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# WHEN PROSECUTORS DON'T: TRENDS IN FEDERAL PROSECUTORIAL DECLINATIONS

*Michael Edmund O'Neill\**

## INTRODUCTION

In the tumultuous wake of the September 11, 2001, attacks upon the United States, Attorney General John Ashcroft announced that the investigative and prosecutorial resources of the federal government would need to be shifted.<sup>1</sup> Ashcroft acknowledged that prosecutorial priorities would need to be redrawn to target serious offenses that threatened national interests. The Attorney General's declaration instigated considerable public speculation as to how the federal government might re-prioritize its efforts to reflect changing realities.<sup>2</sup> Some queried whether this retrenchment might foreshadow a federal retreat from the so-called war on drugs, or whether it might usher in a shift of many criminal matters back to the states to address. With the creation of the Department of Homeland Security, significant changes to federal criminal law, and the sharing of intelli-

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\* Associate Professor, George Mason University School of Law; Commissioner, United States Sentencing Commission. The opinions expressed in this Article are my own, and do not necessarily reflect either the policies or the official positions of the Sentencing Commission. I appreciate the comments I received from Leandra Lederman, Jeffrey Parker, and Todd Zywicki, my colleagues at George Mason University, and my co-commissioners Reuben Castillo, Sterling Johnson, Joseph Kendall, and William Sessions, who provided interesting insights into their courtrooms. I also want to thank Jeff McClellan and Meghan Faturous for their invaluable research assistance, and Frank Buckley and the George Mason University Law and Economics Center for generous financial support.

1 John Ashcroft, U.S. Attorney General, Attorney General Ashcroft and Deputy Attorney General Thompson Announce Reorganization and Mobilization of the Nation's Justice and Law Enforcement Resources (Nov. 8, 2001), at [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11\\_08.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_08.htm), (last visited Nov. 21, 2003).

2 See, e.g., Naftali Bendavid, *Ashcroft Proposes Shake-up of Agencies; Details Sketchy; Congress Dubious*, CHI. TRIB., Nov. 9, 2001, at 1; Dan Eggen, *Ashcroft Plans to Reorganize Justice, Curtail Programs*, WASH. POST, Nov. 9, 2001, at A17; David Johnston, *A Nation Challenged: The Justice Department; Ashcroft Plan Would Recast Justice Dept. in a War Mode*, N.Y. TIMES, Nov. 9, 2001, at B1.

gence among domestic and international law enforcement agencies, the picture is only now unfolding.

One important factor remains a constant, however: resources, even at the national level, are scarce. Scarcity compels the federal government to choose among competing policy objectives, each of which demands attention and, ultimately, funding. Attorney General Ashcroft's tacit acknowledgment of this indispensable economic reality signaled that because combating terrorism would now be a national priority,<sup>3</sup> other public policy objectives would necessarily receive less attention. Since the early 1970s, and presidential candidate Richard M. Nixon's call to use federal resources to combat crime, the federal government has begun to direct more attention to crime—once largely a state concern. Although federal attention to the nation's crime problem was doubtless welcome at the time, the unrelenting expansion of federal criminal law jurisdiction has made the prioritization of which criminal conduct to pursue all the more complicated.<sup>4</sup> Federal prosecutors now have the authority to handle cases that, a generation ago, might have fallen under the exclusive jurisdiction of the state police power.

As a consequence of this recently announced realignment of federal investigative and law enforcement efforts, however, prosecutors will be forced to choose even more carefully among the matters they pursue. The manner in which prosecutors make such choices is crucial, because an individual prosecutor's decision to pursue a criminal matter sets in motion the criminal justice apparatus of the federal government, which stretches across investigatory and prosecutorial boundaries to include the involvement of Article III judges, magistrates, juries, prison officials, and the like. An Assistant U.S. Attorney's (AUSA) conclusion to indict a target thus represents a decision to commit enormous resources to punish a particular instance of criminality. Unlike many political decisions that are subject to rigorous checks and balances, however, prosecutors enjoy considerable in-

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3 The importance of terrorism prosecutions was noted in a letter from Senate Judiciary Committee Chairman Patrick Leahy and Charles E. Grassley, the ranking member on the Subcommittee on Crime and Drugs. In that letter, the Senators noted the high rate of prosecution declinations for terrorism referrals, and questioned the quality of investigatory efforts in this area. Letter from Patrick Leahy, Senator, U.S. Senate, and Charles E. Grassley, Senator, U.S. Senate, to John Ashcroft, U.S. Attorney General, Dep't of Justice, and Robert Mueller, Director, Federal Bureau of Investigation (June 14, 2002) (on file with author).

4 Franklin E. Zimring & Gordon Hawkins, *Legislating Federal Crime and its Consequences: Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 15–19 (1996).

dependence in deciding whether to bring formal charges against an individual. In the criminal justice system, the checks tend to come after the prosecutor decides to pursue a target. Once that threshold determination is made, judicial supervision, grand and petit juries, and public scrutiny come into play. Absent a discriminatory intent and effect, few avenues exist by which authorities outside the U.S. Attorney's office may review the exercise of this initial decision to prosecute an individual.<sup>5</sup>

For good reason, then, prosecutorial discretion is an oft-studied topic in the academic literature.<sup>6</sup> Deciding whether to prosecute an individual criminally is one of the most momentous tasks the government undertakes. When the government decides to train its criminal investigative and prosecutorial sights on an individual, that person is perhaps at his or her most vulnerable.<sup>7</sup> Elaborate procedural protections thus exist to secure the rights of the criminally accused. Indeed, the Constitution's framers were so cognizant of the government's potential to misuse its criminal investigatory powers that substantial portions of the Fourth, Fifth, Sixth, and Eighth Amendments are designed to protect the criminally accused and those who have been convicted.<sup>8</sup>

The exercise of discretion, however, necessarily implies two things. First, obviously, is the decision to proceed with a prosecution. Such a decision is ultimately made in the public sphere and is subject to the various procedural demands that exist in both constitutional and statutory law. The flip side of the decision to commence a prosecution, however, is the decision to *decline* to initiate criminal proceedings. Thus, a consistent question in criminal justice administration is upon what grounds, and governed by what criteria, do prosecutors

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5 See Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511, 1516 n.32 (2000).

6 See, e.g., Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 *CORNELL L. REV.* 405 (1978); Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 *AM. U. L. REV.* 310 (1978); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 *NW. U. L. REV.* 174 (1965); Wayne R. LaFave, *The Prosecutor's Discretion in The United States*, 18 *AM. J. COMP. L.* 532 (1970); Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 *GEO. L.J.* 1171 (1977); L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 *LAW & CONTEMP. PROBS.* 64 (1948). See generally JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 156 (1978).

7 See Erik G. Luna, *The Models of Criminal Procedure*, 2 *BUFF. CRIM. L. REV.* 389, 476 (1999).

8 See Richard A. Champagne, Jr., *The Problem of Integrity, Tradition, and Text in Constitutional Interpretation*, 72 *NEB. L. REV.* 78, 90–96 (1993).

exercise their discretion *not* to pursue formal indictment. Declinations are as unreviewable as decisions to go forward, or perhaps even more so, as there are few formal means by which a decision to decline prosecution may be reviewed. Although scholars tend, at least in the legal academic literature, to focus on the interests of the criminal defendant,<sup>9</sup> the decision not to prosecute can be momentous not only for the accused, but also for the alleged victim as well. Declination further implicates larger questions of deterrence and the equal treatment of similarly situated defendants.<sup>10</sup>

While all prosecutorial discretion is subject to abuse, the discretion invoked to decline prosecution is difficult to monitor because it is largely hidden from public scrutiny.<sup>11</sup> Those who might disagree with the prosecutor's decision to be lenient—namely, the crime victim, the public at large, the investigating agent, or even similarly situated defendants who were prosecuted—have little recourse to complain.<sup>12</sup> Indeed, with perhaps the sole exception of the putative victim (if an identifiable victim exists), other defendants and the general public seldom have any idea about individuals not prosecuted.

Scarce resources, however, dictate that prosecutors will be unable to pursue each matter that is placed upon their desk for consideration. Nor is the federal government's share of the criminal law enforcement pie particularly significant. The federal government prosecutes only (roughly) seven percent of all criminal cases processed within the United States.<sup>13</sup> The individual states handle the bulk of the nation's criminal law enforcement. Even so, the balance between federal investigatory and federal prosecutory resources is

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9 See, e.g., Michael P. Doss, *Resentencing Defendants and the Protection Against Multiple Punishment*, 133 U. PA. L. REV. 1409 (1985); John Wirenius, *Legal Developments: A Model of Discretion: New York's "Interests of Justice" Dismissal Statute*, 58 ALB. L. REV. 175 (1994).

10 See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1399–1401 (2002).

11 See, e.g., FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 294 (1969); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1042–72 (1972) (finding that there is no effective system of checking and reviewing discretionary decisions of U.S. Attorneys regarding whether to prosecute). See generally W. RANDOLPH TESLIK, *PROSECUTORIAL DISCRETION: THE DECISION TO CHARGE* (1975).

12 See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 170–72 (1969) (explaining the injustice that results from selective enforcement of criminal laws).

13 This number was calculated from state and federal filings by the Department of Justice. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *FEDERAL CRIMINAL CASE PROCESSING*, 2001, 2003 NCJ 197104, at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp01.pdf>.

quite skewed in favor of the investigating agencies. The number of federal investigators dwarfs the number of federal prosecutors.<sup>14</sup> Consequently, the number of matters referred is likely consistently to outstrip the number of prosecutors available to pursue them. Moreover, not every case referred to a U.S. Attorney's office will be of sufficient legal merit to seek an indictment. As a routine matter, then, the U.S. Attorneys will necessarily be forced to decline a significant portion of the criminal referrals made to their offices. Discretion in choosing cases to prosecute thus inevitably falls upon the individual prosecutors. Such discretion is nearly invisible, however, and thus poses numerous important public policy questions. If the government wants to re-focus its prosecutorial efforts, it is vital to understand the nature of cases that have been prosecuted in the past, and whether criminal matters that have been declined fall into any discernable patterns.

The purpose of this empirical study is to contribute to a better understanding of prosecutorial decisions to refuse to pursue indictment and to examine the phenomenon of declination from a variety of perspectives.<sup>15</sup> Hopefully, if we can better understand the trends in declinations, we will begin to better understand the reasons prosecutors choose, or are forced, to decline cases. Such an understanding will enable the government to better focus its law enforcement resources on cases that truly evince a national interest and will allow Congress to determine whether prosecutors are adequately enforcing substantive criminal law. In addition, by understanding declination trends, it will be possible to identify trouble spots such as whether there are consistent problems with referrals from certain agencies or whether prosecutors are properly adhering to national priorities. Drawing upon recent efforts to ensure that judges are properly sen-

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14 In June 2000, federal agencies employed over 88,000 full-time persons authorized to carry firearms and make arrests. BRIAN A. REAVES & TIMOTHY C. HART, FEDERAL LAW ENFORCEMENT OFFICERS 2000, in BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN 1 (July 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fl00.pdf>. This compares to fewer than 5000 Assistant U.S. Attorneys employed by the government in that same year. See *infra* Table 6.

15 Although few empirical studies of declination decisions have been done, in no small part because the information is difficult to come by, there have been several early, important quantitative studies. Most notably, Professor Richard Frase performed a seminal analysis of selected federal districts. See Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980). Similarly, an analysis of the disposition of felony arrests in Los Angeles County showed not only the rates of prosecution by offense, but also the reasons cited for nonprosecution of two specific offenses—burglary and possession of dangerous drugs. PETER W. GREENWOOD ET AL., PROSECUTION OF ADULT FELONY DEFENDANTS IN LOS ANGELES COUNTY: A POLICY PERSPECTIVE 94–96 (1973).

tencing defendants, it is similarly necessary to determine whether prosecutors are pursuing appropriate targets.<sup>16</sup> Without such information, Congress and the public are left in the dark as to whether prosecutors are appropriately enforcing federal criminal law and following the Attorney General's lead as he seeks to guide law enforcement efforts.

Of course, prosecutorial discretion is not wholly unfettered. Certain guidelines to cabin prosecutorial discretion do exist. Accordingly, Part I of this Article identifies several of the publicly available declination guidelines from the Department of Justice, as well as individual U.S. Attorneys' offices and other agencies that have a hand in prosecuting criminal cases, and discusses their use and justification. In particular, it examines departmental and agency guidelines for declining matters and explores the legitimacy of prosecutorial discretion generally.

Following a discussion of the extant declination policies, Part II presents trend data on prosecutorial declinations for the period 1994–2000.<sup>17</sup> Part II determines whether any discernable declination patterns exist, and attempts to explain why certain matters may be more likely to be declined. Resource allocations are examined to determine whether staffing and budget changes have had much of an effect upon AUSAs' decisions to prosecute certain criminal matters. It seeks to understand whether the referring agency, the articulated local or national priorities, or the nature of the underlying offense has any effect upon a prosecutor's decision not to pursue a criminal matter. Finally, Part III discusses the policy implications of these findings, suggesting both further avenues for research and additional guidance that may serve to benefit prosecutors as they make these momentous decisions that affect the dispensing of justice at the national level. In particular, the need for written declination rules and mandatory record keeping is discussed as a means not only of controlling prosecutorial discretion, but also as an attempt to permit Congress and the executive branch to more carefully marshal prosecutory resources.

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16 This Article will focus primarily upon trends in declinations from 1994 through 2000, while a follow-up will examine the reasons for those declinations. See Michael Edmund O'Neill, *Understanding Why Prosecutors Decline to Pursue Cases* (Nov. 25, 2002) (unpublished manuscript, on file with author).

17 This is the latest date for which data are available as of this writing.

## I. PROSECUTORIAL DECISIONMAKING AND THE FEDERAL CRIMINAL JUSTICE SYSTEM

### A. *The Structure of Federal Criminal Jurisdiction*

#### 1. The Role of Main Justice

In many respects, the prosecutorial function of the Department of Justice's (DOJ) main office in Washington, D.C., is limited. Although the Criminal Division is a major component within the Department, most criminal prosecutions are handled by the individual U.S. Attorneys' offices. In fact, most criminal investigations and agency referrals go not to Main Justice<sup>18</sup> at all, but instead directly to the U.S. Attorney in the district where the violation has occurred.<sup>19</sup> There are really only three significant exceptions to this direct referral system we need concern ourselves with: Internal Revenue Service (IRS) criminal tax fraud referrals go directly to the Criminal Sections of the Justice Department's Tax Division; Securities and Exchange Commission (SEC) referrals generally go to the Criminal Division's Fraud Section; and many environmental crime matters are referred directly to the Department's Environment and Natural Resources Division.<sup>20</sup>

Consequently, the Justice Department, through its Criminal Division, plays only a minimal, somewhat perfunctory magisterial role with respect to most agency referrals. Those matters referred directly to Main Justice are delegated to one of the Criminal Division's sections. In addition to its legislative, research, and minimal litigation duties, the Criminal Division's supervisory role can be broken down into two functional components: (1) service and support to line prosecutors in the field, and (2) the review of certain specific actions undertaken by individual AUSAs. With respect to the Department's service and support function, sections within the Criminal Division act as support for the various U.S. Attorneys' offices. Thus, the Criminal Division's Narcotics Section will, for example, advise U.S. Attorneys' offices on various matters and will act as litigation support in circumstances where

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18 This moniker is used to denote the Justice Department's main components and headquarters in Washington, D.C. See e.g., JIM MCGEE & BRIAN DUFFY, *MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIBERTIES* 14 (1996).

19 Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 780-81 (1999).

20 EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 6-4.200, 5-11.103, 9-2.100 (2002) [hereinafter U.S. ATTORNEYS' MANUAL].



those offices may have conflicts preventing them from litigating specific cases. The Executive Office for United States Attorneys (EOUSA), which acts as the main point of contact between the U.S. Attorneys and Main Justice, offers among the most important services to the field. The EOUSA provides critical liaison and coordinating functions to the U.S. Attorneys: processing budgeting requests, arranging conferences and training, and dealing with certain administrative issues.

The Justice Department's review component is perhaps more important with respect to day-to-day decisionmaking engaged in by AUSAs. The review section entails two different aspects: (1) administrative approval of certain actions, and (2) the monitoring and reporting of selected cases.<sup>21</sup> For example, before a U.S. Attorney may seek an appeal in a criminal case, he must first have the approval of the Criminal Division's Appellate Section and the Solicitor General's office.<sup>22</sup> Similarly, where the U.S. Attorney seeks the dismissal of an indictment or intends to pursue the death penalty in a particular case, he must have the Department's prior approval.<sup>23</sup> In similar fashion, the Criminal Division's Office of Enforcement Operations must approve all requests for electronic surveillance.<sup>24</sup>

As for the Department's monitoring and reporting requirements, these are merely the means by which the Department tracks particular types of cases. In fact, the data used in this article comes from the Department's uniform reporting requirement that attorneys keep track of all criminal matters for which they expend at least one hour of time.<sup>25</sup> Although not substantive in the sense of guiding prosecutor behavior, this information is vital to understanding the functioning of the various offices and could be employed to create or to amend prosecutorial guidelines.

The Criminal Division's control of individual prosecution in the field is thus quite narrow. Setting aside those cases which are politically sensitive (like the recent prosecution of House of Representatives member James Traficant<sup>26</sup>) or of national importance (such as the prosecution of the Oklahoma City bombers<sup>27</sup>), the Criminal Divi-

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21 *Id.* § 9-2.170.

22 *Id.* § 9-2.170(A).

23 *Id.* §§ 9-10.010 to -10.050.

24 *Id.* §§ 9-7.100, -7.110.

25 Interview with Steve Parent, Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, in Washington, D.C. (May 18, 2002).

26 *See* United States v. Traficant, 209 F. Supp. 2d 764 (N.D. Ohio 2002).

27 *See* United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998).

sion and its various components generally serve merely as sources of advice and occasional technical assistance.

Instead, the individual U.S. Attorneys' offices shoulder the vast majority of the federal government's litigation burden. Those offices are neither required to obtain Departmental approval prior to seeking an indictment, nor are they obligated to report to Main Justice when they decline to prosecute a matter.<sup>28</sup> To this end, the decision to negotiate a plea, to pursue a particular trial strategy, or to guide a criminal investigation—in other words, all of the discretionary decisions that shape the conduct of a criminal prosecution—remain in the hands of the field offices and are virtually immune from review by Main Justice.<sup>29</sup>

## 2. The U.S. Attorneys' Offices

The U.S. Attorneys, who are appointed by the President and confirmed by the Senate to serve a four-year term, enjoy primary responsibility for the prosecution of federal criminal offenses.<sup>30</sup> They enjoy considerable freedom from the Justice Department, in part because of their separate appointments based on party loyalty or professional accomplishment, and in part as a result of their geographic separation from Main Justice.<sup>31</sup> As a result, they hold enormous power in shaping their offices' general enforcement policies. In addition, they have a relatively free hand in choosing their assistants, who are often responsible for the day-to-day operations of the office. As a practical matter, this means that the principal deputies in any office owe their primary loyalty not to the far-off Attorney General, but rather to the U.S. Attorneys who appointed them and with whom they closely work.

Although removable by the President,<sup>32</sup> federal prosecutors are also not beset by the same cadre of political pressures that elected state and local prosecutors must face. Federal prosecutors are largely

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28 U.S. ATTORNEYS' MANUAL, *supra* note 20, §§ 9-2.001, -2.020.

29 *Id.* § 9-2.010 (granting U.S. Attorneys' offices full investigative discretion).

30 28 U.S.C. § 541(a)-(b) (2000). The Department of Justice's central offices in Washington, D.C., also account for a tiny fraction of all federal criminal cases prosecuted. In addition, while military prosecutions are handled by the federal government, they are not included in this study because they are prosecuted before military tribunals by military officers. The rules governing such prosecutions vary considerably from their civilian counterparts.

31 Richman, *supra* note 19, at 781.

32 28 U.S.C. § 541(c). This presidential power is rarely exercised, except when a new President chooses to replace *all* U.S. Attorneys at the beginning of a new term in office. See EISENSTEIN, *supra* note 6, at 97-98 (discussing the political cost of removing U.S. Attorneys).

immune from the political pressures that go hand-in-hand with elective office. Nevertheless, like their state counterparts, federal prosecutors are subject to certain political pressures—most ostensibly coming from Washington or arising within their particular districts. The President, the Attorney General, and, in some instances, Congress, may try to direct the prosecution of particular types of offenses, and thus can pressure individual offices to pursue those matters. Attorney General Ashcroft's announced intention to redirect resources to the pursuit of terrorism-related matters is a prime example of the type of general direction an Attorney General can provide. The Attorney General may also exert more direct influence; for example, Attorney General Ashcroft has recently attempted with his promulgation of guidelines to direct sentencing recommendations and appeals.<sup>33</sup> That memorandum lays out what AUSAs must do when recommending a sentence or objecting to, or ultimately appealing, a pronounced sentence.<sup>34</sup> Although some of the memorandum is intended to give effect to recently enacted legislation, much of it expresses hard to supervise guidance.

Of course, the Attorney General's success will be in no small measure dependent upon the willingness of the individual U.S. Attorneys' offices to follow his lead. After all, the decisions about which criminal offenses to pursue remain primarily community-driven. In other words, local community interests may still determine which cases prosecutors choose to pursue. If a locality is suffering from a drug epidemic, then prosecutors may elect to target drug dealers. Similarly, if the community is plagued by gang violence, prosecutors may choose to disrupt organized criminal enterprises. Local priorities thus cannot be dismissed when prosecutorial decisionmaking is studied.

Compared to the various state substantive criminal laws, however, federal criminal law does not vary significantly from state to state. The laws themselves are thus constant throughout the ninety-four federal judicial districts. This consistency makes it possible to compare declinations nationally in a way that would be difficult in comparing state prosecutorial activity. Even so, geographic locality doubtless plays a role in deciding which cases to bring to trial.<sup>35</sup>

The U.S. Attorneys are also answerable (although in fairly small measure) to the Attorney General, and thus are subject to a certain

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33 Memorandum from John Ashcroft, U.S. Attorney General, Departmental Guidance on Sentencing Recommendations and Appeals 2 (July 28, 2003) (on file with author).

34 *Id.*

35 It goes without saying that fifty grams of cocaine in Manhattan do not have quite the same meaning as fifty grams of cocaine in Iowa might.

degree of supervision by Main Justice in Washington, D.C.<sup>36</sup> Moreover, Justice Department attorneys must screen certain types of cases (such as those involving the tax code) and approval must be granted before a prosecution may proceed.<sup>37</sup> In the vast majority of cases, however, the U.S. Attorney has nearly complete control over which charges, if any, will be filed in his or her district.

### B. *The Legitimacy of Prosecutorial Discretion*

Congress has mandated that “except as otherwise provided by law, each U.S. Attorney, within his district, shall—(1) Prosecute for all offenses against the United States . . . .”<sup>38</sup> Read literally, this language would appear to establish an absolute duty on the part of each U.S. Attorney to prosecute every violation of federal criminal law occurring within his or her district. Despite this fairly straightforward statutory injunction, however, it is beyond peradventure that no one expects any U.S. Attorney to prosecute every detected federal crime she happens upon.<sup>39</sup> The scarcity of resources, the impossibility of “perfect” enforcement, sound public policy determinations, and a host of other reasons mitigate against fulfillment of the congressional directive and, as a matter of custom and tradition, demand that U.S. Attorneys exercise sound judgment in selecting among a variety of cases to prosecute.

It cannot be forgotten, however, that the inevitability of prosecutorial discretion is very much a creature of pragmatism. Legislatures, in criminalizing certain types of activity, necessarily paint with a broad brush. After all, Congress, as an institution, is ill-equipped to

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36 Title 28 provides that the Attorney General “shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys . . . in the discharge of their respective duties.” 28 U.S.C. § 519. Additionally, § 542 of Title 28 gives the Attorney General power to appoint and remove all Assistant U.S. Attorneys, and § 547(5) requires each U.S. Attorney to “make such reports as the Attorney General may direct.” Pursuant to this authority, the Justice Department requires all U.S. Attorneys to submit statistics on the filing and disposition of all civil and criminal cases, as well as the nature and disposition of all civil and criminal investigations in which any attorney spends at least one hour of time. See U.S. ATTORNEYS’ MANUAL, *supra* note 20, § 3-16.100. The Department further provides periodic directives and guidelines for the handling of particular cases.

37 For example, all prosecutions for income tax crimes require prior Justice Department approval, and the IRS refers its cases directly to the Tax Division rather than to local U.S. Attorneys. See 28 C.F.R. § 0.70 (2002).

38 28 U.S.C. § 547.

39 See Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043, 2044–46 (1996) (explaining why courts defer to the prosecutor’s judgment on who to prosecute).

legislate with respect to individual cases.<sup>40</sup> As a consequence, judges and executive branch officials are forced to apply generalized legislation to the quite specific—and often unforeseeable—factual settings in which actual cases and controversies arise. Just as judges often refine legislative pronouncements through statutory interpretation, so do prosecutors when they exercise prosecutorial discretion in deciding whether or not to pursue a particular case. The inevitability of prosecutorial discretion is thus taken as axiomatic.

In a tacit acknowledgement of these circumstances, the Supreme Court has, in a sense, ratified broad prosecutorial discretion. In *United States v. Batchelder*,<sup>41</sup> the Court reviewed a defendant's conviction for being a felon in possession of a firearm. In an odd set of circumstances, two overlapping provisions of the Omnibus Crime Act of 1968 prohibited the exact same conduct.<sup>42</sup> Not surprisingly, prosecutors indicted the defendant, who was subsequently convicted, under the provision authorizing the more severe punishment.<sup>43</sup> Although the Seventh Circuit had originally affirmed the conviction, it remanded the case for resentencing,<sup>44</sup> explaining that it had "serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct."<sup>45</sup> The Seventh Circuit identified three possible constitutional infirmities. First, the court noted the oddity of two statutory provisions criminalizing the same conduct but with varying penalties, explaining that this discrepancy failed to provide the defendant with fair notice, and thus might have rendered the statutes unconstitutionally vague.<sup>46</sup> Second, the court opined that the lack of fair notice implicated a host of other due process and equal protection concerns, perhaps the most important being "excessive prosecutorial discretion."<sup>47</sup> Finally, the court found that the existence of two identical statutes "constitute[d] an impermissible delegation of congressional authority, to prosecutors."<sup>48</sup>

The Supreme Court, however, rejected the Seventh Circuit's analysis. The Court held that it:

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40 Indeed, the Constitution expressly prohibits bills of attainder, which seek to criminalize specific individuals, and ex post facto laws, which attempt to criminalize behavior after it occurs. See U.S. CONST. art. I, § 9, cl. 3.

41 442 U.S. 114 (1979).

42 *Id.* at 115–16.

43 *Id.* at 116.

44 *United States v. Batchelder*, 581 F.2d 626, 636 (7th Cir. 1978), *rev'd*, 442 U.S. 114 (1979).

45 *Id.* at 633–34.

46 *Id.* at 631.

47 *Id.*

48 *Id.* at 631–34.

[H]as long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.<sup>49</sup>

The Court refused to characterize the impact of the dual provisions as empowering "the Government to predetermine ultimate criminal sanctions."<sup>50</sup> Although the Court acknowledged the Seventh Circuit's concern about the existence of the "impermissible delegation to the Executive Branch of the Legislature's responsibility to fix criminal penalties,"<sup>51</sup> it noted that broad discretion has historically resided within the office of prosecutor. "The provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity," the Court explained, "the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws."<sup>52</sup>

Although neither the exercise of judicial nor prosecutorial discretion has ever been deemed illegitimate, concerns inevitability arise at the margins. Critics occasionally berate as "activist" judges who stray too far from the written law in deciding cases.<sup>53</sup> Similarly, prosecutors who engage in selective prosecution, or who seek to cast a case in such a way as to create (or to avoid) criminal liability, come under the same sort of condemnation.<sup>54</sup>

The prosecutor also controls the decision with respect to the number of charges a defendant will confront.<sup>55</sup> He may decide to prosecute a defendant for twenty bank burglaries, ten burglaries, or just one burglary. Similarly, a prosecutor may decide to prosecute for conspiracy as well as for burglary.<sup>56</sup> The charging decision rests entirely upon the prosecutor's shoulders, often constrained only by the

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49 *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) (citations omitted).

50 *Id.* at 125.

51 *Id.* at 125–26.

52 *Id.* at 126.

53 See David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 14 (1999).

54 See, e.g., Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999).

55 *Batchelder*, 442 U.S. at 126.

56 In many jurisdictions, it is possible for a defendant to be convicted and sentenced for both conspiracy and the underlying crime. See WAYNE R. LAFAVE, CRIMINAL LAW § 6.5(h) (3d ed. 2000). The Model Penal Code has limited the court's ability to sentence for both. MODEL PENAL CODE § 1.07(1)(b) cmt. (1985).

factual predicate. The number of charges may affect a jury's perception of the defendant and may ultimately affect the judge's sentence. These real-world considerations contribute to the exercise of prosecutorial discretion.

The broad discretion in the charging decision directly impacts sentencing in those jurisdictions, such as the federal system, which have mandatory sentencing guidelines, or sentencing statutes with minimum and maximum sentences. By choosing to prosecute a robbery as an "armed robbery," the trial judge may be forced to sentence a defendant, if convicted, under a mandatory sentence provision that is applicable whenever a defendant commits a crime while armed.<sup>57</sup> Prosecutorial decisions to charge a violation of a particular statute may affect sentencing in other ways. Sentencing enhancement provisions, such as those found in the "armed career offender" guideline,<sup>58</sup> require that a sentence be enhanced only if the prosecutor chooses to allege and prove prior convictions.<sup>59</sup> Thus, the prosecutor's choices at the initiation of a case have a substantial effect on the defendant's ultimate sentence.

The concern in either forum ought to be the availability of discretion without corresponding safeguards. Guidelines exist to cabin untoward judicial decisionmaking; and the tradition of written opinions and appellate review help to make the process more transparent.<sup>60</sup> The principal difficulty with respect to prosecutorial discretion is that it operates virtually without review, and traditionally without an articulation of the reasons for deciding to forgo a prosecution. To this end, the primary concern is not the exercise of discretion in and of itself, but instead the standardless, *arbitrary* exercise of discretion. Absent an explanation by the prosecutor, it may appear to the public that a decision to forgo one case and to pursue another is capricious. In particular, high profile cases may lead to charges of prosecutorial maliciousness. As these decisions whether to pursue an indictment are largely immune from review and (quite properly) do not take place in the public's view, fairness and equity concerns inevitably arise. Despite

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57 See generally Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 67-73 (1993) (stating that determinate sentencing reform, which centers on multiple factors for sentencing, is undercut by mandating sentences that often focus on a single factor).

58 18 U.S.C. § 924 (2000).

59 *Id.*

60 See Timothy W. Floyd, *Literature for Lawyers and Judges*, 29 TEX. TECH L. REV. 967, 972 (1998) (reviewing BARRY R. SCHALLER, *A VISION OF AMERICAN LAW: JUDGING LAW, LITERATURE, AND THE STORIES WE TELL* (1997), and citing Schaller's guidelines for judicial decisionmaking).

those fears, however, some standards do in fact exist. Accordingly, the following section will discuss some of the publicly available policies that may serve to cabin prosecutorial discretion.

### C. *A Brief Overview of Federal Declination Policies*

Criminal offenses ordinarily come to the notice of prosecutors in one of two ways: either through the efforts of law enforcement investigators, or as the result of victim or witness self-reporting. Investigatory authorities, such as the Federal Bureau of Investigation (FBI) or the Drug Enforcement Administration (DEA), exercise a substantial amount of discretion in determining whether, and how, to conduct a criminal investigation. The criminal investigation, however, is but the first step on a long journey to criminal prosecution. Prior to becoming an actual criminal “case,” the alleged criminal conduct of a potential defendant, which is denoted as a “matter,” must first be referred to the local United States Attorney’s office for a determination as to whether prosecution is warranted. Federal investigative agencies such as the DEA, FBI, or the Immigration and Naturalization Service (INS), routinely make the bulk of such referrals.<sup>61</sup>

Without question, not all of these referrals result in criminal prosecution. Federal prosecutors, after all, have limited resources and must allocate them accordingly. Moreover, evidentiary, procedural, or other policy-oriented impediments may exist that counsel against pursuing prosecution and formal indictment in any given case. While a prosecutor may wish to pursue a notorious gun case, for example, a botched search that the prosecutor knows will result in suppression of key evidence may lead to a declination. Similarly, physical evidence may be lost or mishandled, rendering it useless for trial, or key witnesses may recant, destroying a prosecutor’s case. Consequently, federal prosecutors may decline to prosecute matters referred to them based on a variety of concerns. Despite the wide latitude federal prosecutors enjoy in deciding whether or not to pursue indictment, however, certain policies do exist to direct their decisions.

Identifiable criminal declination policies serve as a guide to federal prosecutors when deciding whether to move forward with prosecution on matters referred to them.<sup>62</sup> The individual U.S. Attorneys’ offices put in place the bulk of those declination policies—many of which are doubtless shaped by the character of the local community. These policies are often difficult to unearth, however. The individual

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61 Of all such referrals, the FBI makes 30%, the DEA 15%, and the INS 11%. See *infra* Table 9.

62 U.S. ATTORNEYS’ MANUAL, *supra* note 20, §§ 9-2.020, 2.111.



offices often argue (and sometimes with good reason) that the release of intra-office declination policies may encourage criminal behavior at the margins and may inform the defense bar as to how it may pitch certain cases in an effort to avoid formal criminal charges.<sup>63</sup> Nor do prosecutors believe it good public policy to announce that they will not pursue seemingly trivial crimes. Such pronouncements may foil deterrence efforts and undermine public confidence in the law. Additionally, the publication of such policies may encourage defendants to appeal whenever they believe they may have been treated differently from similarly situated defendants who may not have been prosecuted at all. Once written and made public, policies have a way of taking on a life of their own, and any attempts to change them may be fraught with difficulty.

Nevertheless, the Justice Department (and various other federal agencies possessing prosecutorial authority) has made public certain general prosecutorial guidelines. As outlined in greater detail below, the purposes of such policies essentially are to maximize the efficient use of prosecutorial resources by focusing them on the most serious offenses that stand a reasonable chance of resulting in a conviction, while at the same time ensuring that important federal interests are vindicated. Thus, declination policies have both pragmatic, as well as aspirational, components.

In addition to providing guidance to federal prosecutors in the exercise of their prosecutorial discretion, similar policies govern related activities of many of the executive agencies that have administrative and investigatory jurisdiction over regulations containing criminal penalty provisions. As a result, such agencies often are the first to become aware of potential criminal wrongdoing through their investigations. Once made aware of suspected crimes, they must then determine whether to refer the matter to the relevant U.S. Attorney's office for consideration as to whether criminal prosecution ought to be pursued. In many cases, these referral policies act both as a means to encourage compliance with governmental regulations, as well as a means to ferret out criminal wrongdoing without having to expend additional agency resources.<sup>64</sup> Thus, referral policies, like declination policies, serve to focus limited federal resources in the most efficient, effective, and judicious manner possible.

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63 Romero, *supra* note 39, at 2046 n.18.

64 Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 560-61 (2003).

## 1. Basic Criminal Declination Policies of the U.S. Department of Justice

The following section will summarize many of the federal government's most important, publicly available declination policies.

### a. U.S. Attorneys' Manual

The U.S. Attorneys' Manual (Manual) provides general departmental guidelines that U.S. Attorneys' offices are expected to follow. The Manual creates a sort of "general handbook of instruction" for the individual offices to achieve some degree of uniformity in the enforcement of federal law. Uniformity in federal prosecutions, however, is plainly not a hallmark of the Manual, as the guidelines are quite broad. For example, pursuant to § 9-2.020 of the Manual, a "United States Attorney is authorized to decline prosecution in any case referred directly to him/her by an agency unless a statute provides otherwise."<sup>65</sup> The Manual thus explicitly recognizes the inherent authority of any prosecutor to forgo prosecution in an individual case. The Manual further provides that an "attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction . . . ."<sup>66</sup>

In other words, the expectation is that where legal evidence of an offense exists, a prosecutor is expected to initiate criminal proceedings. However, a federal prosecutor may decline to prosecute if he or she believes that (1) "[n]o substantial Federal interest would be served by [the] prosecution," (2) the defendant "is subject to effective prosecution in another jurisdiction," or (3) "[t]here exists an adequate non-criminal alternative to prosecution."<sup>67</sup> These three general rules of thumb are important in that they form the foundation upon which many of the general declination policies are built. In turn, the Manual provides for "relevant considerations" with respect to making determinations as to each of the three grounds stated above.<sup>68</sup>

### i. The Existence of a Substantial Federal Interest

With respect to whether a substantial federal interest would be served by prosecuting the accused, a federal prosecutor is to consider

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65 U.S. ATTORNEYS' MANUAL, *supra* note 20, § 9-2.020.

66 *Id.* § 9-27.220.

67 *Id.*

68 *Id.* § 9-27.200.

the priorities of federal law enforcement, the "nature and seriousness of the offense," the "deterrent effect of prosecution," the defendant's culpability and criminal history, as well as the defendant's willingness to cooperate with authorities.<sup>69</sup> Finally, the prosecutor is to also consider "[t]he probable sentence or other consequences if the person is convicted."<sup>70</sup> Thus, these more general instructions provide prosecutors plenty of wiggle room in deciding whether to formally pursue a matter. This opportunity to exercise discretion relatively unfettered by Justice Department authorities has often been criticized by commentators who argue that, without proper guidelines cabining prosecutorial decisionmaking, that process may become one that is seemingly arbitrary and rife with potential for abuse.<sup>71</sup>

## ii. The Availability of Prosecution in Another Jurisdiction

The Supreme Court arguably has expanded the somewhat arbitrary nature of prosecutorial discretion by interpreting the Fifth Amendment's prohibition against double jeopardy so as to permit both state *and* federal prosecutors to pursue the *same* offender with respect to the same criminal conduct.<sup>72</sup> This "separate sovereigns" doctrine grants considerable leverage to the entities pursuing prosecution.<sup>73</sup> As a practical matter, however, while both sovereigns *can* undertake a prosecution of the same defendant, resource scarcity dictates that such multiple-sovereign prosecutions will seldom occur.<sup>74</sup> Hence, the federal government will often acquiesce in a state's decision to pursue a criminal prosecution unless an important national interest is at stake.<sup>75</sup>

With respect to whether an otherwise federal defendant is to be prosecuted in another jurisdiction, the federal prosecutor is to consider "[t]he strength of the other jurisdiction's interest in prosecution," "[t]he other jurisdiction's ability and willingness to prosecute effectively, and [t]he probable sentence or other consequences" to the defendant if convicted.<sup>76</sup> This particular consideration is con-

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69 *Id.* § 9-27.230.

70 *Id.*

71 Podgor, *supra* note 5, at 1515-20.

72 Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 281 (1992).

73 *Heath v. Alabama*, 474 U.S. 82, 88-90 (1985).

74 Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One?*, 69 N.D. L. REV. 915, 925-26 (1994).

75 U.S. ATTORNEYS' MANUAL, *supra* note 20, § 9-2.031.

76 *Id.* § 9-27.240.

trolled by the so-called Petite Policy,<sup>77</sup> which governs “the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding.”<sup>78</sup> The Petite Policy is in large part an artifact of the substantial increase in federal jurisdiction over traditional common law crimes, which may also be prosecuted by state authorities.<sup>79</sup>

Early in the nation’s history, federal jurisdiction over criminal matters was fairly narrow—relegated to federal lands, crimes committed upon the high seas, exclusive federal offenses (e.g., treason, counterfeiting, and tax violations) and military offenses.<sup>80</sup> The general police power was deemed to be largely a matter of state concern. As the federal government’s tentacles reached out to touch individual behavior, however, so too did they extend to encompass the prosecution of crimes at one time believed to be exclusively of local concern.<sup>81</sup>

Regardless of how one may feel about the significant expansion of federal criminal law jurisdiction during the past thirty years, it is clear that a great deal of overlap exists between state and federal law enforcement authority. In light of such overlap, the Petite Policy evolved as a purely practical means of allocating prosecutorial resources. The purpose of this policy is to vindicate substantial federal interests through appropriate federal prosecutions; to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s);<sup>82</sup> to promote efficient utilization of Department re-

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77 The name of the policy is derived from *Petite v. United States*, 361 U.S. 529 (1960), in which the Supreme Court held that because the state and federal governments are separate and distinct sovereigns, they could both pursue prosecutions for similar conduct without running afoul of double jeopardy protections. See also *Rinaldi v. United States*, 434 U.S. 22, 27 (1977) (finding the policy serves an important purpose in protecting the citizen from any unfairness associated with successive prosecutions based on the same conduct).

78 U.S. ATTORNEYS’ MANUAL, *supra* note 20, § 9-2.031.

79 Harry Litman & Mark D. Greenberg, *Legislating Federal Crime and Its Consequences: Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 75 (1996).

80 Zimring & Hawkins, *supra* note 4, at 16–17.

81 *Id.* at 16.

82 Especially in view of the fact that the Supreme Court has held that the Fifth Amendment’s prohibition against double jeopardy does not apply to multiple prosecutions for the “same offense” by the state and federal governments, because they are “separate sovereigns” and thus are presumed to be vindicating different interests. See *Bartkus v. Illinois*, 359 U.S. 121, 128–29 (1959) (holding that the Double Jeopardy

sources; and to promote coordination and cooperation between federal and state prosecutors.

This policy precludes the initiation or continuation of a federal prosecution following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.<sup>83</sup> In addition, there is a procedural prerequisite to be satisfied—that is, the prosecution must be approved by the appropriate Assistant Attorney General.<sup>84</sup>

### iii. The Availability of Alternative Sanctions

Finally, with respect to the availability of non-criminal alternatives to prosecution, a federal prosecutor is to consider the type of alternative sanctions available, their effectiveness, and “[t]he effect of non-criminal disposition on federal law enforcement interests.”<sup>85</sup> This principle has become increasingly important, as civil alternatives such as fines and restitution have been embraced as providing a more effective, cost-efficient means of vindicating federal interests.

### b. The Policies of Individual U.S. Attorneys' Offices

In addition to the general declination policies outlined in the Manual, each U.S. Attorney's office may have its own formal, written declination policies,<sup>86</sup> as well as unwritten traditions passed down over time in the form of non-binding guidance from supervising attorneys or trainers.<sup>87</sup> At a minimum, each office presumably will have informal policies that arise from office culture or that reflect local bar prac-

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Clause does not bar state robbery trial following acquittal on a federal charge of robbery).

83 U.S. ATTORNEYS' MANUAL, *supra* note 20, § 9-2.031.

84 *Id.*

85 *Id.* § 9-27.250.

86 *See, e.g.*, U.S. Attorney, E.D. Wis., United States Attorney's Policy Manual for the Eastern District of Wisconsin (2000) (on file with author).

87 Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 56–57 (2002).

tices or relevant community needs.<sup>88</sup> These policies will serve to guide prosecutors working in that particular office and may serve as an important constraint on each attorney's discretion. The practice of law, after all, is not performed in a vacuum. Lawyers in a particular U.S. Attorney's office generally hail from that district, and thus are nurtured in a particular legal climate unique to that jurisdiction. What juries and federal prosecutors deem important in a small district that encompasses rural communities may be quite different from those in a large, urban district. As a consequence, even if the policies are not expressly recorded, individual offices will have declination guidelines that arise from custom or practice. These internal policies ostensibly do not depart drastically from the general principles the Manual sets forth.

To be sure, the policies do specify particulars depending on the resources the office commands and the nature and frequency of certain offenses that occur within the office's jurisdiction.<sup>89</sup> For example, smaller U.S. Attorneys' offices may not have minimum thresholds for prosecuting certain drug offenses inasmuch as they occur relatively infrequently in the jurisdiction.<sup>90</sup> In contrast, larger U.S. Attorneys' offices located in urban areas may be overwhelmed with drug offenses, and therefore will allocate prosecutorial resources only for the most serious of these offenses. Consequently, they may have an intra-office policy of prosecuting only drug cases involving  $x$ -grams of crack cocaine, while declining to prosecute drug cases involving a lesser amount. The difficulty in evaluating such policies, however, is that they are not routinely available to the public. As previously noted, U.S. Attorneys' offices are reluctant to become embroiled in disputes with defendants who are prosecuted—even though they may not fall within the office's traditional guidelines. Similarly, the offices are wary of making guidelines available to defense attorneys who will then seek to pitch their cases as falling outside the guidelines' scope. It is difficult to evaluate such claims, however, because researchers only have access to anecdotal experience of prosecutors.

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88 Theodora Galacatos, Note, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict Over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 *FORDHAM L. REV.* 587, 599-602 (1995).

89 Frank O. Bowman III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 *WIS. L. REV.* 679, 739.

90 Dan Haude, Comment, *Ohio's New Sentencing Guidelines: A "Middleground" Approach to Crack Sentencing*, 29 *AKRON L. REV.* 607, 622 (1996).

### c. The Antitrust Division

The U.S. Attorneys' offices, of course, are not the sole prosecutorial agencies within the Justice Department. Other divisions under the umbrella of Main Justice also have criminal law enforcement authority. For instance, the Department's Antitrust Division handles prosecutions of criminal violations of the Sherman Act.<sup>91</sup> The Antitrust Division has quite specific declination policies, but they are designated as "leniency" policies because they encompass a wide range of behaviors. Although the "Corporate Leniency Policy" is of particular importance to the Antitrust Division, it also has a "Leniency Policy for Individuals" as well.<sup>92</sup> The Corporate Leniency Policy was established on August 10, 1993, and provides that a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions.<sup>93</sup> This policy is of particular importance as it serves not only to provide guidance to prosecutors, but to inform corporations of the proper behavior as well.<sup>94</sup> To this end, the policy is made public to influence corporate behavior on the theory that certain actions will be deterred and, even if not deterred, whistleblowers will be incentivised to come forward with information.

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91 See 15 U.S.C. § 1 (2000).

92 Deputy Assistant Attorney General Gary Spratling, Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy—An Update, Address Before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), available at [www.usdoj.gov/atr/public/speeches/2247.pdf](http://www.usdoj.gov/atr/public/speeches/2247.pdf).

93 See ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

94 Pursuant to the Policy, the specified conditions are as follows:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

Recently, the renowned auction house Christie's took advantage of the Antitrust Division's Corporate Leniency Policy in order to avoid criminal prosecution for conspiring with its principal competitor, Sotheby's auction house, to "fix . . . commission rates charged to sellers of works of art, jewelry and furniture at auctions" around the world.<sup>95</sup> Presumably made aware of the Justice Department's Corporate Leniency Policy, Christie's reported the criminal conduct first to the Division, thereby qualifying for the first-in-the-door benefit and avoiding harsh punishment. Sotheby's, in contrast, was sentenced to pay a \$45 million fine.<sup>96</sup>

In addition to the Corporate Leniency Policy, the Antitrust Division also has a "Leniency Policy for Individuals," issued on August 10, 1994, as an update to an earlier version.<sup>97</sup> This policy provides the same benefit for complying with the following three conditions prior to the commencement of a criminal investigation:

- (1) At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
- (2) The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and
- (3) The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.<sup>98</sup>

Although this policy "applies to all individuals who approach the Division on their own behalf, [and] not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity," apparently neither of the former Chairmen of Sotheby's or Christie's qualified inasmuch as they eventually were indicted for price-fixing violations.<sup>99</sup>

#### d. Policies Regarding Charging Organizations

Although well beyond the scope of this study, it is worth noting that Main Justice can, and sometimes does, modify existing declination policies and then foist them upon the individual litigating divisions. On June 16, 1999, for example, Deputy Attorney General Eric

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95 Press Release, U.S. Dep't of Justice, Former Chairmen of Sotheby's and Christie's Auction Houses Indicted in International Price-Fixing Conspiracy (May 2, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/8128.pdf](http://www.usdoj.gov/atr/public/press_releases/2001/8128.pdf).

96 See *id.*

97 See ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, LENIENCY POLICY FOR INDIVIDUALS (1994), available at <http://www.usdoj.gov/atr/public/guidelines/0092.htm>.

98 *Id.*

99 See Press Release, *supra* note 95, at 2.



Holder issued a memorandum on bringing criminal charges against corporations to all the heads of the various components of the Department of Justice, as well as to all then-serving U.S. Attorneys.<sup>100</sup> This memorandum included as an attachment a document entitled "Federal Prosecution of Corporations," which was intended to "provide . . . guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case."<sup>101</sup> The presumptive goal of the Holder Memorandum was to provide guidelines to all prosecutors and to ensure the uniform treatment of corporate targets.<sup>102</sup> First and foremost, the non-binding policy asserts:

Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white-collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white-collar crime.<sup>103</sup>

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100 Memorandum from Eric Holder, Deputy U.S. Attorney General, to All Component Heads and United States Attorneys (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>.

101 *Id.*

102 *Id.*

103 *Id.* ¶ I.A. Among factors to be considered in charging corporations are:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges;
5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and

According to the memorandum, the “fundamental questions any prosecutor should ask are: is the corporation’s compliance program well designed? and, does the corporation’s compliance program work?”<sup>104</sup> The answers to these questions ultimately can help determine whether a corporation’s compliance program will move a federal prosecutor to decline prosecution. These criteria are significant in that they reflect general policies with respect to declination, and are translatable even to assessing criminal conduct committed by an individual. The mere existence of this policy shows that the Justice Department *can* provide more robust guidance to prosecutors, regardless of the jurisdiction in which they practice.

## 2. Sample Agency Referral Declination Policies

As previously noted, in addition to the criminal declination policies of the Justice Department and the various U.S. Attorneys’ offices, many executive agencies have referral policies under which they will decline to refer a case for prosecution, provided that the defendant has complied with certain criteria, and that there are good policy reasons for not prosecuting the case. Although I do not wish to outline these myriad policies in exacting detail, a few of the more important policies are summarized below.

### a. Environmental Protection Agency

With increasing importance being placed on environmental crimes, the Environmental Protection Agency (EPA) has become an ever more influential player in criminal prosecutions. On May 11, 2000, the EPA issued its final policy statement on “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations.”<sup>105</sup> Under this policy, “[w]hen a disclosure that meets the terms and conditions of this Policy results in a criminal investigation, EPA will generally not recommend criminal prosecution for the disclosing entity, although the Agency may recommend prosecution for culpable individuals and other entities.”<sup>106</sup> As with the Justice Department’s

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8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.

*Id.* ¶ II.A (internal citations omitted).

104 *Id.* ¶ VII.B.

105 ENVTL. PROT. AGENCY, INCENTIVES FOR SELF-POLICING: DISCOVERY, DISCLOSURE, CORRECTION AND PREVENTION OF VIOLATIONS (2000), available at <http://www.epa.gov/enforcement/resources/policies/incentives/auditing/finalpolstate.pdf>.

106 *Id.* at 14.

corporate policies, the EPA focuses on prompt and voluntary disclosure and self-reporting.<sup>107</sup>

#### b. Health and Human Services

On October 30, 1998, the Office of the Inspector General for the Department of Health and Human Services, announced the recent issuance of its "Provider Self-Disclosure Protocol."<sup>108</sup> The Protocol essentially recapitulates the criteria set forth in the DOJ's Federal Prosecution of Corporations—especially with regard to voluntary and timely disclosure and compliance programs.<sup>109</sup> Although the Protocol does not explicitly address under what circumstances it may decline to refer a matter to the DOJ for criminal prosecution, it nevertheless is clear that "[a] *bona fide* self-disclosure made before the government has learned of the misconduct may well persuade Department of Justice prosecutors to exercise leniency in deciding whether to prosecute the provider, and, if so, which charges to bring."<sup>110</sup>

#### c. Internal Revenue Service

Unlike any other executive branch agency, the IRS wields definitive power within its ambit of regulatory authority with respect to whether a criminal case is filed.<sup>111</sup> With any other administrative or executive agency, should that agency decline to refer a matter for criminal prosecution, it is still possible for another agency with overlapping jurisdiction to refer the matter. With respect to criminal tax fraud, however, *only* the IRS can refer and "sign off" on prosecutions of criminal violations of our nation's tax laws. Thus, the IRS's Volun-

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107 In order to qualify for the benefits of the policy, the entity (most likely an organization) must meet nine criteria: (1) systematic discovery of the violation through an Environmental Audit or a Compliance Management System; (2) voluntary disclosure; (3) prompt disclosure; (4) discovery or disclosure prompted independently of any government or third-party action; (5) correction and remediation; (6) prevent reoccurrence; (7) no repeat violations; (8) violation did not actually and seriously harm environment or pose imminent and substantial endangerment to public health, or violate the specific terms of any order, consent agreement or plea agreement; (9) cooperation. *Id.* at 16–28.

108 See U.S. Dep't of Health and Human Services, Publication of OIG's Self-Disclosure Protocol, 63 Fed. Reg. 58,399-02 (Oct. 30, 1998).

109 Memorandum from Eric Holder, *supra* note 100, ¶ VI.A ("In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors.")

110 Shelly R. Slade, *Truth and Its Consequences: Should You Voluntarily Disclose Overbills to Law Enforcement?*, HEALTH LAW, June 2000, at 36, 40 (emphasis added).

111 U.S. ATTORNEYS' MANUAL, *supra* note 20, §§ 6-4.110, -4.120 to -4.122.

tary Disclosure Policy is, in effect, binding on the DOJ (but it does not, as discussed briefly below, afford defendants any rights).

The IRS Policy, like those policies canvassed above, is to defer criminal prosecution of those individuals or organizations that voluntarily disclose their criminal wrongdoing in a timely, honest, and comprehensive manner. In *United States v. Tenzer*,<sup>112</sup> the district court dismissed a four-count information charging the defendant with unlawfully, willingly and knowingly failing to file his taxes. The lower court found that the defendant “had satisfied the IRS’s voluntary disclosure policy and therefore was immune from prosecution.”<sup>113</sup> The Second Circuit, however, reversed, holding that the defendant had not complied with the policy’s provision that the defendant make a *bona fide* arrangement to pay his back taxes.<sup>114</sup> The Second Circuit found that the defendant had made a mere offer to pay, rather than actually arranging to pay.<sup>115</sup>

The Second Circuit took pains to note that, even if the policy did apply, “neither Tenzer nor the public may reasonably rely on [it]” inasmuch as it simply was a policy and not a rule or a regulation.<sup>116</sup> Nevertheless, the Second Circuit did note that “the government is obligated to negotiate in good faith with the taxpayer toward the end of achieving an arrangement to pay,” and therefore “may not withhold its assent [to the proffered arrangement] capriciously or in bad faith.”<sup>117</sup> The IRS must afford a taxpayer, who has acted in reliance upon the voluntary disclosure policy, a reasonable opportunity to satisfy all of the conditions of that policy, including a payment plan.<sup>118</sup>

#### *D. Relationship of Declination Policies to Prosecutorial Discretion*

At bottom, however, declination guidelines are simply that—namely, suggestions to assist prosecutors in making the final decision whether to proceed with a case. Despite the existence of even formal, written guidelines, individual prosecutors have long enjoyed broad prosecutorial discretion.<sup>119</sup> The United States Supreme Court has ruled that “so long as the prosecutor has probable cause to believe

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112 127 F.3d 222 (2d Cir. 1997).

113 *Id.* at 226.

114 *Id.* at 227.

115 *Id.*

116 *Id.* at 228.

117 *Id.* at 227.

118 *Id.* at 277. See INTERNAL REVENUE SERV., REVISED IRS VOLUNTARY DISCLOSURE PRACTICE (2003), available at <http://www.irs.gov/newsroom/article/ojtid=104361.html>.

119 See *Wayte v. United States*, 470 U.S. 598, 607 (1985).

that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."<sup>120</sup> Because "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake,"<sup>121</sup> the Court explained, "courts properly [are] hesitant to examine the decision whether to prosecute."<sup>122</sup>

Nevertheless, the broad discretion afforded to prosecutors is not "unfettered."<sup>123</sup> In addition to the formal and informal guidelines that guide decisionmaking, certain other principles influence decisionmaking as well. According to the Court, for example, "selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints."<sup>124</sup> In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.<sup>125</sup>

In light of these constraints on the manner in which prosecutors select cases to prosecute, they are also prohibited from prosecuting out of a vindictive motive. Where selectivity may deny equal protection under the law, a vindictive prosecution violates due process.<sup>126</sup> Although it is generally presumed that prosecutors act in good faith, a presumption of vindictiveness will arise where "a defendant is re-indicted, particularly when a prosecutor increases the number or severity of charges after the defendant has appealed his or her conviction."<sup>127</sup> Nevertheless, as this example illustrates, claims of vindictive prosecution rarely occur in the pretrial stage, and are seldom successful if raised after a full-blown trial.<sup>128</sup>

In addition to the broad discretion they enjoy at the time of charging, federal prosecutors also enjoy substantial discretion at the sentencing stage, for it also is "the prosecutor's prerogative to recommend leniency under the Sentencing Guidelines" in the form of a

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120 *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

121 *Wayte*, 470 U.S. at 607.

122 *Id.* at 608.

123 *Id.* (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

124 *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

125 *Id.* at 125 n.9

126 See Chris Zimmerman, *Prosecutorial Discretion*, 89 GEO. L.J. 1229, 1233 (2001).

127 *Id.* at 1238-39.

128 *Id.* at 1239-41.

downward departure.<sup>129</sup> The Federal Sentencing Guidelines were, of course, designed to develop rational and coherent sentencing policies for the federal criminal justice system. Specifically, they are intended to reduce unwarranted sentencing disparity and promote proportionality.<sup>130</sup> As Professor Richard Frase has noted, however, “[p]olice and prosecutors can evade even the strictest plea bargaining and sentencing controls by simply not arresting or charging certain offenders, or not charging certain offenses.”<sup>131</sup> This has led Professor Albert W. Alschuler to comment that “a policy of restricting judicial but not prosecutorial discretion is incoherent.”<sup>132</sup> In other words, formal guidelines limiting prosecutorial discretion may be just as necessary for the criminal justice system as those which bind judges—particularly in the context of existing restrictions on judicial discretion. As former Sentencing Commissioner Ilene Nagel has observed:

The principal goal of the Sentencing Reform Act of 1984 and the U.S. sentencing guidelines is the structuring of judicial discretion so as to reduce unwarranted disparity in the federal sentencing process. Yet, students of sentencing now recognize that prosecutorial discretion, in charging and in the plea negotiation process, poses obstacles to achieving this goal.<sup>133</sup>

Whether criminal declination policies and agency referral policies can, in fact, further the goals articulated by the Sentencing Reform Act<sup>134</sup> is an open question, but nevertheless an intriguing one. What is clear, however, is that more information is needed about declination policies to gain a better understanding of how, and whether, they influence prosecutors in their decisionmaking process.

## II. EMPIRICAL ANALYSIS OF DECLINATION TRENDS

Prosecutors act as the designated gatekeepers of the criminal justice system. While an Assistant U.S. Attorney’s decision to undertake a

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129 *Id.* at 1232.

130 See 28 U.S.C. § 991(b)(1)(B) (2000) (requiring the Sentencing Commission to “provide certainty and fairness” and avoid “unwarranted sentencing disparities among defendants with similar records” when establishing sentencing policies); see also 28 U.S.C. § 994(f) (requiring the Sentencing Commission to pay “particular attention to the requirements of subsection 991(b)(1)(B)” when promulgating guidelines).

131 Frase, *supra* note 15, at 247.

132 Albert W. Alschuler, *Monarch, Lackey, or Judge*, 64 U. COLO. L. REV. 723, 723 (1993).

133 Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 501 (1992).

134 18 U.S.C. § 3551 (2000).

prosecution is made in the light of day, and thus subject to the scrutiny of his peers, judges, juries, and the public, the decision to forgo prosecution is seldom amenable to oversight. The discussion of the various declination policies was intended to provide a context in which to view the empirical data. Those policies permit the data to be understood as the reflection of a complex process that is largely hidden from public view.

Indeed, declination data are notoriously difficult to unearth and pose certain limitations that will be discussed below. The principal source for the data analyzed in this study is EOUSA, which is a component within the Justice Department. EOUSA collects a variety of data from each of the U.S. Attorneys' offices, including information on declined matters. AUSAs are required, as a matter of course, to keep track of all matters for which they spend at least one hour of attorney time, and have further been instructed to record the reasons for their decisions to decline prosecution in individual cases.<sup>135</sup> The relevant form identifies thirty-four reasons for declining to pursue a particular case.<sup>136</sup>

Several caveats must be mentioned with respect to this data. First, the Department does not require AUSAs to record declination reasons for matters on which they spend less than an hour considering.<sup>137</sup> Thus, many seemingly trivial matters, or those that are facially problematic, are not captured within the data. It is unfortunate that such information is not captured, as it might provide important guidance to those seeking to identify problems within investigative agencies. If, for example, matters are consistently being referred that have obvious evidentiary or other legal problems, it might be possible to discover lapses in training or other blind spots among investigating authorities.

Aside from this inherent limitation with the data, however, there are two other significant caveats that must be noted. Assistant federal prosecutors tend to be busy professionals, and thus may fail to record each matter for which they spend at least an hour of time. As a conse-

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135 Bureau of Justice Statistics, *U.S. Dep't of Justice, Data Dictionary: Variables For Defendants in Federal Criminal Cases Filed, Fiscal Year 1994*, at [http://fjsrc.urban.org/noframe/dd/dd\\_intro.htm](http://fjsrc.urban.org/noframe/dd/dd_intro.htm) (last visited Nov. 21, 2003); see also U.S. ATTORNEYS' MANUAL, *supra* note 20, § 9-27.270(A).

136 These thirty-four "Primary Reasons for Declinations" cover a gamut of rationales for why a matter may not be pursued, including "Agency request," "Lack of evidence of criminal intent," "Petite policy," "Statute of limitations," and "Witness problems." See U.S. Dep't of Justice, U.S. Attorney Criminal Matter and Declination Sheet (on file with author).

137 See *supra* note 135.

quence, the recorded declinations may tend to be somewhat more representative of complex matters that AUSAs spend slightly more time examining. Similarly, given the rigidity of the declination categories prescribed by the Justice Department, and the nature of criminal matters themselves, AUSAs necessarily need to make interpretive judgments. With respect to interpretive questions, a declination may often be based on more than one ground, some of which may go unrecorded purely for convenience's sake. In addition, while one AUSA may choose to decline the case for one reason, and record it as such, a different prosecutor may have declined the matter on other grounds. Despite these obvious problems with the data set, however, the information provided by individual AUSAs is still the largest and most comprehensive information regarding declinations available anywhere.

Although there are doubtless limitations to these data,<sup>138</sup> they constitute the largest pool of information of its kind. The following analysis focuses on matters received by prosecutors from an investigative agency. Once referred to a U.S. Attorney's office, such criminal matters may be declined for prosecution, or they may become "cases" that that will be pursued to a formal indictment stage, procedurally dismissed by a court, or defaulted. It is important to note that the data set does not include matters developed by investigative agencies, but then never forwarded to prosecutors. To be included in this analysis, the matter must have been referred to a U.S. Attorney's office (and, of course, the declination reasons must have been recorded by the reviewing attorney). In addition, the data set fails to include matters that go unreported because they fail to consume even an hour of attorney time.<sup>139</sup>

### A. Trends from 1994–2000

#### 1. Criminal Case Filings, Matters, and Declinations

To provide some sort of background to the declination trend data, it is worthwhile to note the number of criminal cases filed for the relevant time period: 1994–2000.<sup>140</sup> After all, to gain some per-

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138 See generally Transactional Records Access Clearinghouse, Syracuse Univ., *About The Data: Federal Prosecutor Database*, at <http://trac.syr.edu/data/jus/eousaData.html> (last visited Sep 21, 2003) ("While these federal prosecutorial databases have some limitations and specific problem areas, on the whole TRAC's analyses have generally found the criminal data to be of relatively high quality as compared with other government administrative data sources.")

139 While a tally of such cases would be interesting to study, as a practical matter there are no means available to retrieve such data.

140 The latest date for which data was available as of this writing was 1994–2000.



spective, declinations must be viewed in the larger context of criminal case filings, as many reasons for declining cases may exist—including the existence of available resources, changes in national priorities, or substantive legal changes. Thus, Table 1 reports the *total* number of federal criminal cases filed during the period of 1994 through 2000, as well as the principal means by which referred matters were terminated.

TABLE 1. SUSPECTS IN CRIMINAL MATTERS 1994–2000<sup>141</sup>

Year	Matters Concluded By U.S. Attorney <sup>142</sup>	Matters Terminated Before U.S. Magistrates	Filings: Matters Prosecuted In U.S. District Court	Matters Declined For Prosecution	Percent of Matters Declined
1994	94,980	9,754	50,802	34,424	36%
1995	102,309	10,710	55,703	35,896	35%
1996	98,454	8,684	56,938	32,832	33%
1997	99,459	10,007	60,383	29,069	29%
1998	106,022	12,243	64,993	28,786	27%
1999	113,933	14,545	68,384	31,004	27%
2000	117,450	13,916	73,090	30,444	26%

The first column lists those matters concluded by the U.S. Attorneys' offices, whether by filing a case in district court, litigating it before a magistrate, or declining to prosecute it altogether. The second column details those matters concluded by a federal magistrate judge. The third column lists those cases actually filed in district court, and the fourth column divulges the number of matters in which AUSAs decided to forgo prosecution. As the table demonstrates, criminal filings increased substantially over the covered period, rising from 50,802 in 1994 to 73,090 in 2000—an increase of roughly 44%. This finding is of particular interest because, over this

141 See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 2000, 2001 NCJ 189737, app. at 28–29, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp00.pdf> [hereinafter CRIMINAL CASE PROCESSING]. This time period was selected because it includes the latest year for which the necessary data were available. These particular years are interesting because they encompass a single President (William Clinton) and a lone Attorney General (Janet Reno). Thus, policies coming from the upper echelons of government might be presumed to have a certain degree of stability. That fact, in and of itself, makes the declination trends all the more interesting.

142 Data reported here are for matters “concluded” during the federal fiscal years tabulated regardless of when the matters were opened. Matters are concluded when (1) a U.S. Attorney files a case in district court, or (2) a misdemeanor case is concluded before a U.S. magistrate, or (3) a U.S. Attorney declines to prosecute the matter. *Id.* at 17.

same time period, a substantial drop in violent crime has been widely reported.<sup>143</sup> Of course, one might argue that crime has dropped because (among other reasons) the government has been vigorously pursuing the prosecution of criminal cases. As can be seen in the trends reflected in the first column of the table, this increase in filings also corresponds to a 24% increase (from 94,980 to 117,450) in the number of matters concluded by the U.S. Attorneys' offices over the 1994–2000 period.<sup>144</sup>

The fourth and fifth columns, respectively, reflect the extent to which federal prosecutors are able to take advantage of their considerable discretion to decline prosecutions. The fourth column details the number of cases prosecutors' declined, while the final column presents data for the proportion of matters where prosecution was declined over the 1994–2000 period. A clear trend is evident: fewer matters were declined over this time-frame so that 36% of matters were declined in 1994 and only 26% in 2000. This finding is particularly interesting given that it occurred over a period when the number of matters handled by the U.S. Attorneys' offices increased dramatically.

Overall, these figures suggest a negative association between the number of matters referred to U.S. Attorneys and the proportion of the matters they declined to prosecute. That is, when the U.S. Attorneys were dealing with *fewer* matters, they tended to decline a *greater* proportion of them (i.e., more than one-third in 1994 when the number of matters was less than 100,000) whereas by 2000, they declined to prosecute only about one quarter of matters and processed over 117,000. At first blush, this appears counterintuitive. One would expect that with an increase in the number of received matters, there would be a corresponding increase in the number of declinations. Although this represents a fairly substantial drop in the total number of new matters declined, it still indicates that roughly a quarter of new matters received will not proceed to indictment. The following section will offer at least a partial explanation for the decrease in declinations even as the number of matters increased.

## 2. Deployment of Available Resources

The findings presented above indicate a negative association between the propensity of U.S. Attorneys to decline to prosecute matters and the total number of matters being handled by their offices. This

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143 See Bureau of Justice Statistics, U.S. Dep't of Justice, *Key Crime & Justice Facts at a Glance*, at <http://www.ojp.usdoj.gov/bjs/glance/cv2.htm>. (last modified Aug. 24, 2003).

144 CRIMINAL CASE PROCESSING, *supra* note 141, app. at 28 (Table A.3).

means that, on the whole, U.S. Attorneys' offices prosecuted relatively fewer matters when they had fewer matters with which to concern themselves. Such a finding seems counterintuitive because, all other things being equal, one would expect more resources (e.g., staff time to investigate referrals) to be available for prosecuting matters when there are fewer matters to deal with. However, it is possible that all other things were not equal over the 1994–2000 time period. Specifically, it may have been that along with annual increases in the number of matters referred came increases in the resources available to prosecute them.<sup>145</sup>

a. Comparisons by District

One approach to testing this hypothesis is to compare districts that process fewer matters annually with those that process a larger number. This test assumes that the number of matters dealt with by a district serves as a proxy indicator for the amount of resources available to prosecute them; that is, larger districts have larger staffs and bigger budgets, more experts in particular areas of the law, and other potential advantages over smaller districts.

To this end, Table 2 presents the proportion of matters declined by districts during the 1994–2000 time period classified into “thirds” on percentile rank according to a court size index, which is based upon the number of matters concluded in the year in question. A clear relationship emerges whereby the U.S. Attorneys for districts in the largest third on the court size index declined fewer than one quarter (21%) of the matters referred to them, whereas those for the districts in the smallest third declined over one third (37%) of matters. As predicted, the districts in the middle-sized third fell in between the two extremes in terms of declination (33%).

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145 See U.S. DEP'T OF JUSTICE, BUDGET TREND DATA 1975–2003, at 71–72 (2002), available at [http://www.usdoj.gov/jmd/budgetsummary/btd/1975\\_2002/2002/pdf/BudgetTrand.pdf](http://www.usdoj.gov/jmd/budgetsummary/btd/1975_2002/2002/pdf/BudgetTrand.pdf) [hereinafter BUDGET TREND DATA] (indicating that U.S. Attorneys' offices budgets experienced a real percentage growth of nearly 47% during 1993–2003; approximately 21% of that growth occurred between 1994–2000).

TABLE 2. PROPORTION OF MATTERS DECLINED BY DISTRICT SIZE<sup>146</sup>

Court Size	Proportion Declined	Mean Number of Matters Concluded Per Year (approx)
Top Third	21%	1343
Middle Third	33%	414
Bottom Third	37%	219

An inspection of Table 2 suggests that the relationship between district size and declination is linear; in other words, that it is more or less uniformly true that as district size increases, the proportion of matters declined decreases. Indeed, the matter-level Pearson correlation coefficient ( $r = -.18$ ,  $p < .001$ ;  $n = 744,087$ ) between these two factors indicates that there is a relatively strong and statistically significant linear association between the district size index (i.e., number of matters handled that year for the district in which the matter arose) and the propensity to decline cases.

#### b. Comparison of Budget Allocations

A second, perhaps more direct means to examine the effect of available resources on declinations is to compare the actual resources available to the districts. Accordingly, Table 3 presents judicial and prosecutorial resources for each of the relevant years for which data were available. The following table summarizes the overall expenditures made by the federal criminal justice system from 1994 through 1999 (the latest date for which data were available),

<sup>146</sup> Original tabulations prepared by the author from public use data sets made available by the Bureau of Justice Statistics. Bureau of Justice Statistics, U.S. Dep't of Justice, *EOUSA Suspects in Matters Concluded*, at <http://fjsrc.urban.org/noframe/dd/variable.cfm> (last visited Sep 21, 2003). There were 744,087 matters with complete data from 1994–2000 included in the analysis. District courts were assigned to “thirds” in Table 2 based on percentile rank on number of matters concluded annually.

TABLE 3. FEDERAL GOVERNMENT JUSTICE SYSTEM EXPENDITURES IN MILLIONS OF DOLLARS<sup>147</sup>

Year	Total Justice System	Police Protection	Judicial and Legal	Corrections
1994	19,084	8059	8184	2841
1995	22,651	9298	9184	4169
1996	23,344	10,115	9459	3766
1997	27,065	12,518	10,651	3896
1998	22,833	12,207	7461	3164
1999	27,392	14,796	8515	4080

As this table shows, a clear trend emerged showing that expenditures increased substantially over the sampled time period. Law enforcement expenditures on “police protection” in particular, rose from about \$8 billion in 1994 to \$14.7 billion in 1999. Corrections expenditures also increased substantially, while judicial resources made few gains. As a consequence, one could reasonably expect that the increase in police expenditures has had substantial bearing upon the overall increase in the number of matters referred to prosecutors.

Table 4 contains a more refined look at resources available to law enforcement by examining personnel. The table reflects the number of full time federal officers overall, and breaks down the number of officers available to principal law enforcement components—namely, the FBI, DEA, INS, and the Bureau of Alcohol, Tobacco, and Firearms (ATF).<sup>148</sup>

TABLE 4. FEDERAL LAW ENFORCEMENT OFFICERS 1993–2000<sup>149</sup>

Year	Number of Full-Time Federal Officers	Number of Officers Per 10,000 U.S. Residents	Customs Service Officers	FBI Officers	INS Officers	DEA Officers	ATF Officers
1993	68,825	2.7	10,120	10,075	9466	2813	1959
1996	74,493	2.8	9749	10,389	12,403	2946	1869
1998	83,143	3.1	10,539	11,285	16,552	3305	1723
2000	88,496	3.1	10,522	11,523	17,654	4161	1967

147 See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 4, available at <http://www.albany.edu/sourcebook/1995/pdf/t12.pdf> [hereinafter SOURCEBOOK].

148 Although the ATF historically has been a component within the Department of the Treasury, it was incorporated into the Department of Justice in 2003 as a result of the Homeland Security Act.

149 Federal law enforcement officers are defined as full-time federal officers with arrest and firearm authority. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 1993, 1994 NCJ 151166, at 1; BUREAU OF

As Tables 4 and 5 illustrate, federal law enforcement agencies experienced substantial growth over the period in question. Although the Customs Service has seen only modest increases, the INS, FBI, and DEA have seen fairly substantial gains in budget and, in turn, the number of agents employed. The increases in the INS doubtless reflect the concern Congress has had with respect to illegal immigration. Similarly, increases in the FBI and DEA budgets and personnel likely stem from efforts to battle violent and drug-related crime.

TABLE 5. FEDERAL LAW ENFORCEMENT BUDGET AUTHORITY BY AGENCY  
1994–2000<sup>150</sup>

Year	Customs Service	FBI	INS	DEA	ATF <sup>151</sup>
1994	\$1458	\$2063	\$1624	\$ 970	\$386
1995	\$1409	\$2280	\$2120	\$1001	\$457
1996	\$1502	\$2433	\$2639	\$1050	\$429
1997	\$1638	\$2739	\$3256	\$1238	\$516
1998	\$1679	\$2932	\$3798	\$1384	\$572
1999	\$2100	\$2992	\$3958	\$1477	\$584
2000	\$1935	\$3040	\$4305	\$1587	\$614

The struggle, of course, comes in matching those who investigate and refer criminal matters to those who must prosecute and adjudicate the cases. It is at this juncture that the picture becomes somewhat more clouded. Resource increases in the U.S. Attorneys' offices and in the courts have not quite kept pace with those of federal law enforcement. Indeed, as the following tables demonstrate, U.S. Attorneys' offices have fared slightly less well than the courts in terms of budgetary increases.

JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 1996, 1998 NCJ 164617, at 1; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 1998, 2000 NCJ 177607, at 1; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 2000, 2001 NCJ 187231, at 1.

150 In millions of dollars (inflation adjusted).

151 Reflects ATF budget figures contained in BUDGET TREND DATA, *supra* note 145, at 131.

TABLE 6. STAFFING IN U.S. ATTORNEYS' OFFICES 1994–2000<sup>152</sup>

Year <sup>153</sup>	Attorneys	Support Staff	Total Personnel	Total Positions <sup>154</sup>
1994	4064	4620	8684	8239
1995	4365	4476	8841	8302
1996	4530	4553	9083	8595
1997	4449	4536	8985	8652
1998	4674	4686	9360	8948
1999	4888	5454	10,342	9044
2000	4172	4655	8827	9120

One telling point of comparison is the 1996–2000 increase in the number of federal law enforcement officer positions shown in Table 4 versus the increase over the same time period in the U.S. Attorneys' offices' positions in Table 6. From 1996 to 2000, the number of federal law enforcement officers with arrest powers increased by 18% (from 74,493 to 88,496) while over that same time period, the number of persons working in U.S. Attorneys' offices increased by only 6% (from 8595 to 9120). Of even greater significance, the number of attorneys actually seems to have decreased during the surveyed period. The seemingly anomalous result suggests that despite a fairly stable number of attorneys (from 4064 attorneys in 1994 to 4172 in 2000), those attorneys were declining fewer matters and filing more cases in district court. It is difficult to speculate as to why this might have occurred. One might think that a stable cadre of AUSAs would mean that more matters would be declined and fewer prosecuted. The increase in filings and corresponding decrease in declined matters, however, belies that hypothesis. A possible explanation may lie in the *complexity* of the filed cases. It may be the case that AUSAs are simply pursuing less complex matters in district court, and thus are able to handle a greater number of cases. If, in fact, AUSAs are interested in gaining trial experience, it may be possible that they are inclined to forgo resource intensive, time-consuming matters in an effort to maximize time before a judge or jury. This is plainly an area that merits further serious study.

152 EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, ANNUAL STATISTICAL REPORTS, 1994–2000 (2002).

153 The 1999 and 2000 figures for attorneys, support staff, and total personnel are calculated by the author from a data set provided by EOUSA, and are therefore not fully comparable with figures published in the Annual Statistics Report for fiscal year 2000.

154 Total positions data summarized from BUDGET TREND DATA, *supra* note 145, at 73.

In a similar vein, Tables 7 and 8 furnish resource information for the U.S. district courts over part of the relevant timeframe. Table 7 reveals that full-time equivalent positions in the courts went from a total of 17,213 in 1997 to 18,500 in 2000, resulting in a 7% increase. Over the same four-year period the budgetary obligations for the courts rose from \$1.7 billion to about \$2.1 billion for an increase of about 22%. Thus, the budget for the district courts apparently rose at a greater rate than the number of people employed therein.

TABLE 7. FULL-TIME EQUIVALENT (FTE) POSITIONS IN U.S. DISTRICT COURTS 1997-2000<sup>155</sup>

Year	Total FTE's
1997	17,213
1998	17,753
1999	18,278
2000	18,500

TABLE 8. BUDGETARY OBLIGATIONS FOR U.S. DISTRICT COURTS 1997-2000<sup>156</sup>

Year	Total Obligations
1997	\$1705
1998	\$1833
1999	\$1991
2000	\$2072

As these tables show, the proportional resources available to the part of the federal justice system, which generates referrals for prosecution, continues to outstrip those available for prosecution itself. Presumably, to the extent that investigatory resources continue to dwarf the number of attorneys available to try cases, or judges available to hear cases, prosecutors will be compelled to select cases based upon resource considerations. Similarly, if judges prove to be the bottleneck, they too will be forced to implement management strategies for the ever-increasing number of filed cases. Regardless, declinations remain a driving force within the criminal justice system.

<sup>155</sup> Original analysis of data provided to author by the Administrative Office of the U.S. Courts (on file with author).

<sup>156</sup> Resources in millions of dollars. Data provided to author by the Administrative Office of the U.S. Courts (on file with author).



### 3. Declinations by the Referring Agency

In the aftermath of the September 11 terrorist attacks, much has been made of the professionalism of federal law enforcement agencies.<sup>157</sup> Indeed, the FBI has often been touted as the single most important law enforcement agency in the world.<sup>158</sup> The reality, however, is that even the vaunted FBI, beset by a series of well-publicized public relations disasters, has seen its image tarnished.<sup>159</sup>

Nor are federal law enforcement agencies clones of one another; they each have different cultures and perhaps inconsistent reputations and policies for generating referrals. Concern about ensuring prosecution may lead agents to hold onto matters longer than is necessary, or even beneficial, for the orderly administration of justice. It is occasionally suggested that law enforcement agencies are often inclined to drop a case only after an Assistant U.S. Attorney has had an opportunity to consider it; as a consequence, agencies sometimes refer inadequately developed legal matters to the U.S. Attorneys' offices for processing.<sup>160</sup> It is therefore useful to consider declinations in the context of the referring agency, as that may tend to show the relative strength of that agency's investigative resources, or the care with which an agency handles a case prior to referring it to a U.S. Attorney's office. To this end, Table 9 presents the proportion of all matters referred to U.S. Attorneys by various law enforcement agencies, and the declination rates for each.

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157 *Before the House Comm. of Veterans Affairs*, 107th Cong. 107-14 (Oct. 15, 2001) (statement of Annie W. Everette, Acting Regional Administrator, Nat'l Capital Region, General Servs. Admin.).

158 Press Release, Senator Charles Schumer, Schumer, Hatch Unveil Bill to Create Blue Ribbon Commission to Conduct Top-to-Bottom Review of FBI (June 20, 2001).

159 Ken Guggenheim, *Congressional Sept. 11 Inquiry Looks at Sharing of Intelligence*, ASSOCIATED PRESS NEWSWIRE, Oct. 1, 2002, WESTLAW, Westnews Library, APWIREPLUS.

160 Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 *FORDHAM URB. L.J.* 573, 576-81 (1999).

TABLE 9. PROPORTION OF MATTERS DECLINED BY  
REFERRING AGENCY<sup>161</sup>

Referring Agency	Proportion Declined	Relative Probability of Declination <sup>162</sup>	Proportion of All Matters	Number of Matters Referred
IRS	43%	Higher	3%	23,497
DEA	19%	Lower	15%	111,834
FBI	43%	Higher	30%	221,212
INS	4%	Lower	11%	81,386
Marshals	43%	Higher	2%	14,166
Postal	40%	Higher	4%	33,017
ATF	33%	Higher	6%	43,642
Customs	16%	Lower	7%	49,946
Secret Service	34%	Higher	4%	30,280
Other	32%	n.s. <sup>163</sup>	18%	135,107

As might be expected, the FBI was by far the largest source of referrals during this time, accounting for some 30% of the total matters referred. The next largest sources of referrals were the DEA (15%) and the INS (11%), respectively—both Justice Department components. Miscellaneous agencies<sup>164</sup> other than those listed on the table accounted for 18% of all referrals, while the IRS, U.S. Marshals Service, Postal Service, Customs, and Secret Service all contributed referral percentages that failed to break out of the single digits.

161 Original tabulations prepared by the author from public use data sets made available by the Bureau of Justice Statistics. See SOURCEBOOK, *supra* note 147. The analysis included a total of 744,087 matters with complete data from 1994–2000. See *supra* note 146.

162 The relative probability of declination for referrals from each agency computed by calculating the adjusted residual statistic for the parallel cross tabulation on a 2% random sample of the population of matters. Adjusted residual statistics are standardized scores with a mean of zero and a standard deviation of one. To the extent that the obtained value in the cell is larger or smaller than that expected under independence, the adjusted residual becomes correspondingly larger or smaller. Probabilities under independence of very large or small values are as follows: (1) *an absolute value of adjusted residual = 2*,  $p = .045$ ; (2) *an absolute value of adjusted residual = 2.5*,  $p = .01$ . Shelby J. Haberman, *Log-Linear Models for Frequency Tables with Ordered Classifications*, 30 *BIOMETRICS* 589, 592 (1974). In this study, cells with absolute values for adjusted residual equaling two or greater are reported as significantly different (i.e., having “higher” or “lower” relative probabilities).

163 No significant difference in relative probability.

164 Over 350 different referring entities appear at least once in the data. These include state and local authorities, courts, and all manner of federal agencies (e.g., Federal Crop Insurance Corporation, Forest Service, Department of Education, and the U.S. Army Corps of Engineers). See SOURCEBOOK, *supra* note 147.

Scrutiny of the results in the column entitled "Relative Probability of Declination" reveals significant differences in the likelihood that matters will be declined depending on the agency that referred them for prosecution. Thus, matters referred by the DEA (19% declined), Customs Service (16% declined), and INS (4% declined) were relatively unlikely to be declined when compared to matters referred by other agencies. All other agencies in Table 9 had declination rates in the 30% to 40% range. This analysis indicates that the matters referred by the FBI, the U.S. Marshals, the IRS, and Postal authorities are particularly likely to be declined.

It is possible that the FBI sees a greater percentage of matters declined because of the sheer volume of matters they refer for prosecution, the culture of their close working relationships with prosecutors, or other internal policies.<sup>165</sup> Nevertheless, these differences suggest that authorities ought to consider evaluating the agency referral process and general investigatory policies. If FBI agents, for example, are using prosecutors as a "clearing house" to weed out deficient cases, it may be fruitful to pursue better agent training as a means of preserving prosecutor time. On the other hand, it may be the case that a number of referred matters are ultimately absorbed into larger cases, or—by their sheer volume—make it difficult for prosecutors to move on each referred matter. Regardless, the high number of FBI-referred matters that are declined for prosecution is an area worthy of further study.

The reason for the relatively high proportion of declined matters from the IRS may relate to the fact that other avenues for pursuing delinquent taxpayers exist.<sup>166</sup> The IRS is not limited to pursuing criminal prosecution in order to obtain just results. It may proceed against a taxpayer civilly, and may substitute civil fines and restitution schedules in lieu of criminal sanctions.<sup>167</sup> Such alternatives are not necessarily available for drug or fraud defendants.

#### 4. Nature of the Offense Alleged

Another general hypothesis about prosecutorial declinations is that the likelihood that a matter will be declined varies according to the nature of the offense alleged.<sup>168</sup> In other words, all other things

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165 John T. Elliff, *National Security and Civil Liberties: The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 786–88 (1984).

166 See 26 U.S.C. § 6651 (2000).

167 *Id.*

168 See Wayne A. Logan, Comment, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1733.

being held constant, the gravity of the offense is likely to affect the probability that it will be declined. A less serious offense is thus more likely to be declined than a more serious offense. This only makes sense if one accepts the underlying principle that, when resources are scarce, it is incumbent upon the government to pursue only the most serious offenses. If resources were not scarce, or it could be demonstrated that the pursuit of certain less significant crimes increased deterrent effects with respect to more serious crimes, then trivial crimes could be pursued with equal vigor to serious offenses. Such a world does not exist, however. Prioritization is thus both inevitable and laudable. Few individuals would fault the Attorney General for encouraging prosecutors to forsake minor drug offenses, leaving them to state authorities, in exchange for an increased effort to ferret out terrorists. To this end, this Part of the Article will present data on the relationship between declination and (1) offense priority, (2) type of offense charged, and (3) the nature of the illegal substance involved in drug cases.

The offense priority represents the Justice Department's present view that a particular sort of activity demands a substantial commitment of public resources to combat.<sup>169</sup> A difficulty with this information is that priorities presumably shift over time. Similarly, the relative experience of AUSAs may have an effect as well. A newly minted assistant attorney may view a matter before her quite differently from the manner a seasoned veteran might view precisely the same matter. This potential for variation among reviewing attorneys highlights, in some respects, the importance of established rules to guide attorney prioritization.

With respect to the "type" of offense charged, the Justice Department groups offenses in rough categories relating to "violent offenses," "frauds," "drug offenses," "property offenses," "regulatory," and "public order" offenses.<sup>170</sup> Although these categories are necessarily crude, they do speak to providing some sort of rough order for a relative comparison of offenses—both inter- and intra-offense type(s). For example, examining declinations by the type of illegal drug involved is a means of assessing law enforcement's prioritization of drug offenses. If prosecutors deem heroin to be a more serious drug (or social problem) than marijuana, then presumably more heroin prose-

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169 See OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUSTICE, FY 2001 PERFORMANCE REPORT & FY 2002 REVISED FINAL FY 2003 PERFORMANCE PLAN (2002), available at <http://www.usdoj.gov/ag/annualreports/pr2001/Section01.htm>.

170 UNIFORM CRIME REPORTING PROJECT, U.S. DEP'T OF JUSTICE, NATIONAL INCIDENT-BASED REPORTING SYSTEM, VOLUME I: DATA COLLECTION GUIDELINES (2000), available at <http://www.tbi.state.tn.us/nibrsv1b.pdf>.

cutions will be pursued. Alternatively, if a particular community believes sophisticated bank frauds to be more serious than simple drug possession offenses, then such drug offenses ought to be declined at a greater rate than frauds.

a. Offense Priority Classifications and Declinations

Prioritizing offenses is a useful means of ensuring the efficient use of otherwise scarce resources. The President, the Attorney General, and Congress presumably establish (or at least generally articulate) national priorities, whereas local communities may clamor for enforcement efforts to concentrate on problems of more immediate, local concern. If, for example, the nation deems it vital to combat terrorism offenses, it makes little sense to focus an office's attention on minor white collar crime matters. Similarly, if methamphetamine use plagues a particular district, it might mean that resources should be shifted away from more minor drug prosecutions. Nevertheless, the designation of what constitutes a "priority" will often come from the top down.<sup>171</sup>

A current example of the Attorney General's setting of such a priority is contained in the Justice Department's *Revised Final FY 2003 Performance Plan*.<sup>172</sup> The first section of the Performance Plan articulates "Strategic Goal One," which is "To Protect America Against the Threat of Terrorism."<sup>173</sup> In this section, the Justice Department vows to "devote all resources necessary to disrupt, weaken, and eliminate terrorist networks, to prevent or thwart terrorist operations, and to bring to justice the perpetrators of terrorist acts."<sup>174</sup> Scrutiny of the Performance Plan indicates that the intention of this declaration is to focus the efforts of the various Justice Department components on the fight against terrorism. To this end, the Performance Plan specifies antiterrorism activities to be undertaken by the FBI, the INS, the DEA, and the U.S. Attorneys' offices.<sup>175</sup>

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171 The U.S. Attorneys' Manual alludes to this process as follows:

[I]n the interest of allocating its limited resources so as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. . . . [I]n addition, individual U. S. Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance.

U.S. ATTORNEYS' MANUAL, *supra* note 20, § 9-27.230(B)(1).

172 OFFICE OF THE ATTORNEY GENERAL, *supra* note 169.

173 *Id.* at 1.

174 *Id.*

175 *Id.*

Each of these Justice Department components has specified performance measures that indicate success in fulfilling the antiterrorism mandate. One such measure is the number of terrorist convictions.<sup>176</sup> This figure is defined in terms of EOUSA central case management system data. Specifically, the Justice Department counts terrorist convictions as the number of “defendants who plead guilty or were found guilty in cases classified by the U.S. Attorneys’ offices under the Domestic Terrorism program category or the International Terrorism program category.”<sup>177</sup>

Presently, the Justice Department data records matters as being of either “national” or “district” priority, both, or neither.<sup>178</sup> Matters are classified as national priorities if their program category is so designated.<sup>179</sup> Matters in some program categories are per se designated as national priorities (e.g., “federal corruption-procurement,” “illegal discharge of toxic waste,” and “cases assigned exclusively to the Organized Crime Drug Enforcement Task Force”).<sup>180</sup> However, matters in some program categories only become national priorities if the dollar loss involved is above a particular threshold.<sup>181</sup>

Table 10 contains information about the relationship between the priority classification of matters and declination. Matters classified as primarily a district priority make up only 13% of the total. Mat-

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176 *Id.* at 17.

177 *Id.* These criminal program categories are a means by which the Justice Department classifies offenses for data collection purposes. To this end, an Assistant U.S. Attorney who receives a criminal referral completes a form that contains some eighty different criminal program categories. See Criminal Matter and Declination Sheet, *supra*, note 136. Particular offenses under the U.S. Code are grouped into program categories on a conceptual basis. Thus, category 011, called “Federal Corruption—procurement” is defined as “[c]orruption of any federal official or employee relating to the procurement of goods and services (may involve violations of 18 U.S.C. 201, 203, 371, 872, 1001, 1962 and other statutes).” Transactional Records Access Clearing House, Syracuse Univ., *Program Category Codebook: Program Category*, at [http://trac.syr.edu/documents/DD\\_AppendixB.html](http://trac.syr.edu/documents/DD_AppendixB.html) (last visited Sep. 9, 2003).

178 The Program Category Codebook for the data notes that a matter qualifies as being a “District Priority” if it is so determined by the local U.S. Attorney and the district priority is different from the established national priorities. Transactional Records Access Clearinghouse, Syracuse Univ., *Program Category Codebook: Agency Priority*, at [http://trac.syr.edu/documents/DD\\_AppendixC.html](http://trac.syr.edu/documents/DD_AppendixC.html) (last visited Sep. 9, 2003).

179 *See id.*

180 *Id.*

181 *See, e.g.*, program category 037, “Bankruptcy Fraud,” which is defined as “[f]raud against creditors, concealment of assets, and other illegal acts related to bankruptcy and bankruptcy proceedings . . . may involve violations of 18 U.S.C. 152, 153, 1341, 1343, 1962 and related statutes.” *Id.* The codebook notes that “[a]ll such cases involving \$100,000 or more in aggregate losses are national priorities.” *Id.*

ters that are of only national, only district, or both a district and national priority comprise the remainder.

TABLE 10. PROPORTION OF MATTERS DECLINED BY  
OFFENSE PRIORITY<sup>182</sup>

Priority Classification	Proportion Declined	Relative Probability of Declination	Proportion of All Matters	Number of Matters
National and District	27%	Lower	9%	62,780
District Only	32%	Higher	13%	97,394
National Only	29%	Lower	37%	272,138
Neither National Nor District	31%	Higher	41%	294,948

Perhaps expectedly, matters that are *neither* a national nor a local priority comprise the bulk (41%) of the declinations. In contrast, matters that are *both* a national and district priority account for the smallest (but still significant) proportion of declined matters at 9% of the total.

The relative probability analysis for these data revealed that matters classified as district only or as neither a national nor a district priority were relatively likely to be declined. This suggests that the articulation of a matter as a national or a local priority makes a difference as to whether a matter will be pursued. Looks can be deceiving, however. An inspection of the actual percentages involved showed that, while significant, these differences were not large in the absolute sense. Thus, the "District Only" (32% declined) and "Neither National Nor District" classifications (31% declined) percentages were not strikingly larger than the "National and District" (27% declined) and "National Only" (29% declined) classifications. Nevertheless, the pattern suggested by this analysis is that prosecutors are generally more likely to decline matters in which a national priority is not involved than other matters.

This information is certainly heartening to the extent that it confirms the view that the establishment of national (and district) priorities should have an effect upon behavior in the field. Nevertheless, it remains clear that substantial resources are still devoted to prosecutions in which only a parochial, or no, interest is involved. Insofar as officials clearly articulate and publicize national and district priorities, it may be the case that greater effort will be made to carry out those priorities. It will be of considerable value to determine whether Attor-

182 The total number of matters with valid data was 727,260. For information on the data source, and the method used for the relative probability analysis, see *supra* notes 145-47.

ney General Ashcroft's call to make domestic security and combating terrorism the Justice Department's chief objectives will be realized.

#### b. Offense Classifications and Declinations

The grouping of offenses by "class" is a complicated endeavor. Federal law sets forth hundreds of statutes under which defendants can be criminally prosecuted. Numerous federal agencies collect statute-specific offense data and, for the convenience of reporting, consolidate various criminal statutes into particular offense categories.<sup>183</sup> Unfortunately (at least for research purposes), while each agency consolidates the offense specific statutes using the same generic criteria (e.g., murder, fraud, drugs), the actual composition of these categories tends to vary significantly by agency.<sup>184</sup> Moreover, unlike offense categories reported by the federal judiciary, the United States Sentencing Commission (USSC), and the Bureau of Prisons (BOP), those reported by the U.S. Attorneys are not based entirely on statutes.<sup>185</sup> For example, the U.S. Attorneys assign program categories and charges according to the type of criminal action or specific departmental initiative.<sup>186</sup> For some offenses, particularly fraud offenses, U.S. Attorneys' program categories are more descriptive than the offense categories used by other agencies.<sup>187</sup> An offense charged under a specific fraud statute might be assigned a program category by U.S. Attorneys that details a specific type of fraud (e.g., health care fraud), or an offense charged under a weapons statute might be assigned a program category that denotes a repeat weapons offender.<sup>188</sup>

The U.S. Attorneys assign the most significant, or most serious, offense in a manner that also differs from the federal judiciary, the USSC, and the BOP. The U.S. Attorneys assign the most significant offense based on the priority of a particular program category within the Department of Justice, whereas the other agencies define the most

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183 See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, available at <http://www.fbi.gov/ucr/ucr.htm> (the Uniform Crime Reporting Program collects, publishes, and archives various crime statistics, including the comprehensive "Crime in the United States"); see also CRIMINAL CASE PROCESSING, *supra* note 141, at 18-19.

184 FEDERAL BUREAU OF INVESTIGATION, *supra* note 183.

185 U.S. SENTENCING COMM., AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES (2002), available at <http://www.ussc.gov/training/fsgovr03.pdf>.

186 See U.S. ATTORNEYS' MANUAL, *supra* note 20, §§ 9-8.000 to -110.000.

187 *Id.* at §§ 9-40.000 to - 49.000.

188 *Id.*



significant offense based on the offense statutory maximum or, in the case of the BOP, on the actual sentence imposed.<sup>189</sup>

In recognizing the incomparability of case processing statistics across federal agencies, the Bureau of Justice Statistics (BJS) implemented the Federal Justice Statistics Program, which attempts to provide uniform case processing statistics across the different stages of the federal criminal justice system. Although the data come from numerous federal agencies, BJS applies uniform definitions to commonly used statistics describing data from each stage of the criminal justice process. BJS uses six main categories to record offenses.<sup>190</sup> These groupings, which are adopted here, are an effort to reconcile the differing means of reporting across the federal government. Table 11 thus presents declination data for alleged offenses classified according to BJS definitions.

TABLE 11. PROPORTION OF MATTERS DECLINED BY SIX-WAY BJS OFFENSE CLASSIFICATION<sup>191</sup>

Offense Type	Proportion Declined	Relative Probability of Declination	Proportion of All Matters	Number of Matters
Violent	34%	Higher	6%	42,331
Fraud	44%	Higher	25%	185,618
Other Property	38%	Higher	4%	26,348
Drug	20%	Lower	32%	233,079
Regulatory Pub. Order	64%	Higher	5%	36,881
Other Pub. Order	22%	Lower	29%	211,661

The relative probability analysis for the data contained in Table 11 revealed that drug offenses (20% declined) and other public order offenses (22% declined)<sup>192</sup> were infrequently declined compared to

189 *Id.* at § 9-27.300.

190 These are: (1) Violent offenses such as murder, robbery and kidnapping; (2) Fraudulent property offenses such as embezzlement, fraud and counterfeiting; (3) Other property offenses such as larceny and auto theft; (4) Drug offenses; (5) Regulatory public order offenses such as food and drug and civil rights offenses; and (6) Other public order offenses such as immigration, weapons, and tax law violations. The Compendium of Federal Justice Statistics contains more detail on these categories. See CRIMINAL CASE PROCESSING, *supra* note 141, at 19.

191 The total number of matters with valid data was 735,918. For information on the data source, and method used for the relative probability analysis, see *supra* notes 145-47.

192 It is worthwhile pointing out that immigration violations comprise approximately 60% of the matters in the "other public order" category. See *supra* notes 145-47. With increased attention paid to immigration offenses, the category may be dramatically affected over time.

the other offense categories in the table. Despite their somewhat ambiguous label, "Other Public Order" offenses are not insignificant. Included within this offense category are crimes involving weapons, immigration offenses, and violations of the tax law.<sup>193</sup> Prosecutors have increasingly targeted crimes involving weapons and immigration offenses for prosecution.<sup>194</sup> With a renewed emphasis on identifying immigration violations as a means of combating terrorism, it is unlikely that prosecutors' focus on immigration offenses will be blurred.

### c. Declinations by Drug Type

The nature of the particular type of drug involved in the offense is also a useful indicator of whether a declination may occur. Different drugs, certainly, have differing effects both upon the individual and upon the community in which they are distributed.<sup>195</sup> Most people, laymen and professionals alike, would doubtlessly consider marijuana to be a less harmful drug<sup>196</sup> (in terms of either its deleterious effect upon the community or its harmfulness to the drug-abusing individual) than heroin or cocaine. It is not that marijuana is not deemed harmful, in and of itself; it is merely that a notorious street drug like heroin is popularly considered *more* harmful than marijuana.<sup>197</sup> If that assumption is, in fact, correct, one would expect that law enforcement would be more diligent in its pursuit of heroin offenders than marijuana offenders. Presumably, law enforcement is most concerned with removing the more dangerous drugs from distribution channels.

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193 CRIMINAL CASE PROCESSING, *supra* note 141, at 19, 28–29.

194 See Joe Cantlupe, *Justice Report: Immigration Prosecutions Double Between 1996 and 2000*, COPLE NEWS SERVICE, Aug. 6, 2002; see also Kris Wise, *Prosecutor's Office Getting Help for Gun Related Cases; Federal Agency Gives Out Grants to County Office*, CHARLESTON DAILY MAIL, May 1, 2002, at 1C; OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUSTICE, STRATEGIC PLAN 2001–2006, at 24–29, 74–85 (2001), available at <http://www.usdoj.gov/jmd/mps/strategic2001-2006/entiredoc.htm>.

195 Peter Reuter, *Setting Priorities: Budget and Program Choices for Drug Control*, 1994 U. CHI. LEGAL F. 145, 165–66 (1994); see also Joe Dombrowski, *First Step in Drug Prevention is to Grasp the Problem*, RICHMOND TIMES DISPATCH, Feb. 16, 2003, at E6; Robert MacCoun & Peter Reuter, *Marijuana, Heroin, and Cocaine; The War on Drugs May Be a Disaster, But Do We Really Want a Legalized Peace?*, AMERICAN PROSPECT, June 3, 2002, at 25.

196 COMMUNITY ANTI-DRUG COALITIONS OF AMERICA & THE OFFICE OF NAT'L DRUG CONTROL POLICY, MARIJUANA—DEBUNKING THE MYTHS (2003), available at <http://www.mediacampaign.org/marijuana/Strategizer.pdf>.

197 See *id.*; Drug Policy Information Clearinghouse, Office of Nat'l Drug Control Policy, *Drug Facts: Marijuana* (June 2003), at <http://www.whitehousedrugpolicy.gov/drugfact/marijuana/index.html> (last modified Sept. 11, 2003).

If this hypothesis is correct, it might be inferred that matters in which marijuana was the drug of choice would be declined at a *higher* rate than cocaine. The actual picture that emerges when declinations are analyzed, however, is murky. Table 12 contains an analysis conducted on the roughly one quarter of matters that are drug offenses. It presents the proportion of matters declined by type of drug involved.<sup>198</sup>

TABLE 12. PROPORTION OF MATTERS DECLINED BY TYPE OF DRUG INVOLVED<sup>199</sup>

Drug	Proportion Declined	Relative Probability Of Declination	Proportion Of All Matters
Amphetamine	26%	n.s.	1%
Cocaine	20%	Higher	33%
Heroin	12%	n.s.	7%
Crack	15%	n.s.	16%
Marijuana	12%	Lower	31%
Methamphetamine	16%	n.s.	12%

The relative probability analysis revealed the rather surprising finding that marijuana is “tied” with heroin for the *least* likely type of drug offense to be declined, with a declination rate of 12%. Thus, a matter involving marijuana is less likely to be declined than one involving amphetamines, methamphetamines, or powder and crack cocaine. About one third of the reported matters involved powder cocaine, and another 16% involved the crack form of the drug. Marijuana accounted for 31% of the matters with the remainder involving methamphetamine, heroin, and amphetamine.

Several possible explanations might be offered to resolve this seeming anomaly. The declination rates might reflect the fact that the only marijuana matters referred to the U.S. Attorneys’ offices involved fairly large amounts of the drug, or that there are a higher number of defendants prosecuted who are traffickers as opposed to mere possessors.<sup>200</sup> It is also possible that prosecutors elect to drop more serious drug charges and retain charges involving marijuana as a means of (successfully) inducing defendants to plea. Plainly, further

198 Note that these were selected drug types; table does not include 6% of matters that involved other drugs such as barbiturates, steroids, etc.

199 The total number of matters with valid data was 177,044. For information on the data source, and the method used for the relative probability analysis for this table, see *supra* notes 145–47.

200 U.S. Drug Enforcement Admin., *Drug Trafficking in the United States*, at [http://www.dea.gov/concern/drug\\_trafficking.html](http://www.dea.gov/concern/drug_trafficking.html) (last visited Sept. 9, 2003).

study is necessary to determine why matters involving marijuana appear less likely to be declined than matters involving more dangerous drugs.

Regardless, these explanations almost certainly cannot hold true for explaining the relatively low declination rate for offenses involving crack cocaine. Crack cocaine, which is derived from the powder, is typically sold in small vials or baggies; it is not itself the subject of importation, nor is it even the preferred means of large quantity distribution.<sup>201</sup> It is routinely found as a street-level drug. The relatively low percentage of crack cocaine matters declined by prosecutors may be due to the fact that much of society perceives crack to be more harmful than marijuana, or that crack penalties are, to an extent, higher than those of powder,<sup>202</sup> and thus crack cases present a more alluring target for prosecutors. If those are in fact the most coherent explanations for understanding these results, it would be useful for policymakers and Justice Department officials to implement guidelines with respect to drug prosecutions. Higher penalties for more harmful drugs will likely affect prosecutors' decisions as to which matters they should vigorously pursue. Whether appropriate or not, penalties will affect prosecutorial decisionmaking—even if merely as a signal to gauge harm.

### III. PUBLIC POLICY IMPLICATIONS

This study has examined declination trends and explored resource and priority indicators that appear to influence those trends. Although a clear pattern has emerged—namely, that during the years examined (1994–2000), a lower percentage of matters were declined each year—it remains a fact that federal prosecutors decline roughly a quarter of all criminal matters referred to them. The data suggest that, as Congress increased resources allocated to prosecutors and investigators over time, the proportion of matters declined decreased. As might have been expected, expanded resources yielded a more vigorous pursuit of criminal activity. As federal investigative agency referrals to the U.S. Attorneys' offices increased during the relevant time period, the actual number of matters declined varied over time, with a

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201 Drug Policy Information Clearinghouse, Office of Nat'l Drug Control Policy, *Drug Facts: Crack*, at [http://www.whitehousedrugpolicy.gov/drugfact/crack\\_b.html](http://www.whitehousedrugpolicy.gov/drugfact/crack_b.html) (last modified Sep 11, 2003). See generally U.S. Drug Enforcement Admin., U.S. Dep't of Justice, *DEA*, at <http://www.dea.gov> (last visited Sept. 21, 2003).

202 U.S. DEP'T OF JUSTICE, FEDERAL COCAINE OFFENSES: AN ANALYSIS OF CRACK AND POWDER PENALTIES 21 (Mar. 2002), available at <http://www.usdoj.gov/olp/cocaine.pdf>.

slight decrease in the total number of matters declined during the relevant time period. It is inevitable that with a substantial number of matters being declined each year, prosecutorial selectivity will remain an inevitable feature of the criminal justice system.

Provided that such selectivity is accomplished in a rational manner, however, it is not necessarily problematic. The difficulty is in ensuring that federal prosecutorial resources are deployed in an efficient fashion. Efficiency, of course, may mean a variety of things depending upon who is defining it.<sup>203</sup> Significant policy questions must be answered in determining whether pursuing a specific sort of "efficiency" is appropriate. One might argue, for example, that it is inefficient for the federal government to squander valuable national resources pursuing crimes that also fall within the ambit of state jurisdiction.<sup>204</sup> In the alternative, it might be asserted that if a community is having a particular sort of crime problem—like a flood of gang-related activity—it is entirely proper for federal prosecutors to lend a hand to bring such individuals to justice. However, such assistance comes at a cost—namely in terms of distracting federal prosecutors from pursuing cases of national importance, or cases that are exclusively within the jurisdiction of the federal government.

A further obstacle to the efficient use of federal resources is that the deployment of federal resources can sometimes seem haphazard. In comparing declination rates across offenses, drug offenses plainly constitute the least likely matters prosecutors decline—even though state and local authorities may also pursue such matters.<sup>205</sup> On the other hand, matters involving the commission of violent or fraudulent acts tend to be declined with somewhat greater frequency.<sup>206</sup> At first blush, it would thus appear that federal resources are being spent chiefly upon crimes involving the use or trafficking of illegal drugs.

Unpacking the reasons as to why this may be the case, however, is difficult. It may be that matters labeled as "violent" are little more than routine simple assaults on federal property, or that some fraud cases involve too small a dollar amount to be worth a federal prosecu-

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203 See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L. J. 1325, 1364–67 (1993) (explaining the political and practical reasons why prosecutors prefer to keep prosecution policies unpublished and flexible).

204 See Litman & Greenberg, *supra* note 79, at 75–77.

205 Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1165–68 (1995).

206 See *supra* Tables 5 and 6.

tor's attention.<sup>207</sup> Regardless, the trends certainly illustrate the emphasis that the federal government has placed upon fighting drug-related offenses. A more important question to ask is whether the type of drug cases being pursued are merely duplicative of state efforts, or are crimes of particular interest to federal authorities and resonating with national priorities.

As Attorney General Ashcroft has noted, prosecutorial priorities matter.<sup>208</sup> Although redirecting the Justice Department's prosecutorial and investigative efforts may be akin to steering the Titanic, the prioritization of crimes to pursue does have an impact. In particular, federal efforts ought to be directed to those crimes which have a national bent or fall expressly within unique federal jurisdiction. What seems odd, however, is that 27% of those matters labeled as being both a "national" and a "district" priority are being declined.<sup>209</sup> While that is low compared to non-priority matters—31% of which are not being pursued—it is still surprisingly high, especially in light of the fact that 69% of matters classified as non-priority are being prosecuted.<sup>210</sup> Of course, there may be other reasons not easily discernable from the raw data as to why prosecutors have declined such seemingly important cases. If the Attorney General's words are to be heeded, then it would seem that not only is a re-ordering of priorities needed, but prosecutors must also pursue those cases determined to be of national significance. Despite the limitations of centralized control of Main Justice over the individual U.S. Attorneys' offices, the Department can still influence office priorities through both formal and informal means.<sup>211</sup>

These findings, while tentative, raise a number of important policy issues, particularly in light of the Attorney General's declaration that prosecutorial efforts would need to be refocused on matters of serious national concern. A comprehensive analysis of each of these

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207 Delbert S. Elliott, *Criminal Justice and Other Programs: Life-Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. COLO. L. REV. 1081, 1082 (1998).

208 Press Release, John Ashcroft, U.S. Attorney General, Remarks at AUC Indictment Press Conference (September 24, 2002), available at <http://www.state.gov/g/inl/rls/rm/2002/13663.htm> (explaining that the indictment of three high-ranking AUC members was the culmination of a two and a half year investigation, and that the indictment marked "the convergence of two of the top priorities of the Department of Justice: the prevention of terrorism, and the reduction of illegal drug use").

209 See *supra* Table 10.

210 *Id.*

211 See H.W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS., Winter 1998, at 129, 138–40 (describing that at the same time that budgets for law enforcement agencies, including prosecutors' offices, were increased, budgets for public defenders were slashed).

issues is well beyond the scope of this Article. Similarly, the data in this study cannot conclusively answer the important empirical questions that underlie these policy issues. Additional research is needed to obtain a better understanding of prosecutorial discretion, to explain what criteria prosecutors use in declining to pursue certain types of cases. That having been said, what follows is a brief discussion of several of the significant policy issues raised by this work.

### A. *Selecting Matters to Prosecute*

The surveyed data suggest that the number of detected federal crimes available to be prosecuted will outstrip existing prosecutorial resources, if for no other reason than that there are substantially more individuals investigating crime than actually prosecuting it.<sup>212</sup> Resource considerations thus inevitably affect the selection of criminal matters to pursue. As this Article demonstrates, an increase in the amount of resources available to federal prosecutors and investigative agencies, as well as to the judicial branch, corresponded with a proportionate decrease in the percentage of matters declined. Although the actual *number* of matters declined has varied over this same time period, the trend has also been downward. Regardless, prosecutors will not choose to pursue all alleged criminal matters referred to them. Given scarce resources (an inevitability), prosecutors will always be faced with having to choose which crimes, and which individuals, to prosecute. The selection of certain crimes to pursue necessarily entails the vindication of particular governmental interests.

The declination trends examined in this study suggest that some federal offenses might be *under-enforced*, while others might be *over-enforced*.<sup>213</sup> It is unclear whether existing, and certainly limited, prosecutorial resources are being allocated so as to maximize criminal enforcement mechanisms. In the absence of such data, however, it should not be assumed that current levels of enforcement are either too low, or that expanded resources would lead to uniformly higher prosecution rates. The important question to be addressed is whether the proper matters are being pursued and whether those matters which are not pursued, are declined on the basis of appropriate pub-

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212 Cf. Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEGAL ETHICS 199, 201-03 (1999) (explaining the significant increase in prosecutorial resources in contrast with the funding for defenders' offices).

213 See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1332-33 (2001) (discussing the social costs of criminal prosecution).

lic policy considerations. It is in this decision of *which* cases to pursue we will now briefly turn.

In deciding which crimes to prosecute, it is important to understand *why* criminal sanctions—as opposed to, for example, civil penalties—have been selected as a means to enforce certain policy preferences. In understanding the purposes for imposing criminal sanctions, then, we can form a better idea of what crimes (and criminals) ought to be pursued. Federal law, of course, is the creation of Congress. Therefore, we will turn to statutory mandates in divining a source of direction to federal prosecutors.

Congress, which considers both retributive and utilitarian ends in enacting punishment schemes, has in 18 U.S.C. § 3553 articulated the factors to be considered in imposing a sentence. Pursuant to that statute, Congress has provided that the sentence “must reflect the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment for the offense.”<sup>214</sup> Similarly, in the utilitarian vein, the prosecution must “afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”<sup>215</sup> These goals of sentencing are thus a useful place for prosecutors to start when selecting matters to pursue. Matters that seem to fall outside of those goals ought not to be pursued quite as vigorously.

In the criminal law, the imposition of punishment is generally predicated upon one of two theoretical bases: the need for retribution or the desire to obtain some utilitarian end.<sup>216</sup> Those scholars who believe that punishment is imposed to achieve retribution (and not simply *limited* by retributive or other normative principles) might consider current federal prosecution rates inadequate.<sup>217</sup> After all, nearly a quarter of alleged federal offenders appear to escape prosecution in federal court. Although various reasons exist for prosecutors to decline to pursue those matters, it is nevertheless the case that a substantial number of referred matters are left fallow. A retributivist would thus decry the federal government’s inability to bring all detected federal offenders to justice. If one believes that punishment is imposed to achieve retribution (and not simply *limited* by retributive or other nor-

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214 18 U.S.C. § 3553(a)(2)(A) (2000).

215 *Id.* § 3553(a)(2)(B)–(D).

216 See Ronald J. Rychlak, *Society’s Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 300 (1990).

217 See Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1890–92 (1998).



mative principles), then current federal prosecution rates must be considered inadequate. Although the trend in having a smaller percentage of matters declined might be viewed as a positive sign, the increased number of declined prosecutions is doubtlessly problematic. The empirical data suggest that significant numbers of federal offenders escape retribution in federal court.<sup>218</sup>

If, however, one possesses a strict utilitarian approach to crime control, such concerns permit a good deal of selectivity in prosecution. Specific deterrence of the individual offender, which has incapacitation at its heart, is a vital part of the criminal justice system. For the utilitarian, however, incapacitation, which is quite costly in real terms, ought to be limited to those instances in which we (1) can predict a defendant's likely future criminality, and (2) can be assured that incarceration will prevent (or at least postpone) future crimes—either by the defendant (specific deterrence) or others (general deterrence). From a purely incapacitative perspective, defendants who do not meet these criteria need not be either prosecuted or punished.

General deterrence, which is designed to discourage others from committing the same offenses as the present defendant, is an important utilitarian aim. Indeed, for utilitarian theorists, general deterrence might be the most important aim of the criminal justice system.<sup>219</sup> To achieve some quantum of general deterrence, prosecutors need not pursue each incidence of criminality. Rather, prosecutors may be able to obtain general deterrence either by focusing on high-profile defendants (such as Enron or WorldCom executives) or by selectively targeting those offenders who are most likely to be risk averse.<sup>220</sup> After all, an occasional prosecution serves to remind the public that certain behaviors are deemed improper or morally wrong. Consequently, a single high-profile prosecution (like that of Martha Stewart) may place other potential offenders on notice that the government intends to ferret them out. Similarly, for certain calculating offenders—tax law violators come to mind—a relatively low level of detection and enforcement may nevertheless provide substantial de-

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218 Galacatos, *supra* note 88, at 600–03 (explaining the reasons why a large number of federal environmental law violators have been able to escape retribution).

219 Kent Greenawalt, *Commentary: Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 350–52 (1983).

220 Bill Berkot, *Day of Reckoning for Corporate "Bad Guys,"* REUTERS, OCT. 2, 2002, available at <http://www.forbes.com/markets/newswire/2002/10/02/rtr739545.html> (describing government actions against high profile executives such as Andrew Fastow, former CFO of Enron, and Martha Stewart).

terrence if the penalty is sufficiently harsh (either in terms of prison time or of financial penalties).<sup>221</sup>

Prosecutors may also choose to focus on those offenders who are most likely to respond to rehabilitation. Offender rehabilitation, which is a congressionally mandated objective,<sup>222</sup> is predicated upon a belief that the defendant may recidivate, and that intervention strategies may prevent that individual from re-offending.<sup>223</sup> Drawing from the wealth of social science data that is available, prosecutors may choose to target those individuals most likely to respond to treatment alternatives. Such a determination, however, is no easy undertaking.

### B. Policy Considerations

Once the appropriate theoretical justification for commencing a prosecution is ascertained, practical and constitutional considerations that demand consideration remain. Selecting which crimes to proceed against may be a daunting task. If the Attorney General's decision to commit greater resources to the pursuit of terrorism is to be realized, however, care must be given to formulating declination rules that will enable prosecutors best to refocus their efforts.

#### 1. Establishing Law Enforcement Priorities in a Federated Nation

A unique aspect of American government is the existence of dual sovereignty—the idea that the state and national governments are each sovereign in their own particular spheres of action. A corollary to this idea of dual sovereignty is that even though one sovereign has the *power* to remedy a particular problem, it may not have the authority to do so if it would mean trenching upon the other sovereign's sphere of authority. In other words, just because the federal government *could* prosecute a particular instance of criminal activity does not mean that it *should*.<sup>224</sup> Limited resources at both the state and national level suggest that law enforcement authorities should establish specific priorities and utilize institutional advantages. This is precisely what appears to be occurring in the prosecution of the recent Washington, D.C. area sniper case.<sup>225</sup> Although several jurisdictions were

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221 Liezl Walker, *The Deterrent Value of Imposing Prison Sentences for Tax Crimes*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 4–6 (2000).

222 18 U.S.C. § 4352 (2000).

223 Ernest Van Den Haag, *Could Successful Rehabilitation Reduce the Crime Rate?*, 73 J. CRIM. L. & CRIMINOLOGY 1022, 1023–24 (1982).

224 Litman & Greenburg, *supra* note 79, at 75–77.

225 *Morning Edition Profile: Officials Vie to Be the First to Prosecute the Accused Suspects in the Washington, D.C., Sniper Murders* (National Public Radio radio broadcast, Oct. 28,

affected by the sniper shootings, and each could lay claim to having an interest in prosecuting offenses perpetrated by the snipers, informal mechanisms seemed to be at work in allocating the order of prosecution.<sup>226</sup> Most recently, in fact, the federal government, which had initially filed federal charges in the case, dropped its charges in deference to what is perceived to be the superior interests of the state governments involved.<sup>227</sup> In fact, murder prosecutions of this sort have traditionally been viewed as being part of the general “police powers” of state governments.

Differentiating between national and district priorities, however, is no easy task. The sniper case is a good example. In such a high profile case that commanded public attention, was it realistic for federal prosecutors to ignore local concerns? Local needs will also divert AUSAs’ attention from federal priorities, particularly if the Justice Department articulates those priorities in only the vaguest of terms (e.g., “the war on drugs”). At present, AUSAs are able to indicate on the form provided by the Justice Department whether a matter they are processing represents a crime that is a national priority, a local priority, or neither. Determining priorities is important not only for the conservation of resources, but also as a means of selecting the appropriate sovereign to prosecute a matter. As an institutional reality, federal and state prosecutorial offices have differing functions within the community. Traditionally, elected state district attorneys have been obligated to be sensitive to community needs and local criminal justice objectives. State and local prosecutors, who handle the bulk of the nation’s criminal prosecutions, are responsible for enforcing substantive state criminal laws, which may differ in substance and penalty, from state to state. Federal prosecutors, appointed by the President and confirmed by the Senate, are obligated to focus on national priorities and on criminal matters that may span many local jurisdictions. Federal prosecutors thus have a special obligation to ensure that federal law is uniformly enforced throughout the nation, without special regard for local sensibilities.<sup>228</sup>

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2002), available at 2002 WL 3190000; *The Saturday Early Show Newscast: Maryland, Alabama, Virginia, and the Federal Government Vying for Control of the Prosecution of the Washington-Area Snipers* (CBS television broadcast, Oct. 26, 2002), available at 2002 WL 8118244.

226 *Morning Edition Profile*, *supra* note 225.

227 Editorial, *Shopping for Death*, ST. LOUIS POST-DISPATCH, Nov. 13, 2002, at B6. As of this writing, it remains to be seen whether the federal government will reinstate its charges.

228 Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 994–95 (1995). For example, as

That obligation is perhaps less pronounced today than in the past.<sup>229</sup> Congressional expansion of federal criminal jurisdiction has created considerable overlap between state and federal criminal law enforcement authority. Historically, the general police power in the United States has been considered a responsibility of state and local governments because the Constitution fails to enumerate it as a power expressly granted to the federal government.<sup>230</sup> The federal government's authority to prosecute criminal cases is derived from the "necessary and proper" clause, which grants the government the authority to execute its enumerated powers. Authority to prosecute also exists in those areas in which the federal government enjoys exclusive jurisdiction.<sup>231</sup> The police power, per se, is presumed to be reserved to the states by virtue of the Tenth Amendment, which reserves to the states all those powers not expressly delegated to the federal government.<sup>232</sup>

Over the years, however, as Congress has enacted more federal criminal laws, the amount of overlap between state and federal criminal jurisdiction has increased.<sup>233</sup> The overlapping of jurisdiction makes it vital that state and federal efforts are not duplicative, but instead complement one another. In this way, distilling a rule for declinations would be on the basis of carefully articulated national priorities, which, for efficiencies' sake, would largely include crimes with no direct state analogue.<sup>234</sup> Unfortunately, even if not unsurprisingly,

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states have individually chosen to decriminalize the use of certain drugs, the Attorney General has made it clear that federal prosecutors have different obligations than their state counterparts and must enforce federal law without regard for state drug decriminalization efforts.

229 Peter Krug, *Prosecutorial Discretion and its Limits*, 50 AM. J. COMP. L. 643, 644-46 (2002).

230 U.S. CONST. amend X.

231 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324-25 (1819).

232 U.S. CONST. amend. X (stating that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

233 M. Todd Scott, *Kidnapping Federalism: United States v. Wills and the Constitutionality of Extending Federal Criminal Law Into the States*, 93 J. CRIM. L. & CRIMINOLOGY 753, 771 (2003); see also *Jones v. United States*, 529 U.S. 848, 860 (2000) (Stevens, J., concurring) (stating that the Court "should interpret narrowly federal criminal laws that overlap with state authority unless Congressional intention to assert its jurisdiction is plain"); TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS'N, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 33 (1998).

234 Podgor, *supra* note 5, at 151 6-20. Examples of such crimes include: federal criminal tax matters, immigration violations, customs violations, various crimes related to the administration of justice in federal court (e.g., perjury, contempt), bribery of federal officials, counterfeiting, violations of federal administrative or

federal prosecutors do not consistently afford offenses without state equivalents the highest priority.

Narcotics violations, the bulk of which state and federal prosecutors alike pursue, appear to be given more attention than most other exclusively federal crimes. Only twenty percent of drug matters are declined by federal prosecutors.<sup>235</sup> One method of preserving scarce federal resources would be to carefully review narcotics prosecutions to ensure that only those of sufficient gravity, or those touching a significant national interest, are pursued. Less serious drug cases could be left to state prosecutors to pursue. Fostering cooperation between federal and state prosecutors, as well as investigative agencies, may yield other benefits as well. Redirecting prosecutorial resources to ensure that federal authorities are not merely duplicating the efforts of their state counterparts would free law enforcement officials and prosecutors to target and investigate more serious offenses.

Although the Justice Department's so-called Petite Policy<sup>236</sup> is an effort to delineate crimes that federal prosecutors will pursue vis-à-vis state prosecutors, in truth, it is often difficult to establish a workable distinction. Oftentimes, local concerns will drive prosecutorial selectivity. If a particular community is plagued by gun violence, for example, federal prosecutors may find themselves inevitably lured into handling such cases. While this is not necessarily problematic, care must be taken to ensure that national priorities are not given short shrift or that U.S. Attorneys' offices do not simply devolve into ersatz district attorneys' offices.

This concern is hardly new. In 1948, as federal criminal jurisdiction first began to expand in the aftermath of World War II, Professor Louis Schwartz proposed the following criteria to guide the assertion of such incidental federal criminal jurisdiction:

[I]n general it can be said that federal action is justified in the presence of one or more of the following circumstances: (1) When the states are unable or unwilling to act; (2) when the jurisdictional feature, *e.g.*, use of the mails, is not merely incidental or accidental to the offense, but an important ingredient of its success; (3) when, although the particular jurisdictional feature is incidental, another substantial federal interest is protected by the assertion of federal power; (4) when the criminal operation extends into a num-

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regulatory laws, and crimes committed within federal enclaves with exclusive federal jurisdiction.

<sup>235</sup> This percentage is somewhat difficult to calculate due to the relatively imprecise BJS offense categorizations used. For information on the data source, see *supra* notes 145-47.

<sup>236</sup> See *supra* notes 77-84 and accompanying text.

ber of states, transcending the local interest of any one; (5) when it would be inefficient administration to refer to state authorities a complicated case investigated and developed on the theory of federal prosecution.<sup>237</sup>

These criteria represent a useful guide in determining when federal prosecutorial power ought to be exercised. Professor Schwartz's criteria assume that state prosecutions might be favored in each of these instances, but that federal prosecution may be necessary in light of a substantial federal interest that is best protected by asserting federal power.<sup>238</sup>

Professor Schwartz's proposed guidelines took on greater urgency when, in 1970, with Schwartz acting as its director, the Brown Commission recommended to Congress that a somewhat different version of these standards be incorporated in the proposed revision of the federal criminal code:

Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies are authorized to decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial Federal interest in further prosecution or that the offense primarily affects state, local or foreign interests. A substantial federal interest exists in the following circumstances, among others: (a) the offense is serious and state or local law enforcement is impeded by interstate aspects of the case; (b) federal enforcement is believed to be necessary to vindicate federally-protected civil rights; (c) if federal jurisdiction exists under section 201 (b) [pendent jurisdiction], the offense is closely related to the underlying offense, as to which there is a substantial federal interest; (d) an offense apparently limited in its impact is believed to be associated with organized criminal activities extending beyond state lines; (e) state or local law enforcement has been so corrupted as to undermine its effectiveness substantially.<sup>239</sup>

The Commission recognized that if left unchecked, federal prosecutorial authority might simply duplicate state authority, thereby wasting scarce federal resources. As a result, the Brown Commission sought to provide at least some guidance as to which cases merited federal prosecution.

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237 Schwartz, *supra* note 6, at 73.

238 Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1058-61 (1994).

239 NAT'L COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE § 207 (1971) [hereinafter NAT'L COMMISSION].

The Commission guidelines represent just how much had changed in the years between Professor Schwartz's original proposal and the Commission's report. The Commission's report permits federal prosecution of *any* case (where jurisdiction otherwise obtains) and only restricts declinations.<sup>240</sup> By contrast, the original Schwartz version appears to start with the premise that *state* jurisdiction is primary, and that federal jurisdiction is appropriate only if certain preconditions are met.<sup>241</sup> The two versions agree that each of the following factors support federal jurisdiction: (1) the offense cannot be effectively prosecuted by local authorities; (2) there is a "substantial federal interest" in the prosecution; or (3) the offense involves several states, and transcends local interests.<sup>242</sup> In an attempt to provide some sort of definition for the otherwise ambiguous term "substantial federal interest," the Commission provided additional guidance by listing examples of circumstances that create such an interest (e.g., organized criminal activities extending beyond state lines).<sup>243</sup>

Nearly thirty years later, still guided by the spirit of Professor Schwartz's original article, if not its letter, the American Bar Association (ABA), under the leadership of former Attorney General Edwin Meese, issued its report, *The Federalization of Criminal Law* (ABA Report).<sup>244</sup> The ABA Report criticized the broad expansion of federal criminal jurisdiction, and urged Congress to abate its appetite to federalize crimes having only the slimmest connections to articulated national interests.<sup>245</sup> Although the report did not itself promulgate guidelines for prosecutors to adopt, it did articulate three principle bases upon which Congress might choose legitimately to criminalize conduct: (1) crimes interfering with the core functions of the federal government; (2) based on a federal relationship to the site of the crime; and (3) criminalization of conduct on a Commerce Clause basis.<sup>246</sup>

Although these guidelines are merely a faint echo of the Schwartz proposals, they do at least provide some direction to both Congress

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240 See generally *id.* §§ 201–12 (the purpose of the Brown Commission was to establish federal prosecutorial guidelines—part of an entire review of the federal justice system).

241 See generally Schwartz, *supra* note 6, at 84–86.

242 See generally NAT'L COMMISSION, *supra* note 239; Schwartz, *supra* note 6.

243 NAT'L COMMISSION, *supra* note 241, § 207.

244 JAMES A. STRAZZELLA, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASS'N, *THE FEDERALIZATION OF CRIMINAL LAW passim* (1998).

245 *Id.* at 3, 43–56.

246 *Id.* at 45–46.

and federal prosecutors. Unfortunately, like the Brown Commission's report, they have largely gone unheeded. The temptation to provide a federal solution to crime problems—even those which are inherently local in nature—may just prove too great. If Congress chose to implement such standards, however, it could have a welcome effect upon the exercise of federal prosecutorial power. Similarly, if the Justice Department articulated standards such as those identified by the original Schwartz article, it could force the attention of prosecutors to concentrate on perhaps more weighty matters where clear federal interests exist.

## 2. Uniform Prosecutorial Rules

Much has been written about the efficacy of uniform guidelines for federal prosecutors.<sup>247</sup> Although a thorough discussion of the merit of rules to cabin prosecutorial discretion is somewhat beyond the scope of this piece, some salient issues are worth mentioning.

It is generally thought that federal prosecutors, regardless of the locale in which they operate, *ought* to abide by similar rules. After all, federal law and, by implication, federal interests, remain the same regardless of local concerns. Uniform rules, it may be argued, will better enable the federal government to efficiently execute investigative and prosecutorial resources. In this manner, the Justice Department may be able to ensure that matters of national import are pursued regardless of what the specific needs of any individual local community might be. Similarly, it has long been argued that the establishment of such rules will inculcate uniform values with the disparate federal prosecutorial offices, and will serve as a guide for new AUSAs. I do not wish to dwell upon rules that would encourage prosecution, but instead I will focus on those rules that would guide declinations.

Uniform declination rules, however, present a host of thorny problems. Even if one accepts the utility of written guidelines aimed at cabining discretion, political realities make uniform declination rules throughout the nation difficult to implement. A basic political reality is that, because of the nature of representative democracy (i.e. every State has two Senators and at least one Representative), it may

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247 See e.g., Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995); Michael A. Simons, *Prosecutorial Discretion and Prosecutorial Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893 (2000); Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249 (1998); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997).



be difficult to allocate federal resources to those jurisdictions that may have the greatest need for federal action.<sup>248</sup> More significantly, it may be more difficult to shift resources *away* from jurisdictions in which few crimes of national import occur.

Although there may be little federal crime in Iowa, for example, and a great deal of crime in Manhattan, it is politically unfeasible (and likely unwise) to scale back the Iowa U.S. Attorney's office and shift those resources to the Southern District of New York. Local concerns thus may dictate the way in which even federal resources are allocated. A community that may have little "classic" federal criminal activity may instead use the U.S. Attorney's office to supplement local efforts—even if such matters are not national priorities and would be best handled by state or other local authorities.<sup>249</sup> Indeed, the Reno and Thornburgh Justice Departments were characterized by federal efforts to assist in combating violent crime—traditionally something within the province of local authorities.<sup>250</sup> U.S. Attorneys, of course, are also generally drawn from the local bar, and thus will be steeped in local mores and traditions. As such, even while wielding the power of the federal government, local concerns may still take precedence. Consequently, because ten grams of cocaine powder might mean one thing to an Iowa prosecutor, and quite another to her Manhattan counterpart, those cases are likely to be handled differently. Variations in prosecutorial activities are thus destined to abound.

Nevertheless, uniform national guidelines do exist and have had a degree of success. In fact, the Justice Department's Petite Policy, which circumscribes discretion to pursue a federal prosecution following state prosecution of crimes arising from the same conduct, acts as a uniform national rule.<sup>251</sup> Instead of leaving the decision to proceed with a prosecution in the hands of the local U.S. Attorney, the policy articulates the narrow circumstances in which federal interests are so implicated that a successive prosecution is warranted.<sup>252</sup> Similarly, although no guidelines exist *per se*, the Justice Department directs that "[w]henver a case is closed without prosecution, the U.S. Attorneys'

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248 Cf. Heller, *supra* note 247, at 1310 ("Policy concerns also detailed local control of the criminal justice system, as state governments were viewed as the political bodies best suited for protecting citizens from the primarily local problem of crime.").

249 Cf. *id.* at 1310-14 (explaining "the widespread presence of the federal government in the area of criminal law").

250 Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1873-75 (1995).

251 Scott, *supra* note 233, at 753.

252 U.S. ATTORNEYS' MANUAL, *supra* note 20, § 9-2.142.

files should reflect the action taken and the reason for it.”<sup>253</sup> To this end, basic information about declinations is recorded.

National uniform guidelines may thus be established as *aspirational* guidelines, even if honored in the breach. Even if guidelines are not mandatory, they could serve to set the tone for federal prosecutors and could serve as a model for prosecutorial conduct in general. After all, even with differences among jurisdictions, federal prosecution begins to look far more arbitrary when declination policies themselves vary widely among jurisdictions. Similarly, the existence of federal sentencing guidelines, which are an effort to, among other things, reduce disparity, counsel for greater uniformity in the sorts of cases prosecutors choose to bring.

### 3. Mandatory Record Keeping

That we are able to evaluate trends at all is a result of individual prosecutors maintaining records of declined matters. To understand prosecutorial decisionmaking, it is vital to have an accurate record of why certain cases were not prosecuted.<sup>254</sup> Presently, prosecutors are required to keep track of cases for which they expend at least one hour of attorney time. Statistical information reflecting patterns of prosecution provides some insight as to why certain matters are pursued, and others discarded.<sup>255</sup>

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253 *Id.*

254 *Id.*

Whenever the attorney for the government declines to commence or recommend Federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files. . . . When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up.

*Id.*

255 See generally BUREAU OF JUSTICE STATISTICS, U. S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1998, 2000 NCJ 180258, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs98.pdf> (providing statistics encompassing all aspects of processing in the federal justice system, including the number of persons prosecuted in federal criminal cases and post-conviction rates); BUREAU OF JUSTICE STATISTICS, U. S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1996, 1999 NCJ 176981, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc96.pdf> (tracking sample of felony cases from the nation's seventy-five largest counties from arrest through sentencing, including data concerning defendant's age, sex, and race); BUREAU OF JUSTICE STATISTICS, U. S. DEP'T OF JUSTICE, JAIL AND JAIL INMATES, 1993-1994, 1995 NCJ 151651, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jaji93.pdf> (presenting inmate population statistics for all states and the Dis-

In order to better understand declination decisions, however, the government ought to maintain and publish additional information. For example, information related to the types or quantities of drugs, the amount of loss in fraud cases, or information about alternative resolution might be a boon to deciding upon resource allocations and expenditures in the future. Although at least some of this information is collected, it is apparently not widely distributed to individual U.S. Attorneys' offices, nor to law enforcement agencies. Such information may tend to curb improper selective prosecution and may, in turn, generate pressure for greater self-regulation within individual U.S. Attorneys' offices. Better statistical information on declinations and prosecutions may reveal whether troubling patterns of disparate treatment exist and may help prosecutors understand whether articulated priorities are being carried out.

Moreover, raw statistical information offers insight into the process of selecting matters for prosecution without an intrusion into individual prosecutor's decisionmaking process.<sup>256</sup> By keeping close track of declination decisions, prosecutors may be able to examine the way certain types of cases are investigated and referred for prosecution. For example, if an office discovers that a majority of a particular

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trict of Columbia); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 1994, 1998 NCJ 164614, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf94.pdf> (presenting survey information on drug trafficking offenses as well as 10 other offenses including data on sex, race, and age of convicted felons); CRIMINAL CASE PROCESSING, *supra* note 141 (describing initial prosecution dispositions and percentage rates for each stage of case processing in the federal criminal justice system); Bureau of Justice Statistics, *BJS Clearinghouse*, at <http://www.ncjrs.org> (last visited Nov. 21, 2003) (distributing Bureau of Justice Statistics' criminal justice data on computer case tapes, CD-ROMs, and diskettes); Inter-university Consortium for Political & Social Research, *Nat'l Archive of Criminal Justice Data*, at <http://www.icpsr.umich.edu/NACJD/index.html> (last visited Nov. 21, 2003) (providing document database searches, statistical information packages, and general referrals on crime and criminal justice statistics); Justice Research & Statistics Ass'n, *InfoBase of State Activities and Research*, at <http://www.jrsa-isar/login.asp> (last visited Nov. 21, 2003) (encompassing Justice Research and Statistics Association database, which includes activities of state criminal justice statistical agencies and Statistical Analysis Center); Nat'l Consortium for Justice Information and Statistics, *Justice Technology Resource Center*, at <http://www.jtrc.search.org/Home.aspx> (last visited Nov. 21, 2003) (providing data about criminal justice information systems employed by state and local governments); Nat'l Criminal Justice Reference Serv., *Drug and Crime Clearinghouse*, at <http://virlib.ncjrs.org/DrugsAndCrime.asp> (last visited Nov. 21, 2003) (providing data concerning illegal drugs).

256 For example, in *Armstrong v. United States*, 517 U.S. 456 (1996), because the defendants asserted racial discrimination in the selection of defendants for federal crack prosecutions, the initial question was whether such prosecution fell disproportionately on African-Americans. *Id.* at 456.

federal enforcement agency's cases are routinely discarded for want of critical evidence, training programs can be implemented to familiarize officers with basic evidentiary standards.

Without accurate statistics, even prosecutors' offices may be somewhat in the dark as to their own prosecutorial practices. Given the relative independence of individual prosecutors, a U.S. Attorney may not, for example, have a clear understanding of which cases his office is focusing on, and he may not be able to justify why certain matters are pursued, while others are declined. Accurate record keeping and public reporting is vital to re-focus prosecutorial efforts as General Ashcroft has suggested.

Statistical information provides a rough but valuable check on the distribution of law enforcement and prosecutorial resources without revealing the deliberative process that underlies the exercise of discretion. In the interest of self-regulation, U.S. Attorneys' offices should maintain records that profile patterns of enforcement and non-enforcement. If the government does not maintain the pertinent statistical data, the legislature should require the government to assemble the information. Congress has long mandated the gathering of crime statistics, giving both the executive and the public a clear sense of the rate and distribution of criminal activity, as reflected by arrest and conviction data.<sup>257</sup> Congress should add responsibility for assembling records reflecting patterns in the exercise of prosecutorial discretion, including data regarding non-prosecution decisions and the allocation of cases between federal and state courts.

Finally, if the data is published, statistical information will provide a public window into the efforts of law enforcement. The public will be able to understand better the fairness with which prosecutorial discretion is wielded and whether important priorities are being addressed. The public will also be better able to determine whether, and under what circumstances, federal law is being enforced. Transparency with respect to declination policies and relevant data may ultimately give rise to accountability. Such accountability is a potentially useful means of ensuring that prosecutors are appropriately and fairly wielding governmental power in their pursuit of targets.

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257 See 28 U.S.C. § 534 (2000) (mandating that the Attorney General "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records"). The original mandate was enacted in 1930 and has since been enhanced. For example, in 1990, Congress directed the Attorney General to gather information relating to hate crimes. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

### C. *A Word on Selective Prosecution*

The flip side of the decision to forgo a prosecution is obviously the decision to proceed. Such a decision is momentous in that it means that the awesome power of the state will be brought to bear against an individual. Supreme Court Justice Robert H. Jackson, himself a former prosecutor, once observed that:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. . . . It is in this realm—in which the prosecutor picks some person whom he likes or dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse in prosecutorial power lies. It is there that law enforcement becomes the [sic] personal.<sup>258</sup>

What has troubled more than a few commentators is the inevitable existence of selective prosecution (or non-prosecution).<sup>259</sup> To some extent, given resource limitations, all prosecutions are selective in at least some sense. Although beyond the scope of this Article, it is worth noting that the problem of selective prosecution may be itself fueled by declination rules.

Even though the trends point to a decrease in the proportion of matters declined, the absolute number of declined matters has risen and still represents roughly one quarter of all referred matters. As a consequence, prosecutorial selectivity is an inexorable artifact of resource scarcity. Selectivity, in and of itself, however, may not always be a bad thing. An occasional prosecution serves to remind the public that certain behaviors are considered wrong. The selection of certain, notorious cases thus serves to remind the public that certain laws are being enforced. However, selective prosecution may only be effective if the fact of selectivity is not broadcast.<sup>260</sup>

If the public is aware of similar, unprosecuted cases, the apparent unfairness or inconsistency of society's formal condemnation process may undermine the deterrence value of the occasional high profile prosecution. A haphazard system of selective enforcement thus may undermine crime control and breed a cynical attitude among the general public.

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258 Robert H. Jackson, 24 J. AM. JUDICATURE SOC'Y. 18, 18-19 (1940), *quoted in* DAVIS, *supra* note 12, at 190.

259 P.S. Kane, Comment, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293, 2293-95 (1992).

260 See Romero, *supra* note 39, at 2045-46.

Selective enforcement, however, can take on many different forms. For example, a policy in which only the most serious offenders are prosecuted may not only make sense, but if prosecutors select the most egregious cases, the public may be better able to understand the system's rationale. Although prosecutors may treat offenders charged with the "same crime" (loosely defined) differently, the public presumably would consider such discrimination as deserved, because the prosecuted offender committed a more serious offense. Thus, when Attorney General Ashcroft announces that the Justice Department will focus on terrorism offenses, his choice is popularly digestible because it represents a class of cases thought particularly serious. Of course, the downside to selective prosecution of this sort is that it may send the unintended signal that minor violators will not face prosecution.

A more problematic form of selectivity is totally unrelated to culpability: certain violators are selected because they occupy positions that make them more visible offering a stronger deterrent effect for the same expenditure of effort and resources. The recent Enron and WorldCom investigations serve as useful illustrations.<sup>261</sup> Even if corporate misdeeds of this sort were common, the government arguably could obtain a greater degree of deterrence if a notorious executive of a large, multi-national corporation were brought to justice, instead of several unknown middle managers. In this circumstance, declination policies are likely to have little impact upon decisionmaking.

Another form of selectivity occurs when defendants are selected at random because only a few are needed to achieve deterrent aims, or because resources are insufficient to permit prosecution of all offenders. Such "arbitrary" selection raises the potential risk that the prosecutor will randomly select her targets. In this circumstance, declination policies may prove valuable.

Even where no alternative criminal penalties exist, the utilitarian aims of the law may be achieved through the application of civil remedies, administrative regulation, pretrial diversion programs, or restitution. Of course, the availability of an alternative to criminal prosecution does not necessarily mean that prosecution would be inappropriate, but it changes the question: one should then ask whether the added value of the criminal process or sanction is worth the added costs of prosecution. The important point to keep in mind in deciding whether to prosecute is simply that, unless one is a strict retribu-

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<sup>261</sup> Some authors have argued against unlimited prosecutorial discretion because the decision to prosecute or decline a matter may be based on factors other than defendant's guilt, including race and other unconstitutional considerations. See Heller, *supra* note 247, at 1309–10.

tivist, any of these alternatives may be valid; the existence of a criminal penalty does not necessarily mean that it must be invoked.

### CONCLUSION

The manner in which prosecutors exercise discretion not to proceed with a matter is critical to the administration of the criminal justice system. The under-enforcement of particular offenses can have much the same impact upon the criminal justice system that ill-considered decisions to proceed with a case do. It is extraordinarily difficult to capture the thinking that goes into an individual prosecutor's decision not to proceed with a criminal referral. It is beyond peradventure that a decision not to proceed will often be appropriate. Determining such "appropriateness," however, is not an easy task. This study has demonstrated recent trends in the non-prosecution of criminal matters referred to federal prosecutors. The data has established that increased overall prosecutorial resources have led to a decreased proportion in declined matters, even while more matters are being referred for prosecution. This is of considerable interest, because this decline occurred during a time at which crime rates in the United States dropped precipitously. In light of resource scarcity, the study has further noted that the articulation of national priorities may serve as a useful means of guiding prosecutorial discretion, even if not completely controlling it. Such priorities may have practical effect upon the day-to-day decisions prosecutors are charged with making in the field. Attorney General Ashcroft's effort to redirect the Department's resources to combat terrorism more effectively will only be successful if the prosecutors in the field will respond to his leadership. In an attempt to follow-up on the Attorney General's admonition, the Justice Department should require substantive reporting to evaluate whether these important priorities are being followed in the districts.

Similarly, the data show a disparity among agencies in terms of declined matters: namely, certain federal agencies consistently seem to have more matters declined by prosecutors. These results suggest, at a minimum, that federal law enforcement agencies ought to receive careful scrutiny to ensure that they are referring only the most appropriate cases to the U.S. Attorneys for consideration. A decision not to prosecute is an important one, and one which has been given far too little consideration. In the aftermath of the terrorist attacks upon the United States, the public has a right to be informed about the nation's investigative and prosecutorial decisions—for these decisions may well have an impact on our future security and upon the future of our liberty interests.