitted by reason of insanity is detained—again, possibly indefinitely—to protect the public.⁴² In both cases, the remedial function of detention continues—in theory—only so long as it is necessary to its corrective purpose.⁴³ Deportation also

35. *Id.*; see also J. L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982) (“Within what can be broadly called a retributive theory of punishment, we should distinguish negative retributivism, the principle that one who is not guilty must not be punished, from positive retributivism, the principle that one who is guilty ought to be punished.”).

36. See H. L. A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 8–13 (2d ed. 2008) (distinguishing between the “General Justifying Aim” of punishment and the question of “Distribution”).

37. Elsewhere, I have argued in favor of non-retributive and purely consequentialist punishment of non-natural persons like corporations. See Gilchrist, *supra* note 6, at 30–31. Retributivism as a limiting principle is a corollary of fairness, and while entities lack the capacity for desert, so too they lack the capacity to demand fairness. As such, the limiting function of retributivism is unnecessary in the corporate context.

38. See Gabriel S. Mendlow, *Divine Justice and the Library of Babel*, 16 OHIO ST. J. OF CRIM. L. (forthcoming 2019) (“[L]egal punishment takes two objects: the transgression *for which* it’s imposed and the person *on whom* it’s imposed.”).

39. John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice*, 30 LAW & PHIL. 1, 7 (2011).

40. See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 121 (1996) (“Punitive purpose is a necessary condition of criminal confinement, whereas civil confinement does not aim to punish.”).

41. See *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (“Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.”).

42. 18 U.S.C. § 4243(e) (2012) (allowing termination of detention only upon a finding that “release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect”).

43. This criminal/civil distinction plays a prominent role when courts assess whether particular deprivations offend the constitution. See, e.g., *United States v. Salerno*, 481 U.S. 739, 748 (1987) (holding that pretrial

is not punishment⁴⁴—and to acknowledge this should in no way belittle the suffering inflicted on the deportee. Deportation is not imposed for being in the U.S. without legal authority (although this is a precondition), it is imposed to remedy that fact in service of other goals: to maintain national security, to preserve borders, and to allocate national resources to those with a legal right to reside in the U.S. The reasons vary, but absent from rationales for deportation is the concept that we deport someone as retribution for being in the U.S. without authorization.⁴⁵

Empowered to resolve criminal matters, prosecutors are not limited to retributive terms of punishment, and over time prosecutors have become increasingly creative in identifying remedial terms of punishment. In this way, the original dual prosecutorial function—investigator and advocate—has been compounded to include a grander role: remediator. As remediators, prosecutors shift from reactive agents, investigating wrongdoing and advocating for retributive punishment, to proactive agents protecting people from harm. The shift is not new. A traditional conception of the prosecutor *includes* protecting people from harm insofar as prosecutions serve a deterrent function, both specific and general. However, the tools of deterrence are generally limited to the basic tools of criminal punishment: prison, fines, supervised probation. This last category has expanded as prosecutors have used their discretion to negotiate plea agreements that span well beyond their normal punitive function.

II. PROSECUTORIAL REGULATION IN CORPORATE CASES

Federal criminal investigations of large public corporations are resolved with terms that are best described as regulatory. This phenomenon highlights the ever-expanding role of prosecutors. While prospective and remedial actions are not particularly new, the terms involved in corporate settlements may be different in scope and effect than those in individual cases.

Corporate settlements send high-profile messages that reverberate throughout entire industries. The remedial terms of those settlements are seen by outside parties as conditions that could prevent or mitigate liability for future misconduct. In this sense, corporate settlements are understood by some insiders as efforts to reform industries and broad expanses of economy, not just individuals. While it is

detention under the Bail Reform Act does not violate due process because it is not punishment). Such arguments are often formalistic and unsatisfying. Obviously, one can accept the traditional criminal/civil distinction while disagreeing with any or all of the process limitations permitted in its name.

44. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (“While the consequences of deportation may assuredly be grave, they are not imposed as a punishment . . .”).

45. *See Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (“The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want.”). *But see* Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 23–24 (2011) (arguing that the Supreme Court decision in *Padilla v. Kentucky* invites a novel argument that deportation is punishment).

not clear whether, or to what degree, prosecutors intend these corporate settlements to establish broader standards, industries rely on settlements to identify best practices and in this way the settlements are broadly influential.⁴⁶ This Part explores two ways in which corporate settlements ensconce prosecutors as regulators: first, through mandated corporate governance changes, and second, through the imposition of specific regulatory standards.

A. Corporate Governance

Managing corporate governance is the most high-profile and clear example of prosecutors adopting a regulatory role. It is what people think of when they think of the concept of prosecutors in a regulatory capacity.⁴⁷

The role of prosecutors in shaping corporate governance is well known.⁴⁸ A recent empirical study found that a significant number of settlements of criminal investigations with public companies mandate accounting, auditing, compliance, monitoring, and other governance reforms.⁴⁹

Federal prosecutors rely on Deferred and Non-Prosecution Agreements (D/NPAs) to resolve most investigations of corporate crime. A Deferred Prosecution Agreement (DPA) generally involves the prosecutor filing an information—an informal charging document—with a district court, thus initiating a criminal action.⁵⁰ Simultaneously the prosecutor and defendant corporation file an agreement that

46. See, e.g., Thomas R. Fox, *Johns & Johnson DPA - Part II: Compliance Program Best Practices*, FCPA COMPLIANCE & ETHICS (Apr. 12, 2011), <http://fcpacompliancereport.com/2011/04/johnson-johnson-dpa-part-ii-compliance-program-best-practices/>.

47. See Spivack & Raman, *supra* note 18, at 161 (“[Federal prosecutors] have become the New Regulators.”).

48. See Arlen & Kahan, *supra* note 18, at 324–25 (describing the transformation of prosecutors increasingly imposing “mandates [on public firms] that can require a firm to alter its compliance program, governance structure, or scope of operations”); see also Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192 (2016) (arguing that the absence of process or review for prosecutor-mandated changes to corporate governance makes the practice inconsistent with the rule of law); Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 2–3 (2014) (“Prosecutors increasingly demand corporate governance reforms when using deferred prosecution agreements (DPAs) to settle criminal cases.”); Baer, *supra* note 30, at 611 (describing how prosecutors have “played an increasingly larger role in demanding how corporations and their managers should behave”); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007); P.J. Meitl, *Who’s the Boss? Prosecutorial Involvement in Corporate America*, 34 N. KY. L. REV. 1, 2 (2007) (describing the expanding role of prosecutors in corporate America, that includes “mandating changes in business practices, governance, and compliance”).

49. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 593 (2015) (also finding that “DPAs and NPAs typically require more non-monetary sanctions than do plea agreements—both in governance-related conditions (such as external monitors or compliance programs) and legal process-related conditions (such as waiver of statute of limitations or attorney-client privileges”).

50. See Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 30 (2014); see also Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & U.S. Attorneys (Mar. 7, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/04/15/dag-030708.pdf>.

the corporation will accept certain terms in exchange for the prosecutor deferring action on the charges.⁵¹ The agreement also provides that if its terms are satisfied, then at some future date the prosecutor will dismiss the information terminating the case.⁵² A Non-Prosecution Agreement (NPA) functions similarly except without the involvement of a court or a formal filing.⁵³ Rather, the agreement establishes terms that, if met, will cause the prosecutor to take no further enforcement action.⁵⁴ The terms of these agreements increasingly empower prosecutors to dictate and review certain corporate governance decisions for a term of years.

The impact of prosecutorial intervention on governance matters in corporate America has been impressive both in its depth and breadth.⁵⁵ Remedial governance measures compelled by settlement agreements include:

- (1) improved compliance measures, (2) cooperating with the DOJ, (3) disclosure of information to the government, (4) dismissing staff, (5) internal review and investigations, (6) increased monitoring, (7) replacement of old and appointment of new management, (8) creation of new personnel positions, (9) increased reporting to government officials, (10) increased training, and (11) appointment of a new board.⁵⁶

Governance terms appear in the vast majority of corporate settlement agreements.⁵⁷ And yet, actual settlement agreements represent only a fraction of the impact. Corporations take notice of the demand for effective compliance and good governance and undertake their own remediation prior to any criminal investigation. It is no exaggeration to say that federal prosecutors are the single-most important authority on best practices for large organizational governance; prosecutorial actions charging or settling criminal cases and public guidance on charging decisions have become the de facto regulations.

Lawrence Cunningham has described the use of Deferred and Non-Prosecution Agreements (D/NPAs) to alter corporate governance:⁵⁸ “‘Prosecutors in the boardroom’ is a slogan that reflects an unintended early twenty-first century overlap of corporate governance and corporate criminal liability.”⁵⁹ He suggests three ways we might conceptualize these novel agreements: as contracts, as regulations, or as discretion.⁶⁰ Contract is imperfect, because it suggests that no terms are off limits

51. O’Sullivan, *supra* note 50, at 30.

52. *Id.*

53. *Id.*

54. *Id.*

55. Kaal & Lacine, *supra* note 17, at 82 (“Through the increasing use of N/DPAs, federal prosecutors are incrementally expanding their traditional role and have started reshaping corporate America by changing the governance of leading public corporations and entire industries.”).

56. *Id.* at 86.

57. *Id.* at 112 (“Of the publicly available N/DPAs from 1993-2013, 97.41 percent contained provisions that mandated substantive governance improvements . . .”).

58. See Cunningham, *supra* note 48, at 2–3.

59. *Id.* at 2.

60. *Id.* at 41.

and it suggests, erroneously, that the deals are subject to the principles and limits of contract law.⁶¹ Regulation is a better fit, because it captures the imbalance of power between the parties and the breadth of subject-matter authority wielded by prosecutors; it remains imperfect as it fails to capture the post hoc nature of plea bargains and those features that are akin to contracts.⁶² Discretion best captures the nature of D/NPAs by allowing for the special constitutional role of prosecutors⁶³ and for identifying a role for prosecutorial restraint.⁶⁴

This framework works outside the corporate context as well. The agreement to a wide array of post-resolution rules for the defendant is negotiated and memorialized between the parties, in a manner suggesting a contract, but subject to radical power disparity and often⁶⁵ unenforceable absent involvement by the court.⁶⁶ The agreement functions as a form of state regulation, but a narrow, post hoc regulation generally reliant on the power of the courts. In the end, these agreements work as a function of prosecutorial discretion to bring, decline, maintain, or dismiss charges, and the accompanying power to seek concessions in exercising that discretion. This discretion is almost unlimited, and time has demonstrated that creative counsel – prosecutors and defense lawyers alike – will expand the scope of negotiable terms. The effect of this expansion in any one case is limited and often mutually beneficial. The effect of the expansion more generally, however, is to expand the authority of prosecutors in a way that creates a new kind of regulator.

B. Imposing New Regulations

The most direct expansion of regulatory authority by prosecutors occurs where plea agreements include terms imposing affirmative obligations on corporate defendants beyond what the relevant agency and substantive law have imposed more generally. The eventual resolution of the criminal investigation of the Upper Big Branch Mine disaster provides a good example of this type of agreement.

61. *Id.* at 41–44 (arguing that contract law fails to capture some parts of plea agreements such as their special constitutional status and the involvement of a court, while also importing rules that have no application to the law of plea bargaining, such as unconscionability).

62. *Id.* at 44–46.

63. *Id.* at 46 (“As the Supreme Court has explained, prosecutorial discretion is entailed by constitutional separation of powers in which the ‘Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.’”) (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)).

64. *Id.* at 49 (“Just as judicial supervision of unconscionable bargains invokes paternalistic impulses, prosecutors negotiating DPAs must protect the interests of their counterparties and must not act arbitrarily.”).

65. One variant of prosecutorial regulation does not directly rely on judicial authority for enforcement. For more on this, see *infra* Section II(B)(2).

66. The non-contractual nature of plea agreements is highlighted by *Mabry v. Johnson*, 467 U.S. 504 (1984). In that case, the defendant communicated his acceptance of an offer by the prosecution, only later to be informed that the prosecution was withdrawing the (now-accepted) offer. *Id.* at 506. The defendant eventually pled guilty and was sentenced according to the second, less generous offer. *Id.* The Supreme Court upheld the conviction and found the plea valid on the sole basis that it was knowing and voluntary. The law of contract was inapplicable. *Id.* at 510 (“[R]espondent’s inability to enforce the prosecutor’s offer is without constitutional significance”).

Twenty-nine minors lost their lives when a coal dust explosion occurred in the Upper Big Branch Mine, then owned by the Massey Energy Company.⁶⁷ The company suffered from a culture that “valued production over safety,” and this culture was a direct cause of the tragedy.⁶⁸ The company systematically avoided safety regulations and maintained conditions that led to the explosion, the worst U.S. mining accident in forty years.⁶⁹ A little more than a year after the explosion, as the investigations into the matter continued, Massey Energy was acquired by Alpha Natural Resources, Inc (“Alpha”).⁷⁰ A few months thereafter, Alpha entered a NPA pursuant to which it agreed “to make payments and safety investments totaling \$209 million.”⁷¹

The agreement is notable in part for affirmative obligations imposed on Alpha as part of the resolution. Alpha was obligated to:

construct and launch a new state-of-the-art safety training facility, . . . includ [ing] a mine lab of approximately 96,000 square feet in which simulated mine situations and conditions will be presented to certified supervisors and examiners to solve and correct; simulators for training on underground and surface equipment; facilities and equipment for electrical and maintenance skills training; and facilities and equipment for supervisory leadership skills training.⁷²

Alpha was also required to “purchase an additional twenty coal dust explosibility meters to conduct real-time sampling at multiple locations at each underground mine.”⁷³ Additionally, Alpha agreed to “participate in the research and development of next-generation foam-based rock dusting equipment.”⁷⁴ These are but a few examples of the regulatory obligations imposed on Alpha’s mining operations as part of the resolution of a criminal investigation.

Mine safety is heavily regulated, but is usually regulated by the Mine Safety and Health Administration (“MSHA,” part of the Department of Labor), pursuant to the Federal Mine Safety and Health Act of 1977.⁷⁵ MSHA has promulgated regulations on each of the matters described from Alpha’s plea agreement in the preceding paragraph. There are extensive and detailed existing regulations about

67. The mine was operated by Performance Coal Company, which itself was a subsidiary of Massey Energy. U.S. DEP’T OF LABOR, MINE SAFETY AND HEALTH ADMIN., REPORT OF INVESTIGATION, FATAL UNDERGROUND MINE EXPLOSION 1 (2010) [hereinafter MSHA UPPER BIG BRANCH INVESTIGATION REPORT].

68. *Id.* at 2.

69. *Id.*

70. See Non-Prosecution Agreement between U.S. Attorney’s Office for the Southern District of West Virginia, the U.S. Department of Justice, and Alpha Natural Resources, (Dec. 6, 2011), <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/alphanatural.pdf> [hereinafter Alpha NPA].

71. See Press Release, U.S. Dep’t of Justice, Alpha Natural Resources Inc. and Department of Justice Reach \$209 Million Agreement Related to Upper Big Branch Mine Explosion (Dec. 6, 2011), <https://www.justice.gov/opa/pr/alpha-natural-resources-inc-and-department-justice-reach-209-million-agreement-related-upper>.

72. See Alpha NPA, *supra* note 70, ¶ 5.c.

73. *Id.* ¶ 5.d.

74. *Id.* ¶ 5.e.

75. 30 U.S.C. § 801(g) (2012).

training,⁷⁶ coal dust sampling,⁷⁷ and coal dust cleanup.⁷⁸ Alpha's plea agreement resolving the criminal investigation effectively subjects it to a heightened level of regulation on these very topics.

As with other terms addressed above, these requirements are fundamentally regulatory, not punitive in nature. Undoubtedly, the expense involved in any such terms costs and thus in some sense "hurts" a corporation; accordingly, some may see a punitive function in these terms. However, if punishment were the goal there are so many better, simpler, and more direct ways to achieve it. The reason these additional terms are introduced is regulatory: prosecutors seek to improve the firm and perhaps the industry through additional rules.⁷⁹ In the Alpha example, prosecutors did this by mandating terms intended to directly improve mining safety at Alpha operations (e.g. the purchase of additional coal dust explosibility meters), terms to better the culture at Alpha (e.g. building a safety training facility), and terms aimed at helping the industry more generally (e.g. once constructed the training facility "will be available to other mining firms interested in improving safety at their own operations"⁸⁰). Any or all of these may be good policy, and it may be that tailored post hoc rules on these matters represent effective and good government; however, they also illustrate the shifting prosecutorial function.

III. PROSECUTORIAL REGULATION IN INDIVIDUAL CASES

The terms of criminal settlements have long spanned beyond the contours of moral condemnation and punishment, and well beyond the traditional tools of criminal justice. From foreclosing certain employment for certain people, to curating public apologies, to limiting the electoral field, prosecutors continue to develop new, prospective, and remedial terms to resolve criminal cases against individuals. While prosecutorial regulation of corporations gets the most attention, this Part aims to establish that the trend is not limited to the corporate form: prosecutors regulate individual defendants as well.

This shift from punishment to remediation can be attributed in large part to the expansive scope of substantive criminal laws,⁸¹ a trend that has been amply described and criticized both in academic and popular literature.⁸² Less noted,

76. See 30 C.F.R. § 46.3 (2018).

77. See *id.* § 74.

78. See *id.* § 75.400.

79. See *supra* text accompanying note 32.

80. See Alpha NPA, *supra* note 70, ¶ 5.c.

81. See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models-and What Can Be Done About It*, 101 YALE L.J. 1875, 1880 (1992) ("A principal cause of overcriminalization is the profligate extension of the criminal sanction to cover all rules lawfully promulgated by an administrative agency. It has become the common statutory pattern in the United States for a statute establishing an administrative agency to provide that any willful violation of the rules adopted by the agency constitutes a federal felony.").

82. See Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1198 (2015) (describing "[a] 2010 joint report by the Heritage Foundation and the National Association of Criminal Defense Lawyers [that] took this approach, defining overcriminalization as numerical proliferation"); Ellen S. Podgor,

however, is that this shift has been fueled in part by the *de facto* expansion of the prosecutorial function to include more regulatory power. By prosecutorial regulatory power I am referring to the fact that prosecutors frequently resolve criminal matters with the imposition of affirmative rules on the defendant that are more akin to regulations than punishments.⁸³ It is now not uncommon to see plea agreements mandating specific changes to the internal governance of a corporation, banning defendants from certain types of employment, limiting defendants' speech, precluding defendants from seeking political office, or even imposing regulatory conditions more onerous than those on the books.⁸⁴ The following sections provide examples of prosecutors serving in a more regulatory capacity in cases against individuals.

A. Bans From Law Enforcement

Police officers hold special positions of trust, enjoy broad discretion, and exercise tremendous power. It is therefore not surprising that when an officer engages in criminal conduct, prosecutors might seek to exclude him from holding that position of power in the future.

Indeed, what is surprising is the relative infrequency with which prosecutors seek to exclude abusive officers from returning to law enforcement, or proceed against police officers in any way. "The Washington Post's recent national survey confirmed the infrequency of prosecutors initiating charges when it revealed that of roughly 10,000 police killings during the 2005-2015 decade, only fifty-four officers faced prosecution."⁸⁵ Prosecutors are reluctant to proceed against police

Overcriminalization: New Approaches to A Growing Problem, 102 J. CRIM. L. & CRIMINOLOGY 529, 530 (2012) ("Many have written about the evils of overcriminalization and overfederalization. After all, it lessens the value of existing and important legislation when you flood the landscape with so many pieces of legislation."). See generally HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

83. Accordingly, the prosecutorial regulatory power is distinct from that described by now-Judge Lynch. See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, LAW & CONTEMP. PROBS., 23, 23 (1997). Lynch describes the oft-invoked if elusive line between criminal and civil actions: "It was rather common, in [pre-indictment] discussions, for defense counsel to assert that, properly understood, the pending matter was 'really not a criminal case,' or was 'really a civil matter.'" *Id.* These contentions are predicated on the perceived "over-expansion of criminal law into regulatory and business matters." *Id.* at 27 (describing Henry Hart's argument). This distinction can, however, be difficult to discern, as described further below. See *infra* Section IV(A)(1). In any event, the claim that substantive criminal law is addressing regulatory or civil matters is distinct from the primary claim of this Article: prosecutors are using regulatory governance tools in place of traditional punishments.

84. Cf. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1200 (2016) (exploring a related-but-distinct issue: the heightened awareness of and attention to collateral consequences of criminal convictions and demonstrating how this approach "shifts discretion to prosecutors to decide whether and when to pursue collateral consequences").

85. Douglas L. Colbert, *Prosecuting Baltimore Police Officers*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 185, 185 (2016) (citing Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.759b689065d9).

officers for a host of well-theorized reasons.⁸⁶

While regulation of police by prosecutors is infrequent, and by many measures insufficiently frequent, it is also true that prosecutors can and do sometimes act in a regulatory capacity over the police. This occurs most plainly when prosecutors negotiate plea bargains with police officers that require the officer not only to resign his position, but also not to seek further employment in law enforcement. In one illustrative case, the defendant police officer was barred from seeking employment as a police officer or security guard for a period of fifteen years. The federal prosecutor described the resolution this way:

This officer was a bad apple—plain and simple . . . Holding him to account and making sure he cannot return to law enforcement work protects the public and everyone’s constitutional rights. It also ensures that the overwhelming majority of officers who do their often difficult and dangerous jobs in an exemplary way get the respect that they need and deserve.⁸⁷

This prosecutor is describing two functions to banning the defendant from future employment in law enforcement. First, it protects the public from potentially being abused by this officer again. Second, it protects the integrity of law enforcement more generally, presumably by demonstrating to the public that those few “bad apples” will be swiftly removed from the force.

Each function is regulatory, and any retributive aspect of this penalty is likely no more than incidental. The officer received a prison sentence of nine-months.⁸⁸ The subjectivity of suffering in prison has been well-established,⁸⁹ but it must pale beside the subjectivity of suffering from any particular employment ban. Prisons are designed to inflict suffering.⁹⁰ True, some suffer more under particular conditions than others,⁹¹ but as instruments of suffering prisons represent a better measure of uniform suffering than a ban from particular employment ever could. Baseline, most people don’t like prison. The same cannot be true about the

86. See, e.g., Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 749 (2016) (cataloguing “numerous ways police seem to be virtually above the criminal law,” including “the inherently problematic, close professional relationship between police and prosecutors, the favorable substantive and constitutional laws that allow police to commit violence at a rate some argue is not appropriate, and the “blue wall of silence,” in which police either refuse to testify against one another or collude to present their stories in the least criminal light”).

87. Press Release, U.S. Dep’t of Justice, Former Police Officer Sentenced to Prison for Violating Civil Rights of Detained Man, (Mar. 21, 2017), <https://www.justice.gov/usao-wdwa/pr/former-police-officer-sentenced-prison-violating-civil-rights-detained-man>.

88. *Id.*

89. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 185, 194 (2009) (collecting sources supporting the claim that “people vary substantially in their experiences of punishment,” and noting that “defendants may still present evidence that prison will be uniquely difficult for them”).

90. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 917 (2009) (“Prisons inflict deprivation by design . . .”).

91. See *United States v. McIlrath*, 512 F.3d 421, 423–24 (7th Cir. 2008) (recognizing—but ultimately rejecting in application—that a “defendant’s history and characteristics were relevant in possibly suggesting . . . that imprisonment would be a more severe punishment for him than for the average Internet sexual predator, which would argue for a lower prison sentence”).

condition of not working as a police officer. As with any employment, some people love being employed as police officers, others do not. Barring a person from a particular type of employment is almost certainly a less titrated imposition of suffering than prison; were the prosecutor driven to seek terms beyond a nine-month prison sentence by a belief that more retribution was appropriate, a longer prison sentence would be a simpler and better mechanism to achieve that end. The employment ban is a prospective remedy regulated by ongoing prosecutorial supervision.

B. *Limits on Speech*

Prosecutors regulate speech through compelled public apologies. Such apologies are particularly popular in cases involving environmental harms, driving under the influence, prostitution, and other crimes where public sentiment can be leveraged to shame the defendant or where the defendant's apology might be used to deter similar crimes.

Bill Saiff is a popular fishing and hunting guide, television personality, and business owner. He owns and operates the Westview Lodge and Marina just south of the Thousand Island region of Lake Ontario in New York, as well as Bill Saiff Outdoors and Seaway Waterfowl Professionals.⁹² He “hosted the popular hunting and shooting sports program ‘Cabin Country’ as seen on Public Television stations across the country.”⁹³

On May 30, 2017, Mr. Saiff pled guilty to two misdemeanor counts of taking migratory birds on or over a baited area in violation of 16 U.S.C. §§ 704(b)(2) and 707(c).⁹⁴ According to the plea agreement, on two occasions in October 2015, Mr. Saiff brought clients to a pond that he had previously baited with corn to hunt for geese and ducks.⁹⁵ On each occasion the hunts were successful, with the parties killing multiple birds.⁹⁶ The prosecutor candidly admitted to the court that the matter rose to the level of a federal case at least in part because of Mr. Saiff's celebrity as a hunter and fisherman.⁹⁷

The plea agreement provided that Mr. Saiff would pay a \$5000 fine, contribute \$10,000 to wildlife preservation organizations, and refrain from hunting or guiding

92. See David Figura, *Upstate NY Hunting Guide, TV Host Pleads Guilty to Baiting Waterfowl for Clients*, NYUP.COM (May 31, 2017), http://www.newyorkupstate.com/outdoors/2017/05/upstate_ny_hunting_guide_pleads_guilty_to_baiting_waterfowl_for_clients.html.

93. See *About Us*, BILL SAIFF OUTDOORS, <http://www.billsaiffoutdoors.com/about-us/> (last visited Dec. 28, 2018).

94. See Plea Agreement ¶ 1(a), *United States v. Saiff*, Case No. 5:17-cr-100 (N.D.N.Y. May 30, 2017).

95. *Id.* ¶¶ 6(a), 6(b).

96. *Id.*

97. See U.S. Sentencing Mem., *United States v. Saiff*, Case No. 5:17-cr-100 (N.D.N.Y. July 14, 2017) (explaining that “while cases involving waterfowl hunters rarely rise to the level of a federal criminal prosecution, this case, from the beginning, has been uniquely egregious” and citing Saiff's status as “a prominent professional hunting guide whose website boasts that for 18 years he ‘hosted the popular hunting and shooting sports program *Cabin Country* as seen on Public Television Stations across the country’”).

hunts until January 1, 2019.⁹⁸ It then added that Mr. Saiff would pay for half-page advertisements in the Waterford Daily Times and the New York Outdoor News stating the following:

I am the owner of Seaway Waterfowl Professionals. I am writing to apologize to the public for my actions in illegally guiding duck hunts over baited areas on two occasions in October 2015. I recently pled guilty in federal court to two misdemeanor counts of violating the Migratory Bird Treaty Act for this conduct. I have always been an ambassador for the outdoors, and I regret my unsportsmanlike and illegal baiting activities. In connection with my guilty plea, I have agreed to pay a fine of \$5,000 and to donate \$10,000 to wildlife charities. Capt. Bill Saiff III.⁹⁹

Compelled apologies like this do not violate the constitution for a few reasons. First, to the extent the speech is mandated by a plea agreement, the speech is voluntary. Plea agreements are nothing more than deals between the government and a defendant in which the defendant agrees to waive her constitutional trial rights in exchange for enumerated concessions by the government. The Supreme Court has sanctioned plea agreements, but only if the defendant's guilty plea is knowing and voluntary.¹⁰⁰ All enforceable agreements, therefore, are voluntary. If, as part of a plea deal, the defendant agrees to post an advertisement, or otherwise to speak in a particular manner, that agreement is *ipso facto* voluntary. Of course, in many cases the legal standard of voluntariness renders this something akin to a fiction: the defendant is effectively compelled to agree to the terms offered by the prosecutor because he faces no meaningful choice.¹⁰¹ The courts, however, have been quite clear that, in the context of plea agreements, the fact that one must choose between two bad alternatives does not render it any less of a choice.¹⁰² Aside from the *de jure* voluntariness of the speech, one might fairly question whether these terms violate the doctrine of unconstitutional conditions. Plea agreements with compelled speech terms involve the prosecutor conditioning leniency on the defendant's agreement to waive not only constitutional trial rights, but also her First

98. See Plea Agreement, *supra* note 94, ¶¶ 3(a), 3(c)(2).

99. *Id.* ¶ 3(c)(3) The agreement also provided that these ads must contain no additional language. *Id.*

100. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”).

101. See Gregory M. Gilchrist, *Plea Bargains, Convictions, and Legitimacy*, 48 AM. CRIM. L. REV. 143, 144 (2011) (“Guilty pleas routinely are secured by something akin to coercion.”).

102. See *Brady*, 397 U.S. at 750 (“[E]ven if we assume that Brady would not have pleaded guilty except for the death penalty provision . . . this assumption merely identifies the penalty provision as a ‘but for’ cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.”); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas.”) (internal quotations omitted).

Amendment rights. In the context of plea bargaining, the doctrine of unconstitutional conditions has never gained any traction with the courts.¹⁰³

Accordingly, there is no case law forbidding these terms.¹⁰⁴ Courts have on occasion invalidated the mandated apologies as outside the scope of statutory probation.¹⁰⁵ In the end, however, the fact that prosecutors sometimes require mandated speech as a term of plea agreements, whether ultimately upheld or not, illustrates the prosecutorial shift from the punitive to the regulatory.

Bill Saiff hunts and helps others hunt for a living, and he broke the law while hunting. He should have known better, and maybe he did. Indeed, this was the government's position: "This crime, then, was not born of ignorance—the defendant was well aware of the rules and regulations regarding the hunting of waterfowl. He broke the law for profit (and, likely, for pride), at the expense of protected waterfowl."¹⁰⁶ For this wrong he was required to pay over \$15,000,¹⁰⁷ and to forgo a core part of his livelihood for a more than a year. This is a severe punishment for shooting birds. Although there is no metric for the assertion, it is probably not too controversial to suggest these parts of Mr. Saiff's sentence amount to sufficient retribution.

So what function is served by the compelled apology?¹⁰⁸ There are a number of possibilities. First, the advertisements serve a deterrent function by alerting others

103. See Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. REV. 801, 801 (2003) ("The Court does not recognize the waiver of criminal protections through plea bargains to entail a form of the unconstitutional conditions problem."); see also Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 651–54 (2016) ("[T]he Supreme Court has not directly addressed the applicability of the doctrine of unconstitutional conditions to plea bargaining[.]").

104. This may also be the result of the incredibly deferential standard of review courts adopt in reviewing terms of probation, which is generally where these agreements would be challenged. See, e.g., *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988) ("The test for validity of probation conditions, even where 'preferred' rights are affected, is whether the conditions are primarily designed to meet the ends of rehabilitation and protection of the public."). The Supreme Court has not ruled on the standard for review of probationary conditions.

105. See, e.g., *People v. Johnson*, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (vacating the requirement that a defendant convicted of driving under the influence of alcohol publish an apology in a local newspaper because "the effect of the publication appears to go beyond the intent of the statute and, possibly, adds public ridicule as a condition").

106. See U.S. Sentencing Mem., *supra* note 97.

107. See *supra* note 98 and accompanying text. The fine was more than \$15,000 because there was also a special assessment, and he was required to pay for the cost of placing the ads. See *Plea Agreement*, *supra* note 94, ¶¶ 3(b), 3(c)(3).

108. This is a simpler and less nuanced question than that asked by those who study the moral status of shaming sanctions, including compelled apologies. If we are to understand how reliance on shaming sanctions involves a prosecutorial shift to a regulatory function, we need only understand what purpose these sanctions *can* serve. The larger question of whether these are socially desirable or morally just punishments is distinct. For more on the larger question, see James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1059 (1998) ("In the last analysis, we should think of shame sanctions as wrong because they involve a species of lynch justice, and a peculiarly disturbing species of lynch justice at that—a species of official lynch justice. The chief evil in public humiliation sanctions is that they involve an ugly, and politically dangerous, complicity between the state and the crowd."); see also Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2076 (2006) ("What's *really* wrong with shaming penalties, I believe, is that

to the severe penalties they might face if they too fail to comply with hunting laws and regulations. This seems most likely, and it is supported by the requirement that the ads be placed in publications likely to be read by people who hunt for migratory birds (either because of geography or subject matter).

Second, the advertisements might be an effort to rehabilitate Mr. Saiff by compelling him to make a public apology. This seems unlikely. Mr. Saiff may have believed the federal government has no business telling him how he can and cannot hunt, and although he will now recognize the government's superior power to penalize those who disagree, compelling him to describe his offense is unlikely to change any personal belief held by Mr. Saiff.¹⁰⁹ "Rather than truly rehabilitate, forced speech is more likely at best to humiliate."¹¹⁰

Third, the advertisements may serve an additional retributive function if they undermine Mr. Saiff's ability to find work as a guide. This function, however, seems particularly unhelpful for two reasons: (1) the retribution imposed by the more traditional parts of the sentence are probably sufficient; and (2) even if one believes that additional retribution is necessary, the shaming function of an advertisement like this is an almost uniquely poor mechanism to impose it because, as with a ban from law enforcement,¹¹¹ it lacks predictability or precision. There is no *ex ante* prediction as to how much this publicity will cost Mr. Saiff's business, and whatever additional retribution is required could more easily and more precisely be imposed by an additional fine.¹¹²

The best justification for requiring public apologies in resolving a criminal case is to alert others to the consequences of a particular crime in an effort to deter that crime. Deterrence is a traditional justification for punishment, but by itself it is regulatory – an effort to "restrain undesirable conduct," not to punish or condemn.¹¹³ To the extent prosecutors are requiring public apologies to resolve criminal matters, these apologies are of *de minimis* punitive value and remain almost purely regulatory.

they are deeply partisan: when society picks them, it picks sides, aligning itself with those who subscribe to norms that give pride of place to community and social differentiation rather than to individuality and equality.").

109. Massachusetts fishing captain Thomas Lukejord was compelled to place ads of apology after sinking his failing vessel to dispose of it, and his subsequent statements on the topic are illuminating:

He recently told a newspaper reporter that the prosecutor wrote the apology himself. He added his belief that the prosecutor "uses the practice to advance his own career and show off that 'he's got another notch on his gun. . . ." The newspaper article suggested that Lukejord was "bitter" about the ad. His attorney commented on defendants from whom apologies are compelled generally: "These people have families. They have kids who are in school . . ."

Gilchrist, *supra* note 101, at 169–70.

110. Recent Case, *State v. KH–H*, 353 P.3d 661 (Wash. Ct. App. 2015), 129 HARV. L. REV. 590, 598 (2015).

111. See *supra* text accompanying notes 83–86.

112. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1503 (1996) (identifying similar problems with reputational penalties in the corporate context).

113. See Baer, *supra* note 30, at 580.

C. Bans From Office

When a public official violates the public trust by committing a crime, it may be that person should no longer hold office. Some criminal statutes forbid a person from holding office upon conviction. For example, a person convicted of bribing a public official or witness

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.¹¹⁴

This sort of ban is different from bans incorporated as a term of probation by a plea agreement. The former is part of the legislative definition of crimes and the consequences thereof. Whether a blanket ban in these cases is or is not a good idea can be disputed, but that is merely a policy question appropriately determined by the legislature. Greater challenges arise when the executive uses its discretion in an individual case to demand a similar ban as a condition of probation.

Probationary bans from office raise constitutional questions including whether the executive may infringe on the right of the people to select who serves in the legislature.¹¹⁵ This Article is concerned with a distinct issue, however: the *fact* that prosecutors seek these terms. This fact, not the constitutional consequences of it, exemplifies the regulatory role of the prosecutor.

The case of Virgil Smith, presently being litigated, provides an excellent illustration.¹¹⁶ Virgil Smith was serving as a State Senator in Michigan in 2015 when he was involved in a domestic dispute with his ex-wife, Anistia Thomas.¹¹⁷ At a probable cause hearing, Ms. Thomas testified that the argument started when she discovered another woman, Tatania Grant, in Smith's bed.¹¹⁸ Accounts from this point differ dramatically. Ms. Thomas testified that Smith punched her in the face a few times and rammed her head into the floor.¹¹⁹ Ms. Grant testified that she never saw Smith punch Ms. Thomas, but rather saw him try to restrain his ex-wife from attacking her.¹²⁰ Whatever else occurred, however, it was undisputed that as Ms. Thomas left the house, Smith followed her with an AR-15 rifle and fired

114. See 18 U.S.C. § 201(b) (2012).

115. See *United States v. Richmond*, 550 F. Supp. 605, 606 (E.D.N.Y. 1982) (rejecting resignation from Congress and agreement not to run for reelection as plea agreement terms because “[t]hey represent an unconstitutional interference by the executive with the legislative branch of government and with the rights of the defendant’s constituents”).

116. See *People v. Smith*, No. 332288, 2017 WL 1399983 (Mich. Ct. App. Apr. 18, 2017) (per curiam).

117. See Gus Burns, *Two Women in Sen. Virgil Smith Jr. Love Triangle Testify About Shooting Incident*, MLIVE (June 25, 2015), http://www.mlive.com/news/detroit/index.ssf/2015/06/two_women_in_sen_virgil_smith.html.

118. *Id.*

119. *Id.*

120. *Id.*

multiple shots into the sky and into his ex-wife's Mercedes.¹²¹

Smith was charged with domestic violence, malicious destruction of personal property, felonious assault, and possessing or carrying a firearm when committing a felony.¹²² Smith entered a plea agreement pursuant to which he “would plead guilty to the charge of malicious destruction of property and agreed both to resign his Senate seat and to refrain from holding public office during his five-year probationary period (which included a ten-month jail term). The remaining charges against the defendant would be dismissed.”¹²³

The trial court rejected the resignation and ban from office on constitutional grounds and denied the prosecution's motion to withdraw from the plea.¹²⁴ The matter is still being litigated. The Michigan Supreme Court recently denied the prosecution's motion for immediate consideration, meaning the matter will not be resolved before the voters are heard on Mr. Smith's candidacy for a seat on the Detroit City Council.¹²⁵

Constitutional questions aside, Smith's case illustrates the real challenges posed by these deals. The conduct leading to Mr. Smith's conviction was egregious, but it did not directly relate to his official duties as do other crimes—e.g. bribery.¹²⁶ Moreover, according to prosecutors, medical records revealed that Smith, who had a history of driving under the influence,¹²⁷ was suffering from alcohol dependency and bipolar disorder.¹²⁸ Both are treatable medical conditions; whether and when Mr. Smith would be fit to serve in public office following this offense is difficult to predict and may hinge on moral and political questions about which there is little consensus—in other words, it may hinge on the sort of questions generally left to voters.

Whatever one concludes about the desirability terms in Smith's case, it is plain they are regulatory, not punitive. Of course, a ban from office may be additional punishment, but as with the other examples in this section, this would be an odd and imprecise sort of punitive measure. If additional punishment is needed for retributive purposes, would not additional time or money be easier to quantify in terms of suffering? The suffering entailed by a ban from office is contingent on so

121. *Id.*

122. *People v. Smith*, No. 332288, 2017 WL 1399983, at *1 (Mich. Ct. App. Apr. 18, 2017) (per curiam).

123. *Id.*

124. *Id.*

125. Jonathan Oosting, *Top Court to Hear Virgil Smith Case, But Not Right Away*, DETROIT NEWS (Sept. 11, 2017), <http://www.detroitnews.com/story/news/politics/2017/09/11/virgil-smith-michigan-supreme-court-ruling/105517250/>.

126. This is not to belittle in any way the very serious nature of either the allegations or the particular crime of which he was convicted. Indeed, it may be that this incident renders Smith *less* fit for public office than crimes more closely related to the office; however, that is a judgment grounded only in moral conviction and thus better left to the discretion of the electorate than the dictate of a prosecutor.

127. See Burns, *supra* note 117.

128. Elisha Anderson & Kathleen Gray, *State Sen. Virgil Smith to Resign as Part of Plea Deal*, DETROIT FREE PRESS (Feb. 11, 2016), <http://www.freep.com/story/news/local/michigan/wayne/2016/02/11/state-virgil-smith-court-wayne/80232392/>.

many variables that themselves are subject to change. Does the defendant wish to hold office? If so, how much? What alternatives does the defendant have? Does the defendant stand any chance of being elected to office? If so, how great is his chance? Were punishment the purpose, there are a host of simpler and better titrated tools.

The purpose of this term is regulatory. The prosecutors have determined that Mr. Smith is not fit to represent the people of Michigan. In this decision, they may be correct, or not. The more significant question is whether society benefits from prosecutors exercising this sort of authority.

IV. THE FOUNDATIONS OF PROSECUTORS' REGULATORY AUTHORITY

The expansion of prosecutorial power follows from a host of conditions including a broad body of substantive criminal law, courts' extensive probationary powers, and realities of plea bargaining that allow prosecutors to largely usurp judicial control over probation. Each of these conditions is amplified by the perceived failure of regulators in certain contexts, and public demand for expressive justice. The resulting broad prosecutorial power could be narrowed in at least two ways. This section considers these conditions in more detail.

A. *Broad Criminal Law*

Prosecutors lack authority absent a violation of law; therefore, this is the first condition precedent to prosecutorial regulation. This condition, however, is increasingly common because substantive criminal law is increasingly broad. This claim can take two forms, one normative and one descriptive. Each is addressed in turn.

1. *The Normative Claim: Overcriminalization*

The Supreme Court recently touched on the normative claim in *Yates v. United States*, where it held that a fish is not a tangible object.¹²⁹ Mr. Yates was a fisherman who tossed a box of undersized grouper overboard before the federal agents could formally measure it.¹³⁰ For this he was charged with the anti-shredding provision of the Sarbanes-Oxley Act, originally passed to confront the sort of document destruction conducted by Anderson Consulting in the early days of the Enron investigations.¹³¹ It is safe to say that no member of congress was picturing anything like Mr. Yates' offense when voting in favor of the act. In a pique of

129. *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015). This is perhaps unfair. The Court did write what is unavoidable: "A fish is no doubt an object that is tangible." *Id.* However, the Court concluded that a fish does not constitute a tangible object as that term is under within the meaning of the Sarbanes-Oxley Act.

130. *Id.* at 1078.

131. *Id.* at 1081 ("The Sarbanes-Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents.").

literalism, a prosecutor decided to charge a fisherman with an accountant's offense, and the Court was not pleased. During oral argument, Justice Scalia asked, "What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?"¹³² Asking a question about wisdom, Scalia got it right.¹³³ However, the question of statutory interpretation was not so easy. The majority held that "[a] tangible object captured by § 1519 . . . must be one used to record or preserve information;"¹³⁴ or, more simply, a fish is not a tangible object under section 1519.

The decision was rightly celebrated for its outcome, if not its rationale. In a powerful dissent, Justice Kagan wrote:

I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.¹³⁵

Kagan's contention was that the law at issue¹³⁶ was improvidently broad, but no less clear for that shortcoming.¹³⁷ A fish, of course, is a tangible object.¹³⁸ Kagan's contention was that Yates's prosecution was flawed not because the prosecutor misinterpreted the statute, but because the statute was too broad. The breadth of criminal laws too greatly empowers prosecutors and sentencers, who simply cannot be trusted to always act wisely.

There is real reason to worry about overcriminalization, but it's also worth recognizing that the very term "overcriminalization" can be more divisive than helpful. The problem stems from the fact that a seemingly descriptive term is being used to introduce a normative concept. How much criminalization is too much? Where is the boundary between a societally healthy reliance on criminal law and too much? One definition of overcriminalization is "the proliferation of criminal statutes and overlapping regulations that impose harsh penalties for unremarkable

132. Transcript of Oral Argument at 28, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451).

133. Ellen Podgor describes this as an "eye-opening example of improper prosecutorial statutory stretching in [the area of obstruction of justice]." Podgor, *supra* note 28, at 530–31.

134. *Yates*, 135 S. Ct. at 1079.

135. *Id.* at 1101 (Kagan, J., dissenting).

136. 18 U.S.C. § 1519 (2012) ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.").

137. *Yates*, 135 S. Ct. at 1098 (Kagan, J., dissenting) ("The plurality points to the breadth of § 1519 . . . as though breadth were equivalent to ambiguity. It is not. Section 1519 is very broad. It is also very clear.").

138. Indeed, I suspect that had the question been whether a multinational agricultural business violated this provision by destroying livestock to impede an inspection, it would hardly have been a question at all. So much of the power of the Yates case comes from the powerful narrative: a local fisherman was federally prosecuted for violating laws made to prevent the next Enron.

conduct (i.e., conduct that should be governed by civil statute or no statute at all).”¹³⁹ This is a good definition insofar as it seems to correctly describe the phenomenon people are complaining about under the rubric of overcriminalization; however, it also reveals the limited content carried by the label as it struggles to bridge the is-ought gap. There simply is no truth value to the phrase “X is unremarkable conduct that should be governed by civil statute or no statute at all,” absent resort to deeper normative claims about the nature and purpose of criminal law.

Traditionally, this gap has been bridged by the harm principle. John Stuart Mill gives the most famous and clearest iteration of this rule:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.¹⁴⁰

The harm principle, however, functions only if people agree about what constitutes harm. It ceases to serve any function when most, if not all, human conduct is understood to generate non-trivial harms to others.

Bernard Harcourt outlined these shortcomings in detail, concluding that: “[t]he harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate.”¹⁴¹ Writing in the 1990’s, Harcourt concentrated on harm arguments offered regarding quality of life offenses, pornography, and homosexuality. Today, the list could credibly be expanded to include driving, eating meat, maintaining a lawn, choosing pronouns, or almost any activity. Harcourt suggested that the collapse of the harm principle might prove beneficial; the real argument ought to be in comparing relative harms while recognizing that harm is nearly ubiquitous.¹⁴² The nuance to which Harcourt aspired¹⁴³ is admirable, but there is a real cost in terms of clarity and certainty as the debate shifts from identifying the set of harmful activities to measuring relative harms.

The concept of overcriminalization would be simple if we retained a bright-line and generally-accepted harm principle; but we do not. Accordingly,

139. Haugh, *supra* note 82, at 1194; *see also* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2136 (1998) (“Most legal academics . . . would probably . . . agree that there are too many criminal statutes on the books, and that those statutes are frequently too broad and too vague.”).

140. John Stuart Mill, *On Liberty*, in *THREE ESSAYS* 15 (Oxford Univ. Press ed., 1912).

141. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 *J. CRIM. L. & CRIMINOLOGY* 109, 113 (1999).

142. *Id.* at 193.

143. “Aspire” may be the wrong word; Harcourt was describing the state of the debate, and in that regard, he was correct.

overcriminalization occurs not where people are punished for conduct that does not harm others, but rather where the harms associated with forbidding certain conduct outweigh the harms associated with permitting that conduct. If only because it is a far more complicated and wide-ranging inquiry than the question of whether X harms others, this debate tends toward irresolution.

2. *The Descriptive Claim: Expansive Criminalization*

Less contentious than the question of whether too much conduct is criminalized, however, is the *fact* that a great deal of conduct is criminalized. While overcriminalization may be a disputable normative claim, that our criminal law is extensive in scope is a nearly indisputable descriptive claim. A broad swath of human activity is subject to criminal law.¹⁴⁴ William Stuntz catalogued a sample of state laws that could subject people to prison time as of 2001:

Florida criminalizes selling untested sparklers, or altering tested ones; it also bans the exhibition of deformed animals . . . California criminalizes knowingly allowing the carcass of a dead animal “to be put, or to remain, within 100 feet of any street, alley, public highway, or road . . .” It also criminalizes the sale of alcohol to any “common drunkard” and cheating at cards. Ohio criminalizes homosexual propositions and “ethnic intimidation.” Texas criminalizes overworking animals, causing two dogs to fight, and violation of rules concerning recruitment of college athletes. Massachusetts criminally punishes frightening pigeons away from “beds which have been made for the purpose of taking them in nets.”¹⁴⁵

The list has changed somewhat, but not in a manner that alters the conclusion that a vast array of conduct is subject to criminal law.

This latter descriptive claim, that criminal laws apply to a broad range of human affairs, is sufficient to recognize the phenomenon of regulation by prosecutor. Since prosecutorial authority mirrors the scope of substantive criminal law, that authority is broad, and it empowers to regulate across a vast expanse of conduct.

B. Enforcement Mechanisms

A necessary but not sufficient condition of prosecutors’ ability to demand regulatory terms is a mechanism to enforce those terms. There are two ways prosecutors can enforce regulatory terms incorporated into plea or other settlement agreements such as DPAs and NPAs. First, and most common, prosecutors rely on the court power to impose a probationary sentence, or a sentence with a component of supervised release. Second, and more powerful, is the prosecutors’ ability to

144. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) (“Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over.”).

145. *Id.* at 515–16 (internal citations omitted).

negotiate terms beyond the scope of probation, solely based on their discretion to dismiss or not pursue charges.

1. *Probation and Plea Bargaining*

Court-administered probation and supervised release allow for a broad array of conditions and serve as the backbone of prosecutorial regulation. Probation allows expansive new terms; plea bargaining allows prosecutorial control of these terms in the vast majority of cases.

Federal courts do not have an inherent power to impose and administer probation; probation and supervised release¹⁴⁶ are strictly creatures of statute.¹⁴⁷ The vast majority of state courts addressing the question have reached the same conclusion.¹⁴⁸

This question of inherent authority first was directly addressed by the Supreme Court. In *Ex parte United States*, the Supreme Court reviewed what effectively amounted to the imposition of probation, absent statutory authority, by a trial court.¹⁴⁹ The defendant was convicted in the Northern District of Ohio of embezzling money from a bank of which he was an officer.¹⁵⁰ The minimum sentence for his conviction was five years in prison.¹⁵¹ The trial judge, however, ordered “that the execution of the sentence be, and it is hereby, suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years.”¹⁵²

The court had no clear authority to issue this order. There was an historical precedent for such suspensions,¹⁵³ but there was no statute providing for the suspension of the sentence in this way. Sentences had been temporarily suspended pending the resolution of a known legal issue, such as to allow the defendant to apply for a pardon, but this potentially permanent suspension was new.¹⁵⁴ The sentencing judge explained his ruling as follows:

146. Supervised release can be added to a term of imprisonment, to be served after release from prison. See 18 U.S.C. §3583(a) (2012) (“Inclusion of a term of supervised release after imprisonment.”). In practice, supervised release is not very different than probation, except that it follows imprisonment rather than replacing imprisonment. The differences that do exist relate to the standards and effects of revoking either status.

147. See *Affronti v. United States*, 350 U.S. 79, 83 (1955) (“Federal judicial power to permit probation springs solely from legislative action.”).

148. See John D. Perovich, Annotation, *Inherent Power of Court to Suspend for Indefinite Period Execution of Sentence in Whole or in Part*, 73 A.L.R.3d 474 (1976).

149. *Ex parte United States*, 242 U.S. 27, 37 (1916).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 41 (“[I]n both the state and Federal courts, over a very long period of time, the power here asserted has been exercised, often with the express, and constantly with the tacit, approval of the administrative officers of the state and Federal governments.”). For more history of probation, dating back to “John Augustus, a Boston cobbler, who in 1841 altruistically took it upon himself to intervene on behalf of ‘common drunkards’ and petty criminals, rescuing them from squalid houses of correction,” see Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 174–75 (2003).

154. *Ex parte United States*, 242 U.S. at 42.

Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but, affecting its extent and character, we consider the effect of the situation upon the individual, as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies.¹⁵⁵

These “modern notions” refer to rehabilitation (“an effort to reform him from . . . a career criminal”) and deterrence (the “effect of the disposition of it upon others of criminal tendencies”) joining retribution as purposes of punishment. The shift from purely punitive sentences to more regulatory sentences had begun. The court may have been prescient, but it was reversed because it lacked authority to suspend the sentence in this way.¹⁵⁶

In 1925, Congress granted federal courts the authority to impose probation in place of prison or fines.¹⁵⁷ Today, federal courts are authorized to impose probation in lieu of prison or fines, or supervised release on release from prison are codified at 18 U.S.C. §§ 3561 *et seq.*, and 18 U.S.C. § 3583, respectively. Permissible terms include orders that the defendant provide child support,¹⁵⁸ maintain employment,¹⁵⁹ refrain from specified occupations,¹⁶⁰ avoid contact with specified persons,¹⁶¹ refrain from excessive use of alcohol,¹⁶² not possess firearms,¹⁶³ undergo psychiatric treatment,¹⁶⁴ report to prison custody on weekends or nights,¹⁶⁵ perform community service,¹⁶⁶ reside in certain

155. *Id.* at 38.

156. *Id.* at 51–52 (“[W]e can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution”). The potential impact of this decision was significant. Because courts had been sentencing similarly without the authority to do so, “many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal, presents a grave situation.” *Id.* at 52. The Supreme Court responded to this potential injustice and hardship by suggesting that complete remedy rested with the pardon power, while pointing to congressional legislation for future relief. *Id.*

157. Probation Act of 1925, ch. 521, 43 Stat. 1259 (1925) (codified at 18 U.S.C. §§ 724–727 (2012)). All states had already granted such authority to their courts. *See* *United States v. Murray*, 275 U.S. 347, 355 (1928) (“At the present time every state has a probation law, and in all but 12 states the law applies both to adult and juvenile offenders.”) (quoting legislative history supporting The Probation Act).

158. 18 U.S.C. § 3563(b)(1) (2012).

159. *Id.* § 3563(b)(4).

160. *Id.* § 3563(b)(5).

161. *Id.* § 3563(b)(6).

162. *Id.* § 3563(b)(7).

163. *Id.* § 3563(b)(8).

164. *Id.* § 3563(b)(9).

165. *Id.* § 3563(b)(10).

166. *Id.* § 3563(b)(12).

areas,¹⁶⁷ not reside in certain areas,¹⁶⁸ and “satisfy such other conditions as the court may impose.”¹⁶⁹ While these statutes were originally silent about their applicability to non-natural persons, courts had no difficulty concluding that corporations too are subject to probationary sentences.¹⁷⁰ The courts’ interpretations have been affirmed by subsequent revisions to the statute that make clear that organizations can be subject to probation.¹⁷¹ The maximum duration of probation or supervised release is set by the class of offense,¹⁷² and given the breadth of possible conditions, duration represents the only meaningful limit on probationary authority.¹⁷³

Courts plainly have the authority to impose each of the conditions described above. Requiring that a corporation revamp its compliance program or make other governance changes is not specified by statute, largely because the statute does not appear to directly contemplate application to corporations; however, once the statute is held to apply to corporations these conditions easily fit within the residual clause.¹⁷⁴ Bans from law enforcement are directly addressed by statute.¹⁷⁵ Limits on speech fit in the residual clause, as do bans from office and submission to additional regulations.¹⁷⁶ Probation and supervised release thus allow for a broad range of terms limited by little more than the court’s imagination.

Control of probation often lies, however, with the prosecutor, not the judge. Plea bargaining resolves the overwhelming majority of criminal cases.¹⁷⁷ When the Supreme Court first recognized plea bargaining as a legitimate process within our justice system, it relied in large part on the “mutuality of advantage” enjoyed by

167. *Id.* § 3563(b)(13).

168. *Id.*

169. *Id.* § 3563(b)(22).

170. See Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1, 14 (1988) (“[C]orporate probation in federal sentencing developed as somewhat of an afterthought: a device implied, but not expressly provided for under the Federal Probation Act.”); see also *United States v. Atl. Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972) (“[C]orporations are subject to the statutory provisions authorizing the court to suspend the imposition or execution of sentence.”); *United States v. Interstate Cigar Co.*, 801 F.2d 555, 556 (1st Cir. 1986) (surveying “the reported cases in which federal courts have put corporations on probation”).

171. 18 U.S.C. § 3551(c)(1).

172. *Id.* §§ 3561(c), 3583(b), (j).

173. Courts have interpreted the residual “such other conditions” clause to be limited only by the valid purposes of sentencing, 18 U.S.C. § 3553(a), the parsimony principle limiting sentences to those “sufficient, but not greater than necessary,” to achieve those purposes, *id.* §§ 3553(a), 3583(d)(2), and policy statements of the U.S. Sentencing Commission, *id.* § 3583(d)(3). See *United States v. Anderson*, 583 F.3d 504, 509 (7th Cir. 2009).

174. 18 U.S.C. § 3563(b)(22) (authorizing the court to require the defendant to “satisfy such other conditions as the court may impose”).

175. *Id.* § 3563(b)(5) (“[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.”).

176. *Id.* § 3563(b)(22).

177. See Gilchrist, *supra* note 103, at 611 (providing statistics on percentage of cases resolved by plea bargaining in federal and state courts).

both parties,¹⁷⁸ and the “giveandtake” of the negotiation.¹⁷⁹ These terms now ring like hollow echoes from formalist chambers bearing little relation to the generally one-sided and often coercive bargains that resolve most criminal cases.¹⁸⁰ It is the prosecutor, therefore, and not the judge (or defense counsel) who has by far the greatest voice in determining the terms of punishment. Coupling this power with expansive probationary terms, prosecutors have secured what amounts to a position of continuing regulatory authority over defendants.

2. Charge Bargaining

Prosecutors can secure terms that extend beyond the permissible scope of probation by agreeing to dismiss or not pursue viable charges in exchange for the defendant’s acquiescence to those terms. As there is almost no check on prosecutorial discretion, this expands prosecutors’ regulatory power considerably.

Consider the case of Nicholas Hogan—the police officer referenced above who was banned from seeking employment in law enforcement for fifteen years. Mr. Hogan faced no more than one year of court supervision. While probation and supervised release could not govern a fifteen-year regulator penalty, charge bargaining could.

Mr. Hogan was convicted of violating the civil rights of a detained man by spraying him with pepper spray after he was restrained and of no danger to anyone, apparently just for getting “mouthy.”¹⁸¹ Mr. Hogan was convicted of a misdemeanor,¹⁸² and because he was also sentenced to a term of prison, supervised release, not probation, would be the appropriate remedy.¹⁸³ The maximum duration of supervised release for a misdemeanor is “not more than one year.”¹⁸⁴ Yet the plea agreement called on Mr. Hogan not to seek employment related to law enforcement for a period of fifteen years, well beyond the time when he would be subject to any sort of court supervision.¹⁸⁵ The terms of the agreement thus extend well beyond the duration of supervised release during which the defendant remains answerable to the court. The enforcement mechanism for the fifteen-year ban is the ability of the U.S. Attorney’s Office for the Western District of Washington to hold Mr. Hogan in breach of the

178. *Brady v. United States*, 397 U.S. 742, 752 (1970).

179. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

180. See, e.g., Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REVIEW OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> (“[I]n both the state and federal systems, the power to determine the terms of the plea bargain is, as a practical matter, lodged largely in the prosecutor, with the defense counsel having little say and the judge even less.”); see also Lynch, *supra* note 139, at 2132 (“The frequent disparity of power between the prosecutor and the defendant makes the role-definition of the prosecutor particularly important to the outcome of the negotiation.”).

181. See Plea Agreement ¶ 9(i), *United States v. Nicholas Hogan*, CR16-154JCC (W.D. Wash. Nov. 2, 2016).

182. See 18 U.S.C. § 3559(a)(6) (2012).

183. See *id.* § 3551(b) (allowing for a sentence of probation *or* imprisonment, but not both); *id.* § 3583 (allowing courts to include a term of supervised release following a term of imprisonment).

184. *Id.* § 3583(b)(3).

185. Plea Agreement, *supra* note 181, ¶ 14.

agreement. “[The] Defendant agrees that if Defendant breaches this Plea Agreement, the United States may withdraw from this Plea Agreement and the Defendant may be prosecuted for all offenses for which the United States has evidence.”¹⁸⁶

Mr. Hogan pled to a misdemeanor information, and the government dismissed the indictment alleging *felony* deprivation of rights under color of law that would expose Hogan to ten years in prison.¹⁸⁷ Hogan admitted in his plea agreement to spraying the victim, while in four-point restraints, with oleoresin capsicum (pepper spray), to kneeling the victim in the head multiple times, and to shoving the handcuffed victim down a hospital hallway until he fell, at which time the officer climbed atop the victim to hold him down with a knee in the back.¹⁸⁸ The prosecution could have argued that pepper spray is a dangerous weapon,¹⁸⁹ and so long as the abuse as a whole inflicted *some* injury it would arguably be sufficient to constitute bodily injury.¹⁹⁰ It forwent these arguments as part of the plea agreement, and dismissed the felony indictment; however, it retained the ability to reinstate and pursue the felony charges should Hogan breach the agreement. By this mechanism, functioning almost entirely on the prosecutor’s power to pursue or not pursue charges at his own discretion, the prosecutor was able to introduce terms of the plea that spanned well past any viable court supervision.

C. Failed Regulators and Public Demand

The expansion of the prosecutorial regulatory function cannot fully be explained without reference to public demand. And that demand is itself attributable, at least in part, to the perceived failure of regulators.

When those with responsibility to regulate a particular industry or field are perceived as failing, there is a call for a prosecutorial response. The 2008 financial crisis, and regulatory oversight of Wall Street more generally, provide a clear

186. *Id.* ¶ 15.

187. Section 242 of title 18 distinguishes between misdemeanor (one year maximum) and felony (ten year maximum). The civil rights violation itself is a misdemeanor, while the same violation is a felony if it includes use of a dangerous weapon or causes bodily injury.

188. *Id.* ¶ 9.

189. There is decidedly split authority on this question. The Ninth Circuit has found pepper spray to be a “dangerous weapon,” but it did so on facts that went beyond those contained in the Hogan record and under the sentencing guidelines, not Title 18. *See* *United States v. Neill*, 166 F.3d 943, 949–50 (9th Cir. 1999) (“Because in this case, pepper spray caused extreme pain and prolonged impairment of a bodily organ, it satisfied the definition of a dangerous weapon, and the district court correctly adjusted the sentence.”); *see also* *Danley v. Allyn*, 485 F. Supp. 2d 1260, 1268 (N.D. Ala. 2007), *aff’d sub nom*; *Danley v. Allen*, 540 F.3d 1298 (11th Cir. 2008) (“Everybody familiar with pepper spray, including these defendants, knew or should have known that pepper spray causes injury and probably likely requires medical intervention after its use.”). Other courts have found—also under the sentencing guidelines and on different records—that pepper spray is not a dangerous weapon. *See* *United States v. Perez*, 519 F. App’x 525, 528 (11th Cir. 2013). The point, however, is not whether the prosecution would prevail; rather, it is enough that the prosecution has retained the ability to pursue these arguments—implicating a potential ten-year sentence for the defendant—should the defendant violate his agreement not to seek employment in law enforcement.

190. *United States v. Budd*, 496 F.3d 517, 530–31 (6th Cir. 2007) (“Although a pretrial detainee’s injuries must be more than *de minimis* to support a constitutional violation, they need not be ‘serious’ or ‘significant[.]’”).

example. The Office of the Comptroller of the Currency has faced intense criticism for its regulatory failings in the face of egregious misconduct by banks.¹⁹¹ The Securities and Exchange Commission was widely viewed as ineffective in relation to Bernie Madoff's Ponzi scheme.¹⁹² Much of the public responded by demanding criminal prosecutions.¹⁹³

Concerns about regulators are not limited to the corporate context. For example, there is reason for concern about the efficacy of those who regulate the police. A Department of Justice report on the particular problems within the Baltimore Police Department concluded that a lack of accountability allowed for "a pattern and practice of conduct that violates the Constitution or federal law," including unconstitutional stops, searches, and arrests, racially disparate enforcement strategies, use of excessive force, and retaliation against constitutionally-protected expression.¹⁹⁴ The accountability problem involved multiple layers of reinforcing failures:

BPD lacks meaningful accountability systems to deter misconduct. The Department does not consistently classify, investigate, adjudicate, and document complaints of misconduct according to its own policies and accepted law enforcement standards. Instead, we found that BPD personnel discourage complaints from being filed, misclassify complaints to minimize their apparent severity, and conduct little or no investigation. As a result, a resistance to accountability persists throughout much of BPD, and many officers are reluctant to report misconduct for fear that doing so is fruitless and may provoke retaliation. The Department also lacks adequate civilian oversight—its

191. See, e.g., OCC OFFICE OF ENTERPRISE GOVERNANCE AND THE OMBUDSMAN, LESSONS LEARNED REVIEW OF SUPERVISION OF SALES PRACTICES AT WELLS FARGO 4–5 (2017).

(finding that the OCC did not take timely and effective supervisory actions after the bank and the OCC identified significant issues with complaint management and sales practices); see also STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS AND TERRORIST FINANCING: HSBC CASE HISTORY 282–335 (2012) (cataloguing failings at the OCC that permitted HSBC to engage in continued and egregious misconduct).

192. See U.S. SEC. & EXCH. COMM'N, OFFICE OF INSPECTOR GEN., CASE NO. OIG-509 INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME 1 (2009), <https://www.sec.gov/files/oig-509-exec-summary.pdf> ("[T]he SEC received more than ample information in the form of detailed and substantive complaints over the years to warrant a thorough and comprehensive examination and/or investigation of Bernard Madoff and BMIS for operating a Ponzi scheme, and that despite three examinations and two investigations being conducted, a thorough and competent investigation or examination was never performed."); see also Eamonn Fingleton, *Madoff and the SEC: The Story You Don't Know*, FORBES MAGAZINE (June 4, 2013), <https://www.forbes.com/sites/eamonnfingleton/2013/06/04/heres-one-reason-why-east-asians-think-america-is-a-basket-case/#42176d9b29a7> (describing "what the Madoff affair says about the truly abysmal state of U.S. financial regulation").

193. See Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41, 66 (2016) ("Public opinion polls consistently showed broad support for more prosecutions after the 2008 financial crisis. The majority of the public—seventy-nine percent in one survey—wanted prosecutors to find the people who were responsible for the financial crash and send them to jail.") (internal citations omitted).

194. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016), <https://www.justice.gov/opa/file/883366/download>.

Civilian Review Board is hampered by inadequate resources, and the agency's internal affairs and disciplinary process lacks transparency.¹⁹⁵

These findings were specific to Baltimore, but lack of accountability for police officers is not. Recent polls suggest that Americans do not believe the police are effective regulators of police misconduct.¹⁹⁶ There are efforts to improve this perception. For example, most states have a peace officer service and training agency authorized to certify law enforcement officers, and the vast majority of those are also authorized to revoke certification for misconduct.¹⁹⁷ And this is but one of a host of changes representing the “professionalism movement in policing [that] brought with it greater attention to the selection and training of officers, the removal of political interference, and stronger management.”¹⁹⁸ The public demand for prosecutorial oversight of abusive police, however, has not abated.

Where regulatory schemes are perceived as insufficient—either as a matter of substance or process—people often think of criminal law as a solution.¹⁹⁹ Prosecutors are empowered because they are called upon at times of crisis. As Miriam Baer describes this phenomenon, “the issue is not merely one of statutory or procedural blurriness between criminal and civil law, but rather a reflection of a deeper, intuition-driven response to moral outrage.”²⁰⁰ This demand for criminal justice further empowers prosecutors to engage in a more prospective, more regulatory enterprise.

More generally, the public seems favorably disposed to a more regulatory approach to crime. Consider but one contemporary example of prospect regulation of defendants that enjoys extraordinary support from the bench, the bar, and the public: drug courts.²⁰¹ Although specifics vary between

195. *Id.* at 10.

196. Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1034–35 (2016) (“An August 2014 poll conducted by *USA Today* and the Pew Research Center found that 65% of Americans believe that police departments nationwide do a poor or fair job of holding police officers accountable when misconduct occurs, compared with 30% who say they do an excellent or good job. A separate 2014 poll found that while a large majority of Americans (78%) have a favorable view of the police, only 46% believe that police officers are held accountable for wrongdoing.”) (internal citations omitted).

197. Loren T. Atherly & Matthew J. Hickman, *Officer Decertification and the National Decertification Index*, 16 POLICE Q. 420, 424 (2013).

198. *Id.* at 422.

199. See Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 280 (2014) (“I suspect (but cannot prove) that the loudest calls for corporate executive prosecutions come from those who would have preferred more regulatory controls on corporate behavior before 2008 and who aren't satisfied with the regulatory response since then.”).

200. Baer, *supra* note 30, at 583. Baer is specifically describing how punishment is favored over regulation; however, the principle that the public demands criminal consequences underlies both that trend and the demand for prosecutorial action.

201. See William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENT'G. REP. 179, 179 (2001–2002) (“Drug courts work—the research proves it and there are science-based reasons for the research findings.”); NAT'L ASS'N OF DRUG COURT PROF'LS, ADULT DRUG COURT BEST PRACTICE STANDARDS: VOLUME 1, at vi (2013), <https://www.ndci.org/wp-content/uploads/2013/08/Best-Practice-Standards-Vol.-I.pdf> (“Now an international movement, Drug Courts are the shining example of what works in the justice system. Today, there

jurisdictions,²⁰² the basic principle of drug courts is to replace traditional punishments with rehabilitative treatment qualified offenders whose offense stems from a substance abuse problem.²⁰³ The probationary process involves more collaboration between the defendant and the court than in traditional criminal courts.²⁰⁴ For example, the Best Practice Standards describe the drug court judge's demeanor as follows:

The judge offers supportive comments to participants, stresses the importance of their commitment to treatment and other program requirements, and expresses optimism about their abilities to improve their health and behavior. The judge does not humiliate participants or subject them to foul or abusive language. The judge allows participants a reasonable opportunity to explain their perspectives concerning factual controversies and the imposition of sanctions, incentives, and therapeutic adjustments.²⁰⁵

Perhaps the most distinctive feature of drug courts is their reimagining of the judge's role not only as non-adversarial, but also as a "personal, hands-on supervisor of individual defendants."²⁰⁶

Drug courts do not embody the idea of prosecutorial regulation because they embrace principles of therapeutic justice and engage all parties in a collaborative effort. If anyone is the regulator of the defendant in drug courts, it is the drug court judge, not the prosecutor.²⁰⁷ Drug courts are distinct from the other examples discussed herein because they reflect a near consensus that substance abuse is a treatable, medical problem. Yet, even with these distinctions, drug courts do exemplify the trend toward prospective regulation of defendants and away from traditional punishment. The sheer popularity of the drug court model suggests a strong appetite for prospective, regulatory treatment of defendants as a substitute—at least in some matters—for traditional punishment.

are over 2,700 Drug Courts operating in the U.S., and another thirteen countries have implemented the model.”). *But see* Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1488 (2004) (concluding that “from a due process perspective, drug courts raise serious problems”).

202. Miller, *supra* note 201, at 1489 (“In practice, there is no ideal or standard drug court; there are, rather, an immense number of local variations on the basic model.”).

203. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DRUG COURTS 1 (2018), <https://www.ncjrs.gov/pdffiles1/nij/238527.pdf> (“Adult drug courts employ a program designed to reduce drug use relapse and criminal recidivism among defendants and offenders through risk and needs assessment, judicial interaction, monitoring and supervision, graduated sanctions and incentives, treatment, and various rehabilitation services.”).

204. Miller, *supra* note 201, at 1491 (explaining that “drug court procedure embodies a non-adversarial partnership among the criminal justice, correctional, and treatment systems”).

205. NAT’L ASS’N OF DRUG COURT PROF’LS, *supra* note 201, at 21.

206. Miller, *supra* note 201, at 1491.

207. *Id.* at 1492

V. THE VALUE OF REGULATION BY PROSECUTOR

This Article has largely aimed to establish that prosecutors use plea agreements to assume a regulatory position over some defendants. Many have complained about regulatory prosecutors in the corporate context. Having determined that the phenomenon is not limited to corporate criminal investigations, the question remains whether regulation by prosecutor, is a good thing.

There can be no single answer to this inquiry. The subject is too multifaceted. Indeed, some will argue that there simply is no unifying thread between bars from employment, mandated public apologies, bans from office, and corporate governance. That argument, however, requires rejecting a distinction between these terms that are almost exclusively remedial and the traditional and foundationally retributive punishments such as prison and fines. It also requires rejecting the reality that prosecutors maintain ever more prospective control over defendants' lives as a result of these terms. "Prosecutors as regulators" is real, and even if the phenomenon is too broad to admit of a singular normative assessment, it remains important to consider the costs and benefits it introduces to our system of criminal justice and society more broadly.

A. *Benefits: Independence and Tailoring*

The benefits are fairly clear. First, federal prosecutors are relatively independent and immune from capture.²⁰⁸ Public opinion seems to have shifted on this matter, particularly in the wake of the 2008 Financial Crisis that many believe brought too few prosecutions of those responsible. In the years following the crisis, many suggested that federal prosecutors failed to bring cases because they were in some way beholden to the power of Wall Street.²⁰⁹ Others have suggested that the culture and incentives within prosecutors' offices had shifted, causing prosecutors to favor a cooperative and remedial approach to corporate malfeasance.²¹⁰ I have disputed the former²¹¹ and largely agreed with the latter.²¹² However, it remains the case

208. See Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 982 (2009) ("Federal prosecutors are not as likely to fall prey to capture as their counterparts in administrative agencies because, unlike the policymakers at the SEC and similar agencies, prosecutors are judged primarily by their criminal convictions.").

209. See MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, *THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET* 6 (2017) (arguing that "[o]nly raw economic and political power can account for [the] gross injustice" of failing to seek criminal sanctions against individuals in the wake of the financial crisis.); Jesse Eisinger, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* xix–xxi (2017).

210. See Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?* N.Y. REVIEW OF BOOKS (Jan. 9, 2014), <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>.

211. See generally Gregory M. Gilchrist, *Opacity, Fragility, and Power: Lessons from the Law Enforcement Response to the Financial Crisis*, 83 BROOK. L. REV. 647, 659–61, 669–70 (2018) (reviewing RAMIREZ & RAMIREZ, *supra* note 209).

212. See Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. COLO. L. REV. 1 (2014).

that federal prosecutors are judged on and benefit from their prosecutorial successes, and the greatest successes are those in high-profile matters against powerful defendants.²¹³ Prosecutors' independence is further fostered by the fact that they apply generalized criminal law instead of specialized regulatory standards.²¹⁴ Few if any regulatory agencies, on the other hand, enjoy a similar reputation for independence.²¹⁵

Second, the one-off post hoc regulations enabled through the prosecutorial process can be tailored to the particularities of a particular industry, company, or individual. Corporate governance and compliance are not susceptible to uniform standards: what works for a mid-size medical services provider is unlikely to fit a global financial institution.²¹⁶ Likewise the determination of whether and for how long a particular law enforcement officer ought to be barred from further service for having committed a crime is fact specific: the officer receiving successful treatment following a conviction for possession of narcotics should be treated differently than the officer who abused his authority to commit a hate crime. Empowering prosecutors to serve in a regulatory capacity over these determinations allows for more nuanced and fair judgments.

B. Costs: Expertise, Coercion, and Arbitrariness

The costs, however, are also clear. Prosecutors may not be qualified regulators, the criminal process may be too coercive, and criminal enforcement may be too arbitrary.

1. Generalist Regulators

Prosecutors are generalists, frequently regulating in areas about which they have little expertise. Prosecutors are not selected for expertise in the substantive areas often regulated by their plea agreements. They tend to be hired based on their

213. As Judge Rakoff describes it:

I completely discount the argument sometimes made that no such prosecutions have been brought because the top prosecutors were often people who previously represented the financial institutions in question and/or were people who expected to be representing such institutions in the future: the so-called "revolving door." In my experience, most federal prosecutors, at every level, are seeking to make a name for themselves, and the best way to do that is by prosecuting some high-level person.

Rakoff, *supra* note 210.

214. See James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115, 156 (2012) ("Drawing upon the power of the criminal law, federal prosecutors are likely to focus on enforcing public values rather than deferring to industry standards.").

215. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.").

216. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.800 [hereinafter U.S. ATTORNEYS' MANUAL] ("The Department has no formulaic requirements regarding corporate compliance programs."); Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 794-95 (2014) (explaining that "agencies and courts reject compliance as one-size-fits-all").

knowledge of the criminal law and ability or potential in the courtroom. This tendency is not absolute of course. At the state level most lead prosecutors are elected, and politics or perceived toughness may be as or more important. Still, whatever selection criteria apply for prosecutors, expertise in governing corporations, managing teachers or police officers, vetting political candidates, or regulating coal-mines and banks would not rank highly. Judge Lynch made this point twenty years ago:

The environmental lawyers, scientists and economists at the EPA know better than criminal lawyers in the Justice Department how important it is to deter violations of each particular rule; generalist prosecutors are not especially well placed to assess the priority of clean air violations versus water pollution offenses, or to judge the environmental harm created by a particular offense. If deciding whether to pursue a criminal remedy is more or less the same kind of decision as determining the level of a civil penalty, or how to regulate a particular kind of emission—in essence, a balancing of the incentives and costs to be imposed on business in order to protect the environment without overly inhibiting valuable economic activity—the power to institute criminal charges should lie primarily with the expert administrators who are assigned to make those judgments.²¹⁷

The concern about empowering generalists is blunted by a few factors. First, in some of these cases, prosecutors are acting in concert with subject-matter experts. Criminal investigations of firms in highly-regulated industries frequently involve both Department of Justice prosecutors and regulators from the relevant agency. For example, the criminal investigation of the Upper Big Branch Mine disaster was led by the Department of Justice, but the Department of Labor's Mine Safety and Health Administration ("MSHA") played a key role throughout²¹⁸ and brought additional expertise to bear by involving the West Virginia Office of Miners' Health Safety and Training, the Governor's Independent Investigative Panel, and the United Mine Workers of America.²¹⁹ In such cases, prosecutors can be expected to rely on the subject matter experts much as lawyers frequently do in complex civil litigation. Second, in some matters one could fairly question what relevant expertise exists, and accordingly conclude that federal prosecutors are sufficiently knowledgeable to regulate.²²⁰ Finally, in some cases outsourcing to third-party experts mitigates the expertise problem. For example, in December 2015, Chem-Solv pled guilty to knowingly transporting hazardous waste without a

217. Lynch, *supra* note 83, at 53–54.

218. See MSHA UPPER BIG BRANCH INVESTIGATION REPORT, *supra* note 67, at 1 ("MSHA and the Department of Labor's Office of the Solicitor continue to cooperate with the Department of Justice in the criminal investigation of the tragedy.").

219. *Id.*

220. See, e.g., Meitl, *supra* note 48, at 22 ("The education and experience that prosecutors bring to the bargaining table in the context of corporate criminal crimes provides a sufficient framework for corporate governance decisions.").

manifest and knowingly storing hazardous waste without a permit.²²¹ As part of its plea agreement, Chem-Solv agreed to “develop, fund, and implement a comprehensive Environmental and Safety Compliance Plan (“ECP”) to prevent future violations,” and to “conduct an audit of each of its facilities at least once per calendar year to determine whether they are in compliance with the ECP and all applicable environmental and worker safety regulations.”²²² Establishing a plan to comply with all environmental and safety regulations requires expertise beyond that typically housed in prosecutors’ offices. Accordingly, the plea agreement specifies that the ECP will be prepared by, and audits will be conducted by, “an outside and independent environmental consultant acceptable to the United States.”²²³

2. Coercion and Overregulation

Regulation under threat of indictment can be coercive and as a consequence may be overly burdensome. In the corporate context, federal prosecutors are empowered to indict the entity whenever a single agent commits a single criminal act in the scope of her agency.²²⁴ Strict enforcement of this standard would be neither possible nor desirable, and the Department of Justice recognizes as much: “it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee.”²²⁵ The policy, however, is merely an internal guidance on the prudent use of discretion, and violations of or deviations from the policy are not externally controlled.²²⁶ While federal prosecutors tend to be reasonable in discretionary decisions regarding whether to initiate an enforcement action against a corporation, their authority at positive law is nearly unlimited and their action in practice remains broad. Given the breadth of substantive laws applicable to corporations, prosecutors maintain broad discretionary authority to engage in the sort of negotiations that tend to result in D/NPAs, often with prospective regulatory functions.²²⁷

The same can be said for more traditional, individual prosecutions. As addressed above,²²⁸ whether one subscribes to the normative claims of overcriminalization, a vast array of conduct has been criminalized. William J. Stuntz identified three

221. Plea Agreement ¶ 1, *United States v. Chem-Solv, Inc.*, Case No. 7:15-CR-106, (W.D. Va. Dec. 22, 2015).

222. *Id.* at ¶¶ 13.B, 13.C.

223. *Id.*

224. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493 (1909).

225. See U.S. ATTORNEYS’ MANUAL, *supra* note 216, § 9-28.500.

226. See *id.* § 1.1-200 (“The Justice Manual provides internal DOJ guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the DOJ.”).

227. See Arlen & Kahan, *supra* note 18, at 376 (concluding that prosecutors mandate governance changes when a firm is found not to have an effective compliance policy, and arguing that this is too broad).

228. See *supra* Section IV(A).

consequences of broad criminalization: de facto power to define illegal conduct shifts to prosecutors, de facto adjudicative power shifts to prosecutors, and the expressive function of criminal law is diluted.²²⁹ Under the first of these conditions, prosecutors maintain broad discretionary power over a large number of people in a wide range of situations; under the second, prosecutors secure the ability, as a practical matter, to impose terms of settlement on those people they choose to prosecute. Prosecutorial regulatory authority over persons and entities is thus primarily limited by two factors: their own discretion and limited resources.

Under these circumstances, overregulation becomes a distinct danger.²³⁰ Whether they take the form of additional compliance measures and new corporate governance controls or barring an individual from law enforcement or public office, regulations imposed by prosecutors cost prosecutors little or nothing. Particularly in the context of real people trying to avoid or minimize incarceration, employment bans and compelled speech are easy concessions for the defense to make, and there are few checks to prevent prosecutors from demanding terms more burdensome than be necessary.

3. *Arbitrary Enforcement*

That prosecutors regulate seems plain, but it does not follow that regulation could or should be left to prosecutors. Enforcement-based regulation is untenable if only because it would be woefully incomplete. Many crimes go undetected or unsolved; most crimes go unpunished. Of course, this assertion is difficult to prove. The difficulty stems in part from discrepancies in record-keeping and reporting by the various law enforcement departments across the nation. It also arises because the measure of “closed-cases/crime” will never have a reliable denominator. Indeed, one set of crimes for which there can be no closed case is comprised of crimes that were never detected; that is, crimes we don’t even know about. That we lack a perfect measure, however, should not obscure the fact that a significant portion of criminal conduct ends up undetected, or unprosecuted, or unpunished.²³¹ For example, one would expect violent crimes to have relatively high clearance rates and somewhat more reliable numbers (if only because bodies and bodily injuries show up in a way tax evasion doesn’t); yet violent crime clearance rates are

229. Stuntz, *supra* note 144, at 519–22.

230. As Miriam Baer wrote in the corporate context:

Unlike regulations that are promulgated by agencies subject to the Administrative Procedure Act and subject to extensive judicial review, regulations by prosecution are subject to none of the checks and balances that ordinarily accompany agency regulations, such as expert analysis, notice and comment periods, and political accountability for final rules

Miriam H. Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1065 (2008).

231. NPR hosts a dataset on this matter that is both helpful and imperfect. See Martin Caste, *How Many Crimes Do Your Police “Clear?” Now You Can Find Out*, NPR (Mar. 30, 2015), <http://www.npr.org/2015/03/30/395799413/how-many-crimes-do-your-police-clear-now-you-can-find-out>.

estimated to be as low as forty-five percent.²³² Corporate crimes are likely detected at a lower rate.²³³

Since enforcement actions correlate to a mere fraction of criminal conduct, enforcement is, if not arbitrary, necessarily incomplete. Consequently, addressing regulatory shortcomings through prosecutorial resolutions risks limited and possibly arbitrary rules. Whereas *ex ante* regulations apply to everyone, *post hoc* resolutions apply only to those who are caught and successfully prosecuted. The latter is necessarily more limited in scope and potentially arbitrary in application.²³⁴ Law enforcement resources – even the mighty resources of federal law enforcement – are dwarfed by the scope of industry, so prosecutorial regulation is scattered amongst people, firms, and industries in a relatively arbitrary manner.²³⁵

CONCLUSION

Prospective and regulatory authority over defendants by prosecutors is established to the point of entrenchment. It is difficult to see any scenario in the foreseeable future in which prosecutors would limit their arsenal of punitive terms to those traditionally associated with criminal justice.

The shift to prosecutors exercising prospective remedial control over defendants stems as much from the nature of criminal law and plea bargaining as it does from a public demand for criminal prosecutions as tools of remedy and governance. The shift does, however, merit further attention. There are plain benefits to prosecutorial regulation: prosecutors are relatively independent and *post hoc* remedies can be crafted to the needs of the individual, the entity, or the industry. So too there are plain costs. Prosecutors may not be the best qualified to regulate in some cases. Regulation under threat of criminal action may be coercive and insufficiently accountable to the democratic process. And, regulation by law enforcement will likely suffer from incompleteness if not arbitrariness. None of these benefits or costs permit a blanket conclusion about the desirability of including prospective remedial terms in plea agreements, but they do counsel caution.

Aside from policy, there is no legal actor who enjoys as much discretion as prosecutors. Discretionary prosecutorial functions are all but unchecked.²³⁶ Courts have justified the broad discretion allowed to prosecutors based on the prosecutor's

232. Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 709 (2017).

233. See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 835 (1994) (“[C]orporate crimes—such as securities fraud, government procurement fraud, and some environmental crimes—cannot be readily detected by the government.”).

234. Cunningham, *supra* note 48, at 44 (“Conceived as pure regulation, prosecutorial interventions are *ad hoc* solutions to systemic problems better addressed by legislation or administrative rulemaking *ex ante* rather than prosecutors *ex post*.”).

235. See Arlen & Kahan, *supra* note 18, at 348 (“*Ex ante* duties have an obvious advantage over mandates imposed selectively on firms with detected wrongdoing: the policing duties imposed—and thus the incentives they create—apply to a wider set of firms.”).

236. See *supra* note 28 and accompanying text.

adjudicative functions. Federal prosecutors are “designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed,’”²³⁷ and hence discretion is necessary to maintain separation of powers. Moreover, courts are “ill-suited” to decide which cases ought or ought not to be pursued and prosecuted.²³⁸ Separation of powers, information control, and competence are all good reasons courts have been reluctant to exercise too much supervision over prosecutors. However, each of these reasons is predicated on a model where the prosecutor’s role largely ended upon sentencing. By adding prospective remedial terms to plea agreements, the prosecutor’s discretionary role in a particular matter may continue throughout the duration of those terms. If a police officer pledges not to seek employment with law enforcement for fifteen years, the prosecutor retains discretionary authority over the defendant for the term. The same goes for a corporation that agrees to implement a particular audit system for a period of three years. Overseeing and assessing a particular defendant’s compliance with the terms of a plea agreement simply does not raise the same issues as charging decisions; as such, the court’s reluctance to supervise prosecutors might be ripe for reconsideration at least with regard to ongoing plea agreements.

If prosecutors continue exercising an ongoing function over individual defendants—as they presently do—it is worth asking whether additional review of discretionary decisions is warranted. Prosecutors are no longer solely investigators and advocates for punishment—if ever they were. Prosecutors now investigate, advocate, and regulate. And there is very little law governing these regulators.

237. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting U.S. CONST. art. II, § 3).

238. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“[F]actors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.”).