PROSECUTORIAL ADMINISTRATION: PROSECUTOR BIAS AND THE DEPARTMENT OF JUSTICE

Rachel E. Barkow[*]

[*] Segal Family Professor of Regulatory Law and Policy, Faculty Director, Center on the Administration of Criminal Law, NYU School of Law. For helpful feedback on earlier drafts, I thank Lincoln Caplan, Adam Cox, Adam Kolber, Margaret Love, Dan Markel, Rick Pildes, Daphna Renan, Ted Ruger, Adam Samaha, Peter Schuck, Stephen Schulhofer, Jeremy Waldron, and participants at the NYU Summer Workshop and Criminal Law Theory Colloquium. Thanks to Samuel Kalar, Zander Li, Alex Mindlin, Rebecca Welsh, and especially Maria Ponomarenko and Shaun Werbelow for first-rate research assistance. I also owe thanks to the Ford Foundation and to the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at NYU for their generous support.

INTRODUCTION

THE federal system is now the most punitive jurisdiction in America. In a nation of skyrocketing incarceration rates that eclipse those of any other country, the federal government can lay claim to the dubious honor of being the most punitive of all. Over the past decade, the federal prison population has increased 400 percent[1] and at a rate nearly three times that of the states.[2] Federal prisons currently house more inmates than the prisons of any single state.[3] During 2011, the number of criminal defendants increased to an all-time high of over 100,000.

Elected officials certainly bear the lion's share of responsibility for this state of affairs. Congress and the President, no matter what political party they belong to, have passed one harsh federal criminal law after another, ignoring the advice of experts.[4]

But we did not reach this state of affairs by politics alone. The role of prosecutors in setting criminal justice policy across a range of areas has also been critically important. It is, of course, well known that federal prosecutors hold the reins of power in individual federal criminal cases. They have almost unlimited and unreviewable power to select the charges that will be brought against defendants. In more than ninety-five percent of all federal criminal cases, defendants plead guilty without a trial, succumbing to prosecutorial demands.[5] Prosecutors' selection of charges and their decision whether to file a motion for a sentencing departure typically dictate a defendant's sentence as well.[6] And prosecutors have

[1] Chief Justice John G. Roberts, Jr., 2011 Year-End Report on the Federal Judiciary 14 (2011), available at http://www.supremecourt.gov/publicinfo/year-end/2011year-end report.pdf.

[2] Paul J. Hofer, The Reset Solution, 20 Fed. Sent'g Rep. 349, 350 (2008).

[3] As of Dec. 31, 2010, there were 209,771 prisoners in federal prison. The closest state was Texas, with 173,649 prisoners. See Paul Guerino et al., Bureau of Justice Statistics, U.S. Dep't of Justice, Ser. No. NCJ 236096, Prisoners in 2010, at 14 (2011), available at http://www.bjs.gov/content/pub/pdf/p10.pdf.

[4] William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 508 (2001); see also Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 734–35 (2005) [hereinafter Barkow, Administering Crime].

[5] According to the U.S. Sentencing Commission, "[i]n fiscal year 2009, more than 96 percent of all offenders [pleaded guilty], a rate that has been largely the same for ten years." Glenn R. Schmitt, U.S. Sentencing Comm'n, Overview of Federal Criminal Cases: Fiscal Year 2009, at 3 (2010), available at http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

[6] See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 876–77 (2009) [hereinafter Barkow, Institutional Design] (noting that "prosecutors often have a choice of charges, which often, in turn,

often been a driving force in the political arena for mandatory minimum sentences and new federal criminal laws.[7]

Prosecutorial power over federal criminal justice policy goes deeper still. Because of the structure of the Department of Justice ("DOJ"), prosecutors are involved in other areas of criminal justice, including corrections, forensics, and clemency. To borrow a phrase from Elena Kagan, who memorably observed that the President's control over the administrative state through a variety of means amounted to "presidential administration,"[8] we are living in a time of "prosecutorial administra-

means a choice of sentence as well" and that "a prosecutor's decision about what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases").

[7] See, e.g., Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 107th Cong. 102–03 (2002) (statement of James B. Comey, United States Attorney, Southern District of New York) (asking for tougher white collar crime penalties); Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, & Human Res. of the H. Comm. on Gov't Reform, 106th Cong. 62–64 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division Department of Justice) (arguing in favor of mandatory minimum drug laws). In addition, although the United States Sentencing Commission is an independent agency in the judicial branch, the Department of Justice has had a tremendous influence on the Federal Sentencing Guidelines. The Commission typically takes the position being advocated by the Department of Justice. See Hofer, supra note 2, at 351; Letter from Jon M. Sands, Fed. Pub. Defender, to Hon. Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n 3 (Sept. 8, 2008), available at http://www.fd.org/docs/select-topics---sentencing/USSC_Priorities_ltr_with_appendix_9-8-08.pdf("The Department has routinely and successfully argued for increased guideline ranges . . . ."). The Commission's membership further reflects the dominance of prosecutors. In almost every year of its existence, a majority of the Commission's voting membership has been comprised of former prosecutors. See Barkow, Administering Crime, supra note 4, at 764. In addition, a member of the Department of Justice serves as an ex officio member of the Sentencing Commission. Sentencing Reform Act, Pub. L. No. 98-473, § 235(b)(5), 98 Stat. 1837, 2033 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.). When the Judicial Conference proposed the inclusion of a public defender as one of the Commission's ex officio members, the Department of Justice objected. The Commission's response was silence. It refused to stand by the Judicial Conference's initial proposal to balance the Commission's membership. See Letter from John M. Sands, Federal Public Defender, to Hon. Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n 1 (July 31, 2007), available at http://www.famm.org/Repository/Files/USSC_Letter_Victims_Advisory_Group_7-31-07.pdf (stating that "the Commission has, at least initially, decided to take no position on the proposal"); see also The Smart on Crime Coal., Smart on Crime: Recommendations for the Administration and Congress 129 (2011), available at http://www.besmartoncrime.org/pdf/Complete.pdf (arguing that "[t]he presence of a Defender ex officio would ensure that all relevant issues are raised and receive timely and balanced consideration"); Richard S. Frase, State Sentencing Guidelines: Still Going Strong, 78 Judicature 173, 174 (1995) (noting that most state sentencing commissions include defense attorneys and other interested parties, making these panels much more broadly representative than the federal commission).

[8] Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2245 (2001).

tion," with prosecutors at the helm of every major federal criminal justice matter.[9] Kagan highlighted the benefits of presidential administration, but consolidating power comes with costs.

Indeed, whatever the benefits of presidential administration, the consequences of *prosecutorial* administration should concern anyone interested in a rational criminal justice regime that is free from bias in any particular direction. If decisions about corrections, forensics, and clemency are being made by prosecutors—and thus through the lens of what would be good for prosecutors and their cases and from the limited perspective of those who have prosecuted cases but have not represented other interests—it is possible that these decisions are not accounting for what would be good policy overall, taking into account interests other than law enforcement. Indeed, even if the goal is law enforcement, it is possible that prosecutors might be ill-suited to take into account the long-term goals of law enforcement because they are focused on the short-term pressure of dealing with current cases and often lack a broader perspective.

To be sure, law enforcement interests will exercise enormous political power, no matter what the institutional structure. But some institutional structures are better than others at mediating prosecutorial impulses, either by making it difficult for prosecutors to keep tabs on each individual decision that gets made or by allowing an agency with a different agenda to fully research and generate data on a topic of interest without being stopped in its tracks by prosecutors at the Department of Justice before the agency can finish its inquiry. This Article takes up the task of showing the flaws in the current structure of prosecutorial administration and offers possible roadmaps for improvement.

Part I begins by describing the current regime of "prosecutorial administration" and its reach into a variety of areas beyond simple en-

[9] In many respects, prosecutorial power goes far deeper than criminal matters. Prosecutors effectively regulate businesses through the threat of criminal charges. See generally Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct (Anthony S. Barkow & Rachel E. Barkow eds., 2011). And prosecutors are often at the heart of national security decisions as well, deciding when to pursue national security objectives through criminal cases or other means. See, e.g., 28 U.S.C. § 509A (2006) (establishing, through a reauthorization of the USA PATRIOT Act, the National Security Division of the United States Department of Justice for the purpose of combating terrorism and other threats to national security); Jane Mayer, The Trial, The New Yorker, Feb. 15 & 22, 2010, at 60, 62 (describing Attorney General Eric Holder's decision to pursue terrorists through criminal trials). This article, however, focuses on the extent of prosecutorial administration in criminal justice issues.

forcement of the law in an individual case. In particular, it focuses on three areas of criminal justice policy: corrections, clemency, and forensics. These topics were selected because of their importance to the criminal justice system and because of the potential conflicts they pose with prosecutorial interests. Part I explains how these matters came under the aegis of the Department without much concern about the conflicts they would create with the Department's law enforcement mission. And as the conflicts began to emerge, the interests of prosecutors trumped other concerns.

Part II explains prosecutorial administration as a matter of institutional design. It is a well-established feature of institutional design that an agency with competing mandates will adhere to the dominant one. In the case of the Department of Justice, that dominant mandate is undoubtedly law enforcement and obtaining convictions in particular cases. As a result, whenever conflicts arise (or appear to arise) between this mission and other functions such as corrections, clemency, or forensic science, the law enforcement interests (as perceived by the Department's prosecutors) will dominate.

Part III turns to the question of how institutional design could help create a more balanced approach in these areas that is not so tilted to law enforcement concerns. It begins by first considering whether there is a political will to make any changes at all, given the power of law enforcement interests in the political arena. After making the case that institutional change is feasible in at least some areas, Part III tackles the question of what changes could yield positive results in each of these areas and what tradeoffs they entail. The goal must be to strive for a design that would allow prosecutorial concerns to be aired and addressed without overshadowing other concerns. Put another way, while federal prosecutors should have general input on the Nation's criminal justice policies to produce sound decision making—and as a political matter, will have such influence, regardless of institutional design—they should not dominate the process to the exclusion of other interests. Institutional design can help curb some of that dominance.

I. PROSECUTORIAL ADMINISTRATION

The Department of Justice today is, by any measure, a behemoth. Consisting of thirty-nine separate components,[10] with over 116,000 employees,[11] it is one of the largest federal departments.[12]

The Department, as such, with the Attorney General ("AG") at the helm, was not created until 1870. The position of the AG came much earlier, with the passage of the Judiciary Act in 1789.[13] But for most of the Nation's early history, the AG's function was relatively modest, consisting largely of providing the President with occasional advice on legal matters.[14] Indeed, up to the Civil War, the AG's office has been described as "basically a one-man operation."[15] The AG did not obtain the authority to oversee U.S. Attorneys (called district attorneys until 1870) until 1861.[16] The AG was named the head of the Department at its creation in 1870.[17] The purpose of the 1870 Act creating the Department was to eliminate redundancy among legal advisor offices within different departments and consolidate control over criminal justice within a single department.[18] The Department's role remained relatively modest, however, because there were so few federal criminal laws at the end of the nineteenth century.[19]

As federal criminal law expanded, so too did the responsibilities of the Department. The first wave of increased federal jurisdiction came

[10] U.S. Dep't of Justice, Organization, Mission and Functions Manual, http://www.justice.gov/jmd/mps/mission.htm (last updated June 2012).

[11] U.S. Dep't of Justice, FY 2011 Performance and Accountability Report I-6 (2011), available at http://www.justice.gov/ag/annualreports/pr2011/par2011.pdf.

[12] U.S. Office of Pers. Mgmt., Employment Cubes: March 2012, http://www.fedscope.opm.gov/employment.asp (last visited Oct. 29, 2012). Not counting the military or the Department of Veterans Affairs, the Department of Justice is the second largest department after the Department of Homeland Security.

[13] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

[14] Indeed, until 1853, Attorneys General were able to combine their legal duties with private legal practice. See Homer Cummings & Carl McFarland, Federal Justice: Chapters in the History of Justice and the Federal Executive 154–55 (1937).

[15] James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 10 (1978).

[16] Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285–286.

[17] The AG has the authority to make rules and regulations for the Department and to supervise U.S. Attorneys. Act of June 22, 1870, ch. 150, §§ 1, 8, 16 Stat. 162, 162–63.

[18] Cummings & McFarland, supra note 14, at 221–25.

[19] Barkow, Institutional Design, supra note 6, at 884 ("Federal criminal law barely existed prior to 1896.").

with the adoption of the Eighteenth Amendment and Prohibition.[20] Another burst of federal criminal legislation came with the New Deal, with a particular focus on regulatory offenses.[21] But the biggest growth spurt is the most recent, beginning in the 1970s. Of the federal criminal laws enacted since the Civil War, more than forty percent were passed since 1970.[22]

Each of these expansions in federal law prompted a corresponding increase in the number of federal prosecutors and prosecutions. A growing population of federal inmates eventually necessitated the construction of federal prisons and a new prison bureau to oversee their management. The growing federal inmate population also led to an influx of pardon applications, which prompted the creation of an office to process those clemency requests. Law enforcement tools and techniques also changed over time, with science and technology pushing toward the development of a federal identification system and national laboratory for forensics.

As the expansion of federal criminal law placed greater strain on corrections and the pardon process, and as science and technology advanced, Congress faced a choice of where to put the responsibility for addressing these issues: within the Department of Justice or elsewhere (perhaps in a newly created agency or an existing department other than Justice). Congress spent little time mulling over the decisions and ultimately settled on the Department of Justice at each juncture. These decisions at the time were far from irrational. When the decisions were made, the new bureaus were so small, and their functions so limited, that it did not seem to matter a great deal where they were placed. And it was efficient to place them with an existing agency instead of creating a new one. Moreover, the Department's overall responsibilities for criminal justice were also still relatively slight. Federal criminal law was still in its infancy, and tough-on-crime politics had yet to take hold. Even if not fully documented or studied, it was at least rational for policymakers to assume that the Department of Justice could make professional judgments in each area in which it governed without being unduly influenced by its other functions, because no one function seemed to dominate its agenda.

[20] Sara Sun Beale, Federalizing Crime: Assessing the Impact on the Federal Courts, 543 Annals Am. Acad. Pol. & Soc. Sci. 39, 41 (1996).

[21] Id. at 41–42.

[22] Task Force on the Federalization of Criminal Law, Am. Bar Ass'n, The Federalization of Criminal Law 7 (1998).

This Part tells this story in greater depth, explaining how and why the decisions were made to place corrections, clemency, and forensics within the Department. These initial decisions were critical, because by the time the incongruence between the Department's core prosecutorial mission and these more peripheral functions became apparent, bureaucratic inertia and the modern politics of crime made changing course more difficult.

A. The Bureau of Prisons

At the Nation's founding, federal criminal law was sparse.[23] As a result, there was hardly a need for a bureaucracy to administer it. Pursuant to the Judiciary Act of 1789, the U.S. Marshals had authority over the sparse number of federal prisoners.[24] The Marshals were appointed by the President[25] and operated independently of the Attorney General, so there was no mingling between prosecutorial functions and corrections.[26] Moreover, the duties of the Marshals themselves were limited because federal prisoners were housed in state and local jails.[27]

It was not until the establishment of the Department of Justice in 1870 that the AG assumed responsibility for federal prisoners.[28] The decision to give the Nation's chief law enforcement officer control over the prisons sparked almost no debate. This is unremarkable, as there were still no federal prisons at that time, and few federal inmates. All that was at stake was the administrative control over where among state and local jails to place the relatively small number of federal prisoners. The AG's power as a law enforcement officer was also relatively narrow at this point, as federal criminal law was hardly a major political issue of the

[23] See supra note 19.

[24] See Judiciary Act of 1789, ch. 20, §§ 27, 28, 33, 1 Stat. 73, 87–88, 91–92; Paul W. Keve, Prisons and the American Conscience: A History of U.S. Federal Corrections 10–13 (1995) (noting Marshals' early supervision of prisoners). As late as 1890, the federal government still had fewer than 2000 total prisoners. Elizabeth Dale, Criminal Justice in the United States, 1789–1939, at 118 (2011).

[25] See Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

[26] See Cummings & McFarland, supra note 14, at 218 (noting that both district attorneys and Marshals "remained all but completely independent" of the Attorney General).

[27] Dale, supra note 24, at 10. The Marshals' duties were so limited that, in addition to transporting prisoners and serving warrants, they were also tasked with conducting the decennial census until 1870. Cummings & McFarland, supra note 14, at 369.

[28] See Act of June 22, 1870, ch. 150, § 15, 16 Stat. 164; Cummings & McFarland, supra note 14, at 225.

day.[29] Thus, the notion of a potential conflict between the AG's responsibilities was not immediately apparent.

By the end of the nineteenth century, federal criminal law expanded and the federal inmate population grew sufficiently large that Congress moved to establish the first federal prisons. With a greater federal presence in criminal law enforcement,[30] policymakers began to confront the wisdom of combining enforcement and prison administration within a single department. Attorney General Augustus Garland supported housing both functions in the Department, urging Congress to provide for the construction of a federal prison and to establish a prison bureau within the Department of Justice.[31] In 1890, the House Committee on the Judiciary agreed with this recommendation.[32]

It was during the debate over this law that concerns were first expressed that the Department might have a conflict of interest between law enforcement and prison administration functions. In particular, Representative William McAdoo[33] objected to placing prisons under the Attorney General's authority, finding it "eminently improper to give to this officer the charge of disciplining the prisoners whom he has prosecuted and convicted in the courts."[34] McAdoo seemed most concerned that prison administration responsibilities would negatively affect law enforcement decisions because one responsible for administering prisons would have incentives to see them fully occupied, which could lead that person to overcharge if he was also responsible for bringing cases.[35] Because of this conflict, McAdoo proposed giving the Department of Interior supervisory responsibility for the federal prisons.[36]

[29] At the end of the nineteenth century, political attention was focused mainly on the increasing expression of "extralegal justice," "popular justice," or "rough justice" within the states. See Dale, supra note 24, at 90–96. The importance of federal criminal law took a back seat to local issues such as jury nullification and a sharp rise in lynching. Id.

[30] By 1895, there were "2516 federal felons held in [state prisons], compared to only 1027 ten years earlier." Keve, supra note 24, at 26.

[31] 21 Cong. Rec. 783 (1890).

[32] Id. at 892.

[33] McAdoo served in Congress only briefly and later went on to serve as New York Police Commissioner.

[34] 21 Cong. Rec. 792 (1890) (statement of Rep. William McAdoo).

[35] Id. at 873. As noted in Part II, the more likely concern given the modern politics of crime is the opposite—prosecutorial interests are likely to influence prison administration decisions. See infra Part II.

[36] Id. at 792.

But McAdoo was essentially a lone voice on this issue, as his colleagues did not share his concerns. First, because the AG was already responsible for assigning prisoners, they argued that it made sense as a matter of administrative efficiency to grant him authority over the newly constructed federal prisons.[37] In addition, they noted that all but two European countries placed prison administration under the control of a Minister of Justice or comparable official.[38] They also pointed out that the Department of Interior had enough responsibilities already without being given more.[39] When McAdoo failed to win support for his views, he withdrew the amendment and the House voted to place prison administration under the Justice Department's control.[40] The Senate approved the measure—now known as the Three Prisons Act—in 1891.[41]

The question of the AG's possible conflict of interest lay dormant for almost four decades after the federal prisons were created.[42] Then, in 1928, in response to reports of mismanagement and overcrowding at the three federal prisons existing at the time, Congress held a series of hearings on the prospect of creating a Bureau of Prisons within the Department of Justice that would exercise more robust central control over federal prisons. At those hearings, questions were once again raised about the possible conflict of having the Nation's chief prosecutor operate the Bureau.

[37] Id. at 876 (statement of Rep. John Henry Rogers).

[38] Id. (statement of Rep. John D. Stewart).

[39] Id. (statement of Rep. James B. McCreary).

[40] The final vote in favor of the bill was 116 to 104, with 108 members abstaining. Id. at 892. The principal disagreement, however, was over the necessity of federal prisons to begin with, not the wisdom of placing prison management under the Attorney General's authority.

[41] Originally, the Senate version of the bill proposed an independent committee to oversee prison construction, but similarly delegated ultimate control over prison management to the Department of Justice. 22 Cong. Rec. 2925 (1891). The Senate ultimately enacted the House version of the bill. Id. at 3563–64 (1891).

[42] The federal prisons, while nominally under the control of the Attorney General, were in practice governed by individual wardens who operated largely independently. See Keve, supra note 24, at 91–92. In 1907, the Attorney General created the Office of the Superintendent of Prisons, who, along with a minimal staff, was tasked with supervising the federal prisons and surveying conditions in state and local jails, which still housed most federal inmates. Id. After 1910, the superintendent also served as the third member on each of the newly established federal parole boards. See Edgardo Rotman, The Failure of Reform: United States, 1865–1965, *in* The Oxford History of the Prison: The Practice of Punishment in Western Society 151, 167 (Norval Morris & David J. Rothman eds., 1998). Because of these responsibilities, he did not have the time or the resources to provide much oversight.

This time there was a new factual basis for an argument in favor of an independent prisons bureau. By 1929, all of the states had established independent prison commissions or bureaus.[43] And although state structures varied (and produced varying results),[44] a movement toward rehabilitation in the late 1800s led many states to focus on the need to make prison management more professionalized.[45]

Congress, however, seemed uninterested in the state experience or testimony about the desirability of an independent bureau. The outgoing Superintendent of Prisons drafted a bill[46] that passed both houses with little debate and without a recorded vote.[47] Thus, the establishment of the Bureau of Prisons ("BOP") in the Department was met with little resistance and limited discussion.

Since the BOP's establishment, there has been no serious call for its removal from the Department of Justice. Until the early 1980s, it was hardly clear there was a conflict that required remedying, and, even now, the tension is not immediately apparent. As late as 1974, a Bureau official noted that: "The Bureau is a small, non-political part of the Department of Justice and certainly not the most visible; we have traditionally been low on the department priority list . . . ."[48] Indeed, for much of its history, "[a]ttorneys general have done little to interfere with the daily management of the Bureau."[49] As a result, Bureau officials long pursued

[43] Federal Penal and Reformatory Institutions: Hearings Before the Special H. Comm. on Fed. Penal and Reformatory Institutions, 70th Cong. 80–81 (1929) [hereinafter 1929 Hearings] (statement of James Bennett).

[44] Georgia, for example, established a Prison Commission in 1897, and its three members were initially elected by popular vote. Prison Indus. Reorganization Admin., The Prison Labor Problem in Georgia 5 (1937). After serious abuses of its prisons came to light, Georgia shifted the structure of its prison authority, ultimately adopting a five-member Board of Corrections, appointed by the Governor with the advice and consent of the state senate. Albert B. Saye, A Constitutional History of Georgia, 1732–1945, at 460 (2010) (citing sections of the 1945 Georgia Constitution, which created a five-member State Board of Corrections, appointed by the Governor and confirmed by the Senate, for staggered five-year terms). California experimented with several different board structures made up of gubernatorial appointees. Shelley Bookspan, A Germ of Goodness: The California Prison System, 1851–1944, at 2–51 (1991). In 1895, New York established an eight-member State Prison Commission. Rebecca M. McLennan, The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941, at 201 (2008).

[45] Bookspan, supra note 44, at 39–40 (describing this shift in California).

[46] Keve, supra note 24, at 96.

[47] 72 Cong. Rec. 2157–58, 8575–76 (1930).

[48] Arjen Boin, Crafting Public Institutions: Leadership in Two Prison Systems 109–10 (2001) (quoting Norm Carlson, former Director, Bureau of Prisons).

[49] Id. at 109.

a more reformist agenda than one might expect from an agency under the authority of prosecutors. For instance, the Bureau was one of the first correctional systems to implement a community corrections program through "a series of halfway houses of its own to help offenders nearing the end of their sentences prepare for their release back to the community."[50] And "[w]hereas in 1996 more than half of the state prison systems had one or more consent decrees or court judgments concerning the conditions of confinement pending against them, the Bureau had none."[51]

But times have changed, and there are signs that in recent decades the BOP's placement in the Department may be muting it as a voice for corrections reform. For half a century after the Bureau was established in the Department, the federal prison population remained relatively stable at roughly 20,000 prisoners.[52] Starting in the mid-1980s, the federal prison population started to spike, and has quadrupled since 1990.[53] There are now 120 federal institutions with over 212,000 prisoners.[54] The Bureau witnessed these enormous changes in virtual silence.

As the American Bar Association recently noted in a letter calling for new leadership to "reinvigorate the agency," the Bureau has been "slow and grudging" in adapting to this drastic expansion of the prison population.

> It has lagged behind many state systems in developing innovative programs for women prisoners and those with families, imposed unnecessary restrictions on admission to beneficial drug treatment programs, been haphazard in preparing prisoners for release, failed to respond to the needs of the growing population of non-citizen prisoners, and resisted sensible suggestions for change as exemplified by rejection of the National Prison Rape Elimination Commission recommendations

[50] John W. Roberts, The Federal Bureau of Prisons: Its Mission, Its History, and Its Partnership With Probation and Pretrial Services, 61 Fed. Probation 53, 55 (1997).

[51] Boin, supra note 48, at 112.

[52] Letter from Bruce Green, Chair, ABA Criminal Justice Section, to Hon. Eric Holder, Att'y Gen. (May 6, 2011) (on file with the Virginia Law Review Association).

[53] Id.

[54] Id.

that reflect prevailing state policy on cross-gender searches and supervision.[55]

Margaret Colgate Love attributes the "BOP's institutional sclerosis . . . to its place within the Department of Justice."[56] She argues that "[a] career-led BOP has become captive to the Justice Department's prosecutorial agenda."[57] As an example, she notes that it is difficult for the Bureau to lead the charge on downsizing the prison population by reducing recidivism through reentry programs or other reforms—something that some state corrections departments are doing[58]—because of the potential conflict with the Department's continued pursuit of convictions and long sentences.[59]

The conflict between the Department's law enforcement mission and the Bureau's responsibility over corrections is manifest not only in the Bureau's failure to take a more aggressive role on corrections reform. It can also be seen in the federal policy on the use of community correction centers ("CCCs"), more commonly known as halfway houses. The

[55] Id. The ABA also criticized the Bureau's reluctance to use its sentence modification authority to grant compassionate release to terminally ill prisoners so that they can die at home. Id.

[56] Margaret Colgate Love, Time for a Really New Broom at the Federal Bureau of Prisons, The Crime Rep. (Apr. 17, 2011, 11:46 PM), http://www.thecrimereport.org/news/articles/2011-04-time-for-a-really-new-broom-at-the-federal-bureau-of [hereinafter Love, Time].

[57] Id.

[58] For example, the Georgia Department of Corrections and the State Board of Pardons created the Reentry Partnership Housing for Residence-Problem Inmates project. The project "is designed to provide housing for work-ready convicted felons who remain in prison after the Parole Board has authorized their release due solely to having no residential options." Reentry P'ship Housing, Georgia Department of Corrections, http://www.dcor.state.ga.us/Divisions/OPT/Reentry/ReentryPartnershipHousing.html (last visited July 24, 2012). The program also resulted in an estimated savings of $18 million. National Council of State Housing Agencies, Award-Winning Georgia Re-Entry Program Creates Housing Solutions, U.S. Interagency Council on Homelessness E-newsletter (June 5, 2009), http://www.ncsha.org/story/award-winning-georgia-re-entry-program-creates-housing-solutions. James LeBlanc, Chief of Operations for the Louisiana Department of Public Safety and Corrections, has also pushed for reentry initiatives. LeBlanc "started the re-entry program at Dixon Correctional Center when he was the warden there, and he has made re-entry a centerpiece of his system-wide reform efforts." Cindy Chang, Louisiana Incarcerated: How We Built the World's Prison Capital; Re-entry Programs Help Inmates Leave the Criminal Mindset Behind. But Few Have Access to the Classes, Times-Picayune, May 19, 2002 at A1. "Under LeBlanc's plan, the pilot program currently in place at [Orleans Parish Prison], along with a similar one in Shreveport, will eventually develop into regional re-entry centers, hosting all soon-to-be released inmates from those areas. LeBlanc hopes that, someday, all local prison inmates will graduate from re-entry." Id.

[59] Love, Time, supra note 56.

Bureau had a longstanding practice of placing some of its nonviolent offenders with short sentences in these facilities when recommended by a judge.[60] And on at least one occasion during that time, the Department affirmed the legality of the Bureau's position.[61]

In 2002, however, the Deputy Attorney General asked the Department's Office of Legal Counsel ("OLC") to reconsider this practice.[62] The impetus seemed clear: the Bush administration was coming under fire "by some Democrats for going easy on corporate criminals because of its close political ties to Wall Street."[63] Department officials thus opted to change the Bureau's practice "to strengthen the hands of federal prosecutors in high-priority cases like the Enron and WorldCom scandals. Officials say they are trying to signal to reluctant targets in those cases that they should cooperate with the government—or else."[64] While the Department memorandum condemning the Bureau practice intimated that the Bureau asked for OLC's evaluation of the policy,[65] one judge called that description "disingenuous."[66] And, in fact, the memorandum itself suggests the key motivating factor for the Department to take a closer look at the policy: "BOP's current placement practices run the

[60] Yana Dobkin, Note, Cabining the Discretion of the Federal Bureau of Prisons and the Federal Courts: Interpretive Rules, Statutory Interpretation, and the Debate over Community Confinement Centers, 91 Cornell L. Rev. 171, 173 (2005).

[61] Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. Off. Legal Counsel 65 (1992), *quoted in* Todd Bussert, et. al., New Time Limits on Federal Halfway Houses: Why and How Lawyers Challenge the Bureau of Prisons' Shift in Correctional Policy—and the Courts' Response, 21 Crim. Just. 20, 21–22 (2006).

[62] Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Kathleen Hawk Sawyer, Dir., Fed. Bureau of Prisons (Dec. 16, 2002) [hereinafter Thompson Memo] (on file with the Department of Justice).

[63] Eric Lichtblau, Criticism of Sentencing Plan for White-Collar Criminals, N.Y. Times, Dec. 26, 2002, at C2. While the Justice Department implied that its review of the policy stemmed from a Bureau request, most accounts attribute the second-look of the policy as coming from a Justice Department eager to show it was willing to be tough on corporate fraud. S. David Mitchell, Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements, 16 Mich. J. Race & L. 235, 245 n.45 (2011); Jennifer Borges, Note, The Bureau of Prisons' New Policy: A Misguided Attempt to Further Restrict a Federal Judge's Sentencing Discretion to Get Tough on White-Collar Crime, 31 New Eng. J. on Crim. & Civ. Confinement 141, 179 (2005).

[64] Michael Isikoff, Hard Time for Corporate Perps, Newsweek and The Daily Beast (Dec. 19, 2002, 7:00 PM), http://www.thedailybeast.com/newsweek/2002/12/19/hard-time-for-corporate-perps.html.

[65] Memorandum Opinion from M. Edward Whelan III, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the Deputy Att'y Gen. 1 (Dec. 13, 2002) 2002 WL 31940146 (O.L.C.).

[66] Monahan v. Winn, 276 F. Supp. 2d 196, 205 n.9 (D. Mass. 2003) (Gertner, J.)

risk of eroding public confidence in the federal judicial system" by giving white collar offenders preferential treatment.[67]

Given the policy concerns of the Department, it is hardly surprising that it concluded that the Bureau lacked authority to place offenders in these facilities because they did not constitute "imprisonment" under the Bureau's authorizing statute,[68] even though imprisonment was broadly defined as "any available penal or correctional facility."[69] According to the Department's interpretation, the Bureau could use CCCs only pursuant to its statutory authority related to reentry transfer, and thus could place inmates in CCCs for the final ten percent of their term, up to a maximum of six months, but could not otherwise use CCCs as a form of imprisonment.[70]

The Department's view received widespread criticism, particularly from trial judges,[71] but there is no evidence the Bureau tried to push back. After courts disagreed with the Department's interpretation of the relevant statutes as denying the Bureau the discretion to use CCCs as it did,[72] the Bureau promulgated a rule in 2005 that reached the same outcome that the Department advocated, only this time claiming the power to do so as a matter of discretion as opposed to statutory mandate.[73] Still

[67] Thompson Memo, supra note 62. As one Bureau official pointed out, white-collar offenders were by no means the only inmates to benefit from CCC placement: "There are a lot of drug offenders, single moms and ordinary folks who aren't wealthy people who have benefited from this. It's not just Enron types." Lichtblau, supra note 63.

[68] Whelan, supra note 65, at 4–5, 7. Pursuant to 18 U.S.C. § 3621(b) (2000), "[t]he Bureau of Prisons shall designate the place of the prisoner's imprisonment." Id. at 4.

[69] The First Circuit rejected the Department's interpretation. Goldings v. Winn, 383 F.3d 17, 24, 28 (1st Cir. 2004).

[70] Mitchell, supra note 63, at 249.

[71] Dobkin, supra note 60, at 174–75 (noting that the decision "raised the ire of judges nationwide, who expressed shock at the 'amputation of the [Bureau's] discretion' and the insult to the courts, and who criticized that even if the Bureau's 'about-face on community corrections could somehow be justified . . . it should never have been carried out in the cavalier manner it was'" (citations omitted)).

[72] See *Goldings*, 383 F.3d at 19 (concluding that the new policy is contrary to the plain meaning of 18 U.S.C. § 3621(b) (2000)); Elwood v. Jeter, 386 F.3d 842, 847 (8th Cir. 2004) (noting that "the BOP may place a prisoner in a CCC for six months, or more" and that the BOP has "the discretion to transfer prisoners to CCCs at any time during their incarceration"); Monahan v. Winn, 276 F. Supp. 2d 196, 199 (D. Mass. 2003) (citing examples).

[73] Community Confinement, 70 Fed. Reg. 1659 (Jan. 10, 2005) (codified at 28 C.F.R. § 570 (2011)); Mitchell, supra note 63, at 254. See also Muniz v. Sabol, 517 F.3d 29, 33 (1st Cir. 2008) ("[T]he BOP has codified as a formal rule the substance of the 2002 policy, reaching the same result by relying on the opposite rationale: instead of arguing, as previously, that it lacks discretion to make CCC placements before the last ten percent of a sentence,

more telling, even after Congress expressly permitted the Bureau to place inmates in CCCs for up to a year prior to release,[74] the Prison Bureau issued a new rule that once more reaffirmed the six-month limit first mandated by the Justice Department in 2002.[75]

Given the Bureau's four-decade preference for exercising its discretion to place certain nonviolent offenders in CCCs, its shift to a categorical rule barring such placements except in the limited circumstances that the Department had endorsed seems to be a product of the Department's law enforcement preferences, not the Bureau's corrections objectives.

B. Clemency

Because federal prisons did not emerge until the end of the nineteenth century, the notion of a Bureau of Prisons, much less where to place it, was not on the Framers' radar. In contrast, clemency presented itself as an issue to confront from the outset. Article II, Section 2 of the Constitution gives the President the power to "grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." From the Founding, then, there was a need to determine how this power would be administered.

Early on, individuals seeking clemency made their request to the Secretary of State. Typically, the Attorney General also reviewed all applications, but only the Secretary of State had the authority to investigate requests and issue pardon warrants. Thus, while the chief law enforcement officer played a role in the process, the leading force was the Secretary of State, someone outside of the criminal justice regime.

This practice continued until the middle of the nineteenth century. In 1853, President Millard Fillmore's AG and his Secretary of State agreed that, as a matter of expediency, the AG should take charge of receiving and reviewing all pardon applications, though the State Department would still retain the final authority to issue warrants.[76] Congress tacitly approved this institutional arrangement when in 1865 it provided for a

BOP now claims its discretion is broad enough to allow it to make a categorical rule preventing such placements.").

[74] 18 U.S.C.A § 3624(c)(1) (West 2012).

[75] Mitchell, supra note 63, at 261.

[76] Cummings & McFarland, supra note 14, at 149.

pardon clerk to assist the AG in his new responsibility, and later, in 1891, created the office of the Pardon Attorney.[77]

At the time the AG took on the responsibilities for clemency, the potential for conflict existed because of his law enforcement functions. But there were several mitigating factors at play that may have detracted attention from flaws with that institutional design. First, as noted above, federal law enforcement itself was relatively modest at this point in the Nation's history, and certainly the politics surrounding federal crime were a far cry from the tough-on-crime culture that we have witnessed in the past four decades. Second, the AG's role at the head of the Department of Justice remained limited. The AG's office in its first 100 years was narrow in scope, shielded in part from partisan politics, and almost entirely divorced from the day-to-day administration of criminal justice by U.S. Attorneys in the field.[78] In fact, because the AG was so removed from the political landscape, handing him authority over pardons was in some sense a decision to insulate those decisions from politics. As former Pardon Attorney Margaret Love observes, "[d]irecting all pardon applicants to the Justice Department gave the president a measure of protection both from unwelcome importuning and political controversy."[79]

These factors may explain why the rate at which clemency was granted stayed relatively high (at least compared to past grants) even after the AG took over responsibility for pardons.[80] Love reports that Presidents issued more than 10,000 grants of clemency between 1885 and 1930,[81]

[77] Margaret Colgate Love, Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful, 27 Fordham Urb. L.J. 1483, 1489 n.26 (2000) [hereinafter Love, Of Pardons]. In 1893, President Cleveland issued an executive order formally giving the Department the authority to review and issue all warrants. Joanna M. Huang, Note, Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency, 60 Duke L.J. 131, 143 n.66 (2010).

[78] See generally Nancy V. Baker, Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789–1990, at 3, 51–52 (1992); Cornell W. Clayton, The Politics of Justice: The Attorney General and the Making of Legal Policy 16, 48 (1992).

[79] Margaret Colgate Love, Reinventing the President's Pardon Power, 20 Fed. Sent'g Rep. 5, 6 (2007) [hereinafter Love, Reinventing].

[80] P.S. Ruckman, Jr., provides a comprehensive table of the number of pardons requested, granted, and denied by each administration from 1900 to 1993, in Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993), 27 Presidential Stud. Q. 251, 261, 263 (1997).

[81] Margaret Colgate Love, The Twilight of the Pardon Power, 100 J. Crim. L. & Criminology 1169, 1185 (2010) [hereinafter Love, Twilight].

"with no slow starts and no bunching of grants at the end."[82] Warren Harding issued 474 pardons and 733 commutations during his two years in office; Franklin Roosevelt issued 2,721 pardons and 491 commutations over the course of his twelve-year presidency.[83] Indeed, the 1920s represented the high-water mark for clemency, particularly in proportion to the size of the federal inmate population and the number of pardon requests. With the advent of federal parole in 1931, parole replaced commutation as the principle mechanism for shortening prisoners' sentences.[84] Accordingly, clemency rates dropped somewhat over the ensuing five decades.[85] Presidents continued, however, to issue post-sentence pardons at rates that seem high by today's standards. Between 1960 and 1980, an average of 150 pardons were issued per year.[86]

The conflict between clemency and prosecution responsibility came to light in the Reagan years, for two main reasons. The first was the new politics of crime.[87] By 1980, it became clear that criminal justice was a key political issue and that no President could afford to be seen as soft on criminal law. Certainly the message was crystal clear by the time George H.W. Bush successfully ran against former Massachusetts Governor Michael Dukakis with an ad campaign that featured Willie Horton, who had committed rape and robbery while on release as part of a Massachusetts furlough program.[88]

The AG and the Department of Justice were highly sensitive to what it meant to operate in this new political climate. President Reagan promoted an ideological shift toward "tougher" crime policy,[89] and criminal law enforcement and criminal justice policies became a high-profile part of the presidential administration. In a memorandum sent to key leaders within the Department of Justice, Assistant Attorney General William Bradford Reynolds emphasized that the administration should "polarize the debate" on a variety of public health and safety issues such as drugs, AIDS, obscenity, and prisons, and "not seek 'consensus'" but rather

[82] Id. at 1186.
[83] Ruckman, Jr., supra note 80, at 261.
[84] Love, Twilight, supra note 81, at 1190.
[85] Id. at 1190–91.
[86] Id. at 1192.
[87] See Love, Of Pardons, supra note 77, at 1495.
[88] See A 30-Second Ad on Crime, N.Y, Times, Nov. 3, 1988, at B20; Paul Farhi, Two Political Ads Share More Than Fame and Controversy, Wash. Post, Sept. 7, 2004, at A2.
[89] See Marc Mauer, Race to Incarcerate 59–64 (2d ed. 2006) (examining the "tough-on-crime" focus of the Reagan Administration).

"confront[ation] . . . in ways designed to win the debate and further our agenda."[90] The political message was clearly received, as federal prosecutions for nondrug offenses rose by less than four percent and drug prosecutions rose by ninety-nine percent from 1982 to 1988.[91] Correction spending also increased by 521 percent between 1980 and 1993.[92]

The second reason the conflict between clemency and law enforcement grew so pronounced involved a shift in the responsibility for pardons at DOJ. Attorney General Griffin Bell decided in 1978 to delegate supervisory authority over clemency to the Deputy Attorney General.[93] Until then, the Pardon Attorney reported directly to the Attorney General, who in Love's telling is a "political counselor" as much as a law enforcement officer.[94] The principal responsibility of the Deputy Attorney General's Office is to supervise federal prosecutions, so the shift in reporting meant that the pardon process "increasingly reflected the perspective of prosecutors, in policy positions in Washington and in the field, who did not always have a clear understanding of or appreciation for clemency."[95]

Given the changing nature of the politics of crime, it is certainly possible (if not likely) that even if the Pardon Attorney continued to report to the AG, positive clemency recommendations would decline. It is hard to imagine a "political counselor" being much more inclined than a law enforcement officer to tell the President to issue more pardons given the political climate. Love also observes that the Deputy Attorney General "has either been a former prosecutor himself, or has had career prosecutors on his staff review the clemency recommendations drafted by the Pardon Attorney."[96] As a result, Love claims that the "the pardon pro-

[90] Id. at 63 (citing Memorandum from Assistant Att'y Gen. William Bradford Reynolds for Heads of Dep't Components, Dep't of Justice (Feb. 22, 1988)).

[91] Id. at 61.

[92] Id. at 68.

[93] Love, Twilight, supra note 81, at 1194 ("But perhaps the most important negative influence on presidential pardoning was the hostility of federal prosecutors and a change in the administration of the pardon program at the Justice Department that allowed prosecutors to control clemency recommendations.").

[94] Love, Reinventing, supra note 79, at 7–8.

[95] Love, Of Pardons, supra note 77, at 1496; see also Albert W. Alschuler, Bill Clinton's Parting Pardon Party, 100 J. Crim. L. & Criminology 1131, 1165–66 (suggesting that the "fraternal regard" prosecutors have for one another led them to be less inclined to grant pardons).

[96] Love, Of Pardons, supra note 77, at 1496 n.49; see also Alschuler, supra note 95, at 1165 (stating that both Pardon Attorneys and their superiors in the Justice Department have

gram lost its independent voice and pardon recommendations came to reflect the unforgiving culture of Federal prosecutors."[97] But AGs have largely come from similar law enforcement backgrounds.[98]

Whatever the ratio between politics and institutional allocation of responsibility that drove the shift, the consequences for clemency practice since 1980 have been dramatic. The Pardon Office established more exacting rules for recommending a grant to the President,[99] a shift that the Pardon Attorney during the Reagan administration described as "better reflect[ing] his administration's philosophy toward crime."[100] Love, who was Pardon Attorney from 1990 to 1997, reports that, at the beginning of the Clinton administration, she was briefly "directed to deny all commutation petitions except those in which a member of Congress or the White House had expressed an interest."[101] By the late 1990s, she writes, "Justice seems to have essentially shut down its production of pardon recommendations, notwithstanding the steadily growing number of applications."[102] "Under Bill Clinton and George W. Bush together, the Justice Department received more than 14,000 petitions for commutations, but recommended only 13 to the White House."[103]

DOJ's increasing stinginess with positive recommendations is reflected in the rate of presidential clemency grants. The grant rate was forty-nine percent between 1860 and 1900, and it slowed down to twenty-

"overwhelmingly" been former prosecutors); Love, Twilight, supra note 81, at 1194 n.105 (observing that "[a]ll but a handful of the individuals officially responsible for approving Justice Department clemency recommendations since 1983 have been former federal prosecutors").

[97] Presidential Pardon Power: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 107th Cong. 25 (2001) [hereinafter 2001 Hearings] (statement of Margaret Love).

[98] Of the sixteen attorneys general who have served from 1969 to the present (2013), only four lacked prosecutorial experience. Those with prosecutorial experience either worked as prosecutors in the Department of Justice (with four having been Deputy Attorneys General), in state AG offices, or as state prosecutors. Attorneys General of the United States 1789–Present, U.S. Dep't of Justice, http://www.justice.gov/ag/aghistlist.php.

[99] Love, Of Pardons, supra note 77, at 1497, 1497 n.53.

[100] Pete Earley, Presidents Set Own Rules on Granting Clemency, Wash. Post, Mar. 19, 1984, at A17.

[101] Margaret Colgate Love, Taking a Serious Look at "Second Look" Sentencing Reforms, 21 Fed. Sent'g Rep. 149, 150 (2009).

[102] Margaret Colgate Love, The Pardon Paradox: Lessons of Clinton's Last Pardons, 31 Cap. U. L. Rev. 185, 198 (2003).

[103] George Lardner, Jr., No Country for Second Chances, N.Y. Times, Nov. 24, 2010, at A27.

eight percent between 1961 and 1980.[104] After 1980, it dropped sharply. The rate of clemency grants for each complete presidential administration since Nixon is as follows:[105]

President	**Clemency Grant Rate**	**Avg. Grants per Month in Office**	**Total Number of Grants**
Nixon	35.7%	13.8	926
Ford	26.8%	14.1	409
Carter	21.5%	11.8	566
Reagan	11.9%	4.8	410
George H.W. Bush	5.3%	1.6	77
Clinton	6.1%	4.8	457
George W. Bush	1.8%	2.1	200

The trend continues with President Obama. President Obama ended his first term with only twenty-two pardons and one commutation,[106] giving him a grant rate of less than one per month he has been in office and the lowest total number for a full-term President since George Washington.[107] With almost 400,000 people currently under federal supervision,[108] and hundreds of thousands more living with federal records, it is hardly for lack of candidates that the rate of pardons and commutations have fallen so dramatically.

C. Forensics

Although the states have traditionally dominated most areas of criminal justice—with the overwhelming responsibility for policing, the great bulk of all criminal prosecutions, and the lion's share of prisons and

[104] Alschuler, supra note 95, at 1131.

[105] I based the calculations on data from Presidential Clemency Actions by Administration (1945 to Present), U.S. Dep't of Justice, http://www.justice.gov/pardon/actions_administration.htm.

[106] Dafna Linzer, Commutation Request Will Get a New Look: U.S. Inmate's Case Sparked Criticism, Wash. Post, July 19, 2012, at A3.

[107] Obama: More Dubious Pardon History-Making, Pardon Power Blog (Jan. 24, 2013, 7:20 PM), http://www.pardonpower.com/.

[108] See Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, Ser. No. NCJ 234184, Federal Justice Statistics, 2009, at 17, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf.

jails—the federal government has typically been at the forefront of what we now think of as forensic science.

The federal government's first inroad into this field was with the establishment of a national system of criminal records to facilitate identifications. In 1902, Congress authorized a National Bureau of Criminal Identification at Leavenworth to maintain records of federal inmates. Other such bureaus for criminal records existed throughout the U.S., including one in the New York City Police Department ("NYPD") and a voluntary clearinghouse kept by the International Association of Chiefs of Police ("IACP").[109]

But while prosecutors' offices and prisons could operate independently without much in the way of negative consequences, balkanized policing was another matter. The problems with the disaggregation of criminal records soon became apparent. As Simon Cole notes, "police in New York City looking for a suspect's criminal record would have to write separately to the police in Newark, Philadelphia, Hartford . . . and so on. How many letters the police were willing to write depended on how badly they wanted the information."[110]

Although some local bureau chiefs resisted centralization because they worried about losing their powers,[111] ultimately the need for a uniform national system of identification overcame local resistance. The question thus became not whether to have a central repository, but where to house it. The NYPD offered to serve as a temporary clearinghouse until an independent Central Police Bureau could be established in Washington, D.C.[112] The IACP, which had never been on particularly good terms with the NYPD, lobbied instead for the Department of Justice to take over the records of existing bureaus. In 1921, the IACP succeeded, and the Attorney General combined the IACP's records with its existing collection in Leavenworth to form a new identification depository in Washington, D.C.[113]

Congress held hearings in 1924 to consider the suitability of having DOJ as the central clearinghouse. Objections were not particularly focused on the wisdom of placing a law enforcement agency in control of

[109] Simon A. Cole, Suspect Identities: A History of Criminal Identification and Fingerprinting 220 (2001).
[110] Id. at 219.
[111] Id. at 236.
[112] Id. at 242.
[113] Id. at 243–44.

identification records; after all, other law enforcement agencies had already controlled them. Rather, the main objections at the hearing involved the fear of some local departments that they would become "an annex to the Department of Justice."[114] Thus, for example, the NYPD commissioner testified in favor of having the bureau placed at the Department of the Interior instead because of his concern that it not be placed where "it might lead to control."[115]

Congress was not persuaded that Interior was a good fit for the bureau, and, as one member stated, the idea of "[a] separate bureau is rather obnoxious to us at Washington."[116] So with Interior out and an independent commission seen as wasteful, Congress opted in 1924 to formally authorize an Identification Division within the FBI.[117]

J. Edgar Hoover became Director of the FBI in that same year and viewed forensic science as a key part of the agency's mission. Hoover led the Bureau to create a "cross-referenced filing system that permitted an agent to take a single piece of information—a fingerprint, a physical description, a modus operandi—and trace it back to a whole criminal."[118] Hoover encouraged some of his agents to develop expertise in ballistics, handwriting analysis, and other first-generation forensic techniques. In 1932, the Bureau created its own Technical Laboratory to assist in federal investigations and later to assist state and local police agencies throughout the United States with forensic science (or what they more commonly called scientific policing).[119]

Although the potential for conflict between objective forensic scientific analysis and law enforcement goals should have been apparent even at the formative stage, the expansion of the FBI into this field raised few

[114] To Create a National Police Bureau, To Create a Bureau of Criminal Identification: Hearing Before the H. Comm. on the Judiciary on H.R. 8580 and H.R. 8409, 68th Cong. 5 (1924) (statement of Richard E. Enright, N.Y.C. Police Comm'r).

[115] Id. at 11.

[116] See, e.g., id. at 5 (statement of Rep. Ira G. Hersey, Member, H. Comm. on the Judiciary).

[117] See John Edgar Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 184 n.8 (1952). At the time, the FBI was known as the Bureau of Investigation—it went through several name changes before finally settling as the FBI in 1935.

[118] Claire Bond Potter, War on Crime: Bandits, G-Men, and the Politics of Mass Culture 36 (1998).

[119] Not many agencies took the FBI up on its offer to test samples. The FBI made only fifty-three examinations for outside agencies in November 1934. Department of Justice Appropriation Bill for 1935: Hearing Before the Subcomm. of H. Comm. on Appropriations, 73d Cong. 66 (1934) (statement of J. Edgar Hoover, Dir. of Investigation).

eyebrows. In part, this was because investigation bureaus organically developed in police agencies, so no other model existed and path dependency likely took hold. But it also reflected that the FBI put itself at the forefront of the field, earning it a reputation that led the Commission on Law Enforcement and the Administration of Justice (created by President Johnson to review the state of criminal justice and chaired by Attorney General Nicholas Katzenbach) to spend little time even addressing forensic science "because the best laboratories, such as the FBI's, are well advanced . . . ."[120]

DOJ's reach into forensic science ultimately went deeper than the FBI lab. After the Katzenbach Commission proposed the creation of research institutes to study criminal justice topics, the Johnson administration recommended that Congress pass the Safe Streets and Crime Control Act.[121] The Act provided, among other things, for a Law Enforcement Assistance Administration ("LEAA") to fund law enforcement training and development programs, as well as a National Institute of Law Enforcement and Criminal Justice within the LEAA to coordinate and finance research into all aspects of criminal justice and reform.

At this point, a counterview emerged to place this research function in a more independent body. Senator Ted Kennedy introduced a proposal for a National Institute of Criminal Justice, also within the Department of Justice, but operating independently of the LEAA.[122] This institute, modeled on the National Institute of Mental Health, "would be a well-staffed, highly competent, neutral, nonpolitical institution which could serve as a marketplace of ideas and a repository and disseminator of information, a seeker of truth and a stimulator of progress, without responsibility for governmental functions, or for day to day administering of large grant-in-aid programs."[123] Under Senator Kennedy's vision, this institute would have its own laboratories, research staff, and a compre-

[120] President's Comm'n on Law Enforcement & Admin. of Justice, The Challenge of Crime in a Free Society 255 (1967).

[121] Omnibus Crime Control and Safe Streets Act of 1967, S. 917, 90th Cong. (as reported in the Senate, Apr. 29, 1968), H.R. 5037, 90th Cong. (1967); Text of President Johnson's Special Message to Congress on Crime in United States, *in* N.Y. Times, Feb. 7, 1967, at 24.

[122] S. 992, 90th Cong (1967), *reprinted in* Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 992, S. 1007, S. 1094, S. 1194, S. 1333, and S. 2050 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 90th Cong. 102–03 (1967) [hereinafter, 1967 Hearings].

[123] Id. at 1050–51 (statement of Sen. Edward M. Kennedy, Member, Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary).

hensive fellowship program to attract outside experts.[124] Members of the American Bar Association's criminal law section offered an even stronger view that the Justice Department might not be an ideal location for an independent research institution.[125]

DOJ resisted suggestions for a more independent model. Attorney General Ramsey Clark testified on behalf of the Department that the Kennedy proposal would be duplicative and unnecessary because the successor body to the Office of Law Enforcement Assistance contemplated by the Safe Streets and Crime Control Act of 1967 would fulfill the charge of the Katzenbach Commission.[126] Dr. Donald Hornig, Director of the Office of Science and Technology, supported the DOJ model because in his view, an independent research program would be too divorced from "actual field operations" and new laboratories may be too "arduous and time-consuming" to set up.[127]

Congress sided with the President and created a small national research institute as part of the broader LEAA.[128] A decade later—in response to criticism that emerged that the LEAA had focused too many of its resources on police programs at the expense of other aspects of criminal justice[129]—Congress established the National Institute of Justice ("NIJ"), which is "dedicated to improving knowledge and understanding of crime and justice issues through science."[130] Again, however, Congress opted to place this agency within the Department of Justice.[131]

The decisions to place these research agencies within DOJ can also be understood as a species of path dependence and a concern with resource constraints. At this point, almost all forensic laboratories—eighty percent—were tied to a law enforcement agency with the rest scattered

[124] Id.

[125] Id. at 1065 (statement of William Walsh, President-Elect, American Bar Association Section of Criminal Law).

[126] Id. at 381–82, 481, 822 (statement of Hon. Ramsey Clark, Att'y Gen. of the United States).

[127] Id. at 1062–63 (statement of Dr. Donald F. Hornig, Dir., Office of Sci. and Tech.).

[128] See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 42 U.S.C. § 3711(2006)).

[129] See, e.g., Jay N. Varon, Note, A Reexamination of the Law Enforcement Assistance Administration, 27 Stan. L. Rev. 1303, 1307 (1975) (noting that the LEAA's excessive focus on police problems is the principal source of controversy surrounding the agency).

[130] National Institute of Justice, About NIJ, http://www.nij.gov/about/welcome.htm (last modified Apr. 4, 2011).

[131] Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167 (codified as amended at 42 U.S.C. § 3722 (2006)).

through "medical examiners' offices, prosecutors' offices, scientific/public health agencies, and other public or private institutions."[132] As with the creation of the forensic lab at the FBI, then, this model was the dominant one, and strong reasons had not emerged to second guess it.

Strong reasons did emerge, however, at the end of the twentieth century and the beginning of the twenty-first century when DNA evidence came on the scene. To be sure, reasons existed earlier, as there was evidence in the 1970s that labs were producing erroneous results at high rates.[133] But these results failed to prompt any kind of considered look or reflection. Doubts about DNA, in contrast, got attention. Defense experts and judges began to raise concerns about government DNA evidence in cases in the late 1980s and early 1990s. In one landmark case, *People v. Castro*,[134] experts on both sides of the case jointly agreed that "the DNA data in this case are not scientifically reliable enough to support the assertion that the samples . . . do or do not match. If these data were submitted to a peer-reviewed journal in support of a conclusion, they would not be accepted."[135]

A series of reports and studies followed that unearthed disturbing findings about crime labs.[136] There were dozens of serious scandals at crime labs that revealed "carelessness, bias, incompetence, [and] exces-

[132] Paul C. Giannelli, Regulating Crime Laboratories: The Impact of DNA Evidence, 15 J.L. & Pol'y 59, 69 (2007); see Randolph N. Jonakait, Forensic Science: The Need for Regulation, 4 Harv. J.L. & Tech. 109, 115 (1991) (noting that "crime laboratory performance is routinely unreliable and that the quality of forensic science needs drastic improvement" (citations omitted)); D. Michael Risinger et al., Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise," 137 U. Pa. L. Rev. 731, 734 (1989) ("Like folk medicine, handwriting identification may sometimes be efficacious; but no verification yet exists of when, if ever, it is and when it is not.").

[133] A proficiency testing program, sponsored by the LEAA, revealed in 1978 that 71% of labs produced erroneous results in at least one blood test, and 28.2% in firearms identifications. Only about two-thirds of the labs "had 80 percent or more of their results fall into the acceptable category." Giannelli, supra note 132, at 72–73 (citations omitted) (internal quotation marks omitted).

[134] 545 N.Y.S.2d 985 (Sup. Ct. Bronx Cnty. 1989). On the history and consequences of the landmark case, see Jennifer L. Mnookin, *People v. Castro*: Challenging the Forensic Use of DNA Evidence, *in* Evidence Stories 207, 208–09 (Richard Lempert ed., 2006). See also Giannelli, supra note 132, at 79.

[135] Eric S. Lander, Commentary, DNA Fingerprinting on Trial, 339 Nature 501, 504 (1989).

[136] For an excellent history, see generally Paul C. Giannelli, *Daubert* and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research, 2011 U. Ill. L. Rev. 53, 53–58 (2011).

sive coziness with prosecutors."[137] Labs in Boston, Chicago, Detroit, Houston, Los Angeles, New York, North Carolina, Oklahoma City, San Francisco, West Virginia, and the FBI all came under fire for various deficiencies in a variety of forensic areas.[138] One study in 1999 revealed that, of sixty-two DNA exonerations, one-third of the convictions had been based in part on "tainted or fraudulent science."[139] Another found that forensic evidence was introduced by prosecutors in more than half of the trials of defendants ultimately exonerated by DNA evidence.[140] As one prominent biologist observed, "[a]t present, forensic science is virtually unregulated—with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row."[141]

In many instances, it was clear that problems stemmed in part from close ties between law enforcement investigators and lab analysts. It is routine in many places for police investigators to give forensic practitioners background details about a case. In New Jersey, for example, the forms officers use to submit evidence to the state's police laboratory leave a space for investigators to include just such background details about the case.[142] Indeed, "the practice was virtually universal" in publicly funded labs.[143] Other forms of pressure are even more direct. Michael Risinger notes that "[s]ometimes police or prosecutors respond to test results that are negative or inconclusive by suggesting to forensic scientists what they should have found and asking them to test again in hopes of obtaining a 'better' result."[144]

[137] Jennifer L. Mnookin et al., The Need for a Research Culture in the Forensic Sciences, 58 UCLA L. Rev. 725, 727–28 (2011).

[138] Problems occurred in serology, bloodstain pattern analysis, DNA, fingerprint identification, and other areas. Id. at 728 n.5.

[139] Giannelli, supra note 132, at 85 (quoting Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted 248 (2000)).

[140] Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 81 (2008).

[141] Lander, supra note 135, at 505.

[142] D. Michael Risinger et al., The *Daubert*/*Kumho* Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion, 90 Calif. L. Rev. 1, 32 (2002).

[143] Id.

[144] Id. at 39. One analyst recalls "investigators who responded to inconclusive results by saying to forensic examiners: 'Would it help if I told you we know he's the guy who did it?'" Id. (quoting Peter DeForest, Address at the 2d International Conference on Forensic Document Examination (June 14–18, 1999) (notes of Michael Saks, who was present)).

In theory, forensic analysts could resist such pressures, but because the labs are part of law enforcement agencies and under their supervision, there is a "team spirit" that takes hold.[145] As one former lab director put it, scientists in the lab viewed "their role as members of the state's attorney's team. 'They thought they were prosecution witnesses.'"[146] One example offers a vivid image of how the lines between law enforcement and science can be blurred: A discredited forensic analyst in West Virginia, who falsified test results in as many as 134 cases over a decade,[147] "asked to be addressed as 'Trooper,' and . . . wore a police uniform and gun even though his job was to supervise a crime lab."[148]

Less dramatic, but no less troubling, examples emerge from labs plagued by scandal. A review of the forensic lab in North Carolina revealed that lab analysts routinely failed to disclose inconclusive or negative tests for the presence of blood; indeed, failing to turn over inconclusive results was the explicit policy of the lab contained in its operating manual.[149] The investigators probing the lab's procedures concluded that the lab's failures stemmed, in part, from "[a] mindset promoted by the Section Chief that the lab's customer was law enforcement and reported results should be tailored primarily for law enforcement's consumption."[150] A similar bias was found in Houston. After a series of investigative reports by a local television station exposed troubles at Houston's crime lab, the city hired a team of independent specialists to investigate its lab. The final report, published in 2007, described the laboratory's DNA and serology work as "extremely troubling."[151] Investigators reviewed a sample of 135 DNA cases and found "major issues" in forty-

[145] Jim McKay, A Bad Apple Or . . ., Tex. Tech., Spring 2008, at 10, 13 (quoting William Thompson, a professor at the University of California, Irvine and forensic expert).

[146] Steve Mills et al., When Labs Falter, Defendants Pay, Chi. Trib., Oct. 20, 2004, at 16.

[147] Paul C. Giannelli, Essay, The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories, 4 Va. J. Soc. Pol'y & L. 439, 442 (1997).

[148] Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 92 (2011).

[149] Chris Swecker & Michael Wolf, An Independent Review of the SBI Forensic Laboratory 21 (2010), available at http://media2.newsobserver.com/smedia/2010/08/18/13/SBIreview.source.prod_affiliate.156.pdf; see also Bernadette Mary Donovan & Edward J. Ungvarsky, Strengthening Forensic Science in the United States: A Path Forward—Or Has It Been a Path Misplaced?, Champion, Jan.–Feb. 2012, at 22.

[150] Swecker & Wolf, supra note 149, at 28.

[151] Michael R. Bromwich, Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room 4 (2007), available at http://www.hpdlabinvestigation.org/reports/070613report.pdf.

three of them (thirty-two percent).[152] The report concluded that, in a number of cases, analysts had "reported conclusions, frequently accompanied by inaccurate and misleading statistics, that often suggested a strength of association between a suspect and the evidence that simply was not supported by the analyst's actual DNA results."[153] The problems could be traced in part to a poor physical plant and shoddy supervision.[154] But the troubles were also linked to bias. "[T]he lab almost always erred on the prosecution's side,"[155] with "many instances of failure to report analytical results that would have weakened the prosecution's case or strengthened the case for exonerating the defendant."[156]

The federal government has not been immune to this dynamic. In 1995, after a chemist in the FBI's crime lab publicly accused the FBI of "pressuring forensic experts to commit perjury or skew tests to help secure convictions in hundreds of criminal cases,"[157] the Department's Inspector General ("IG"), Michael Bromwich, launched an investigation. He issued a report in 1997 that documented "significant instances of testimonial errors, substandard analytical work, and deficient practices."[158] The IG recommended that the chiefs of both the Chemistry-Toxicology and Explosives units be removed from their positions and, if permitted to remain in the laboratory, be supervised by examiners with scientific backgrounds. The IG report also documented a number of examiners who had given false or perjured testimony in high profile cases, and still others whose work simply lacked the markers of objectivity or expertise. The IG urged the Justice Department to review the cases in which the examiners had taken part.

Although the FBI responded by raising standards for examiners and improving its supervisory structure, an effort the Office of the Inspector

[152] Id.

[153] Id. at 5.

[154] Id. at 10 ("[T]he DNA Section was in shambles—plagued by a leaky roof, operating for years without a line supervisor, overseen by a technical leader who had no personal experience performing DNA analysis . . . and generating mistake-ridden and poorly documented casework.").

[155] McKay, supra note 145, at 10, 12.

[156] Bromwich, supra note 151, at 94. Since the release of the report, the Houston lab changed its practices and after a series of reviews received accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board. Id. at 2.

[157] David Johnston, F.B.I. Chemist Says Experts Are Pressured to Skew Tests, N.Y. Times, Sept. 15, 1995, at B8.

[158] Michael R. Bromwich, The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases pt. 1, at 2 (1997).

General later described as commendable,[159] the Department was less impressive in how it handled the review of individual cases. The AG appointed a task force to go through the laboratory's files to identify instances of past misconduct in the thousands of criminal cases (state and federal) handled annually. But the FBI asked that the task force "keep the focus off the most vulnerable cases by not conducting reviews if a case was still in litigation or on appeal."[160] Despite earlier promises of transparency, the task force never made its conclusions public.

More than a decade later, in 2012, *ProPublica* and *The Washington Post* published exposés on the results of the task force investigation and subsequent Department actions. As the *Post* describes, "[T]he panel operated in secret and with close oversight by FBI and Justice Department brass . . . who took steps to control the information uncovered by the group."[161] When the Department uncovered any potentially exculpatory evidence in its review of the cases, it turned the information over to the individual federal and state prosecutors working on the case, but did not notify the defendants.[162] In federal cases, the Department informed prosecutors that it would "'monitor all decisions' . . . over whether to disclose information."[163] *The Washington Post*'s review of task force files suggests that "prosecutors disclosed the reviews' results . . . in fewer than half of the 250-plus questioned cases."[164] As IG Bromwich observed, it was "deeply troubling that after going to so much time and trouble to identify problematic conduct by FBI forensic analysts the DOJ Task Force apparently failed to follow through and ensure that defense counsel were notified in every single case."[165]

As cases of wrongful convictions brought these conflicts and errors to light, calls for more in-depth research studies followed. The National Academy of Sciences ("NAS") was going to examine various techniques, but canceled its project after the Departments of Defense and

[159] Id. at 27.

[160] Spencer S. Hsu et al., Reviewed Lab Work Held Close to Vest, Wash. Post, Apr. 18, 2012, at A1.

[161] Id.

[162] Id.

[163] Id.

[164] Spencer S. Hsu, Defendants Left Unaware of Flaws Found in Cases, Wash. Post, Apr. 17, 2012, at A1. Donald Gates, for example, who was finally exonerated as a result of DNA testing in 2009, was never notified by D.C. prosecutors of potential inconsistencies in the hair sample analysis that put him away. Id.

[165] Id.

Justice wanted to review its findings—oversight that the NAS believed compromised its integrity as a scientific institution.[166] Congress responded in 2005 by bypassing DOJ and appropriating funds directly to the NAS to establish a forensic sciences committee to analyze the state of forensic science and make recommendations for reform where appropriate.[167]

NAS appointed the committee in 2006, and in 2009 the NAS forensic science committee ("NAS Committee") issued its report.[168] The NAS Committee described the deficiencies of various forensic techniques, including fingerprint examinations, handwriting comparisons, and ballistics, and noted that testimony about their reliability is often exaggerated and that there are often no standard protocols in place for forensic practice.[169] The NAS report observed that, other than DNA analysis, "no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."[170] Based on the existing shortcomings of forensic science, the NAS report made a variety of recommendations. These included calling for scientific research to establish the validity of forensic techniques, for the development of nationwide standards for reporting and testing procedures, and for certification for forensic labs and technicians. To spearhead these reforms and control research and funding, the NAS Committee called for the creation of an independent federal agency—a National Institute of Forensic Science—and for funding for state and local governments to transfer their existing forensic responsibilities from the police to independent administrative units.[171]

The NAS Committee's endorsement of the independent agency model stemmed from its view that a forensic agency "must have a culture that is strongly rooted in science" and "cannot be principally beholden to law

[166] Giannelli, supra note 136, at 64, 80.

[167] Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2302 (2005).

[168] Nat'l Acad. of Scis., Strengthening Forensic Science in the United States: A Path Forward (2009) [hereinafter Strengthening Forensic Science].

[169] Id. at 4–7.

[170] Id. at 7.

[171] A majority of state and local laboratories are part of law enforcement agencies. Id. at 183; Paul C. Giannelli, Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias, 2010 Utah L. Rev. 247, 250 (quoting Joseph L. Peterson et al., The Capabilities, Uses, and Effects of the Nation's Criminalistics Laboratories, 30 J. Forensic Sci. 10, 11 (1985)).

enforcement."[172] The NAS Committee recognized the "modest" efforts of NIJ and the FBI crime lab to address existing problems, but noted the limits of these agencies: "[B]ecause both are part of a prosecutorial department of the government, they could be subject to subtle contextual biases that should not be allowed to undercut the power of forensic science."[173] The NAS Committee reached "a strong consensus . . . that no existing or new division or unit within DOJ would be an appropriate location for a new entity governing the forensic science community."[174] The NAS Committee remarked that "DOJ's principal mission is to enforce the law and defend the interests of the United States according to the law" and that DOJ agencies "operate pursuant to this mission."[175] Thus, the NAS Committee observed, "[t]he potential for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great."[176]

The NAS report, which was widely covered in the media, received mixed reactions.[177] A diverse group of research scientists, academics, and members of the bench and bar specifically praised the call for an independent forensic agency.[178]

[172] Strengthening Forensic Science, supra note 168, at 14–19.

[173] Id. at 16.

[174] Id. at 80.

[175] Id. at 17.

[176] Id.

[177] See, e.g., Rick Casey, Houston: They All Have a Problem, Hous. Chron., Feb. 8, 2009, at B1; Solomon Moore, Science Found Wanting in Nation's Crime Labs, N.Y. Times, Feb. 5, 2009, at A1 (expressing optimism that the report would result in meaningful reform); Carol Cratty & Jeanne Meserve, Crime Labs Need Major Overhaul, Study Finds, CNN (Feb. 18, 2009), http://articles.cnn.com/2009-02-18/justice/crime.lab.problems.

[178] See, e.g., Strengthening Forensic Science in the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 111 (2009) (statement of Drs. Lyn Haber and Ralph Norman Haber) (supporting an independent NIFS, noting that "[t]he 100 year history of the forensic disciplines continues to show the inadequacy of their self-regulation"); The Need to Strengthen Forensic Science in the United States: The National Academy of Sciences' Report on a Path Forward: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 56–57 (2009) [hereinafter Senate Judiciary March 2009] (statement of Peter Neufeld, Co-Director, Innocence Project) ("The Innocence Project whole-heartedly supports the primary recommendation of the . . . report to create a federal National Institute of Forensic Sciences."); How Scientific Is Forensic Science?, Champion, Aug. 2009, at 36, 37–38 (including statements of Professors Adina Schwartz and William C. Thompson and defense attorney Michael Burt in support of an independent NIFS, and a statement by Judge Jed S. Rakoff suggesting that an NIFS could be placed anywhere "as long as it is not located in the Department of Justice").

The reaction from law enforcement was decidedly more negative. Even before the NAS Committee's report was published, the Department resisted its findings.[179] Once released, DOJ continued to downplay the NAS Committee's conclusions that cast doubt on the scientific validity of forensic methods.[180] DOJ also resisted the suggestions for reform. Kenneth E. Melson, Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, testified on behalf of the Department before the House of Representatives and indicated that the FBI's scientific working groups and the National Institute of Justice were already conducting the necessary research called for in the report.[181] As for the NAS Committee's call for an independent agency due to possible conflicts, Melson viewed that recommendation as potentially wasteful and unnecessary.[182] An FBI-sponsored scientific working group similarly rejected the proposal for national oversight as unnecessary and inefficient.[183]

State and local law enforcement officials' reactions mirrored those of DOJ. The National District Attorneys Association released an online video arguing that the "report does not show that there are problems with forensic science," and rejecting the call for the National Institute of Forensic Science.[184] The International Association of Chiefs of Police

[179] Giannelli, supra note 136, at 53; see also Commerce, Justice, Science, and Related Agencies Appropriations for Fiscal Year 2009: Hearings Before a Subcomm. of the S. Comm. on Appropriations, 110th Cong. 101–02 (2008) (statement of Sen. Richard C. Shelby) (accusing the National Institute of Justice of attempting to "derail" the report and "undermine and influence" its authors); Moore, supra note 177, at A1 (citing earlier attempts by DOJ to derail the report and noting that "law enforcement opposition" had "delayed its publication").

[180] Simon A. Cole, Who Speaks for Science? A Response to the National Academy of Sciences Report on Forensic Science, 9 L. Probability & Risk 25, 36–38 (2010) (quoting exchange between Melissa Gische of the FBI Laboratory and William Thompson). An FBI-sponsored scientific working group released a position statement highly critical of both the methodology and findings of the NAS report. Scientific Working Grp. on Friction Ridge Analysis Study and Tech., SWGFAST Position Statement (Aug. 3, 2009), http://www.swgfast.org/Comments-Positions/SWGFAST_NAS_Position.pdf) [hereinafter SWGFAST Position Statement].

[181] National Research Council's Publication "Strengthening Forensic Science in the United States: A Path Forward": Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 5–7 (2009) [hereinafter House Judiciary May 2009] (statement of Kenneth E. Melson, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, Former Director, Executive Office for the United States Attorneys, U.S. Department of Justice).

[182] Id. at 65.

[183] SWGFAST Position Statement, supra note 180, at 5.

[184] NDAA Message to Prosecutors Regarding the National Academy of Sciences Forensic Science Report, WIN Interactive, http://www.wininteractive.com/NDAA/NAS.html (last

also opposed any efforts to remove crime laboratories from law enforcement control.[185]

The forensic science community largely sided with law enforcement. The American Society of Crime Laboratory Directors endorsed the report's call for more federal funding, but opposed the call to make crime labs independent of law enforcement agencies.[186] The International Association for Identification rejected the proposal to have an expanded federal role in accreditation and standardization.[187] Only the American Academy of Forensic Sciences ("AAFS") endorsed the report's recommendations in full, though the depth of the organization's enthusiasm for the creation of an independent national forensic agency is unclear.[188]

Given the opposition by law enforcement to the report, it is unsurprising that Congress has been slow to respond to its recommendations. The first congressional hearing on forensic science after the report's publication investigated the possibility of locating the federal government's reform initiatives in the offices of the National Institute of Standards and Technology—one of the agencies the NAS Committee expressly deemed poorly suited to handle forensics.[189] Congress ultimately held

visited June 16, 2012) ("The other recommendation which is problematic for us is the creation of [the] NIFS . . . to allow some nebulous as yet unformed group to take control over forensic sciences throughout the country. Now that doesn't give me a warm and fuzzy feeling, ok? I'm not really comfortable abrogating control of forensic crime laboratories to a government that can't get bottled water to the superdome for four days.").

[185] Meredith Mays, IACP Responds to National Academy of Sciences Report on Forensics, The Police Chief, July 2009, at 8.

[186] Senate Judiciary March 2009, supra note 178, at 25–26 (statement of Dean Gialamas, President, and Beth Greene, President-Elect, American Society of Crime Laboratory Directors).

[187] Id. at 42–43 (statement of Robert J. Garrett, President, International Association for Identification).

[188] Press Release, Am. Acad. of Forensic Scis., The American Academy of Forensic Sciences Approves Position Statement in Response to the National Academy of Sciences' "Forensic Needs" Report (Sept. 4, 2009), available at http://www.innocenceproject.org/docs/widgets/AAFS_Position_State-ment_for_Press_Dis-tribution_090409.pdf. The position statement offers only a general endorsement of the report's recommendations. The statement specifically singles out those recommendations dealing with certification and standardization, leaving some doubt as to the strength of the AAFS's support for an independent NIFS, as opposed to a new entity housed in one of the existing agencies.

[189] Strengthening Forensic Science in the United States: The Role of the National Institute of Standards and Technology: Hearing Before the Subcomm. on Tech. & Innovation of the H. Comm. on Sci. & Tech., 111th Cong. 5 (2009) (statement of Rep. David Wu, Chairman, Subcomm. on Tech. & Innovation of the H. Comm. on Sci. & Tech.).

three additional hearings in 2009, and law enforcement witnesses dominated the hearings. Not a single scientist was called to testify.[190]

Some members of Congress have introduced legislation in response to the NAS report, but none of the proposed bills follows the NAS blueprint of creating an independent agency outside of the Department. In 2010, members of the Senate Judiciary Committee began discussing a forensic science reform bill that would create a Forensic Science Commission in the office of the Deputy Attorney General.[191] In 2011, Senator Leahy introduced a similar bill, the Criminal Justice and Forensic Science Reform Act of 2011,[192] which would place a federal forensic science authority (the Office of Forensic Sciences) within the Department with a director appointed by the Attorney General.[193] The legislation empowers the Department to undertake responsibility for best practices, accreditation, national research strategy, the validation process, and the definition of forensic science disciplines.[194] The Director of the Office of Forensic Sciences would be required to give "substantial deference" to the accreditation and research priority recommendations of a newly created Forensic Science Board.[195] The Board, which would be comprised of nineteen members appointed by the President, would have at least ten members with "comprehensive scientific backgrounds" (five with experience in scientific research and five with experience in forensic science), and would also represent federal, state, and local law enforcement and criminal justice interests.[196] Senator Leahy argued that this proposal would strike a balance between the interests of law enforcement and

[190] House Judiciary May 2009, supra note 181, at 72 (written statement of Jay Siegel, Director, Forensic and Investigative Sciences Program, Chair, Department of Chemistry and Chemical Biology, Indiana University-Purdue University Indianapolis).

[191] Staff of S. Comm. on the Judiciary, 111th Cong., Preliminary Outline of Draft Forensic Reform Legislation (May 5, 2010), available at http://www.bulletpath.com/wp-content/uploads/2010/06/Draft-Legislation.pdf.

[192] S. 132, 112th Cong. (2011).

[193] Id. § 101(a)-(b).

[194] Id. § 101(e)(2).

[195] Id. § 101(e)(4)(i).

[196] Id. § 102(b)(1), (3)-(4). The Board would be required to have at least one member from each of the following groups: "(A) judges; (B) Federal Government officials; (C) State and local government officials; (D) prosecutors; (E) law enforcement officers; (F) criminal defense attorneys; (G) organizations that represent people who may have been wrongly convicted; (H) practitioners in forensic laboratories; (I) physicians with relevant expertise; (J) State laboratory directors." Id. § 102(b)(4)(A)–(J).

those seeking broader reform,[197] and he further emphasized the cost savings associated with keeping the agency within DOJ.[198] The Judiciary Committee has yet to take any action on the bill.

As critics have been quick to point out, although these proposals pay some attention to the importance of science and independence, they fail to address the conflict of interest that stems from having the forensic science agency within the Department. It "dangerously tie[s] the development and oversight of forensic science to federal law enforcement."[199] According to the American Statistical Association, "[b]ecause DOJ is so integrally tied to the forensic science culture and current problems, a forensic science office must be independent of the DOJ to realize the necessary changes in a timely manner."[200] Professor Paul Giannelli notes that "[t]he most thorough and well-reasoned reports in the field have come from impartial scientific investigations," whereas "[t]he government has not only failed to conduct the needed research, it has thwarted efforts to do so."[201] Thus far, however, there has been no further movement to create an independent forensic agency.

II. AGENCY DESIGN AND THE RISE OF PROSECUTORIAL ADMINISTRATION

As Part I documented, when functions other than prosecution and investigation were placed within the Department of Justice, little attention was paid to whether a conflict was likely to emerge. But conflicts have emerged in each of these areas, to varying degrees, and when they have,

[197] 112 Cong. Rec. S194-95 (daily ed. Jan. 25, 2011) (statement of Sen. Patrick Leahy) ("Some have argued that, because the purpose of forensic science is primarily to produce evidence to be used in the investigation and prosecution of criminal cases, it is vital that those regulating and evaluating forensics must have expertise in criminal justice. . . . Others have argued that, for forensic science to truly engender our trust and confidence, its validity must be established by independent scientific research, and standards must be determined by scientists with no possible conflict of interest. . . . This legislation attempts to address both of these concerns with a hybrid structure that ensures both criminal justice expertise and scientific independence.").

[198] Id. at S195 (noting that the proposed legislation "capitalizes on existing expertise and structures, rather than calling for the creation of a costly new agency. . . . I am committed to exploring ways to use existing resources so that this urgent work will not negatively impact the budget").

[199] Donovan & Ungvarsky, supra note 149, at 23.

[200] Id. at 24 (quoting Letter from Robert N. Rodriquez, President, Am. Statistical Ass'n, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (Mar. 31, 2012), available at http://www.amstat.org/policy/pdfs/LeahyS132letter.pdf).

[201] Giannelli, supra note 136, at 89-90.

prosecution interests have won out. In the case of clemency, the conflict is pronounced, with positive clemency recommendations from the Department plummeting and rule changes tightening up eligibility. We have also witnessed notable tension between forensic science and prosecution interests, with forensic labs tailoring results for law enforcement interests and the Department resisting changes to its use of forensics even in the face of serious evidence that existing protocols come up short. Conflicts with corrections are perhaps the hardest to document, but even there we have seen the BOP abandon its use of community correction centers because of the Department's political concerns. The relative silence of the BOP on questions of reentry is similarly notable given the BOP's charge to "provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens."[202]

It is reasonable to predict that more conflicts will arise in the future—and anticipate how they will likely turn out. This Part explains why—given everything we know about agency design—the Department's prosecution functions will trump the secondary interests of corrections, clemency, and forensic science.[203] It begins in Section II.A with a general discussion of how institutional design and the number of functions vested in an agency affects the achievement of its goals, and then applies those lessons to the Department in Section II.B.

A. The Relationship Between Agency Design and Agency Goals

Whenever Congress needs some function performed, it faces the choice of whether to give that function to a preexisting agency that is already responsible for at least one other mission or to create an agency dedicated solely to the task.[204] Resource constraints will typically point in favor of giving the function to an agency that is already up and running with a staff, or at least to setting up an agency that will do more than one thing. These kinds of efficiency concerns were explicitly men-

[202] Fed. Bureau of Prisons, Mission and Vision of the Bureau of Prisons, http://www.bop.gov/about/mission.jsp (last visited Feb. 7, 2013).

[203] By secondary, I mean non-dominant interests. It is possible for an agency to have a preexisting mission that becomes non-dominant as compared to a subsequently granted function. The temporal order does not matter, except insofar as path dependency might make it harder for the initial mission to yield.

[204] See James M. Landis, The Administrative Process 26–28 (1966); Rachel Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 50–51 (2010) [hereinafter Barkow, Insulating Agencies].

tioned when the Department obtained responsibility for federal prison administration and became a clearinghouse of criminal records.[205] Such concerns have also been raised by those seeking to keep forensic science within the Department.[206] No doubt, these issues will become part of the discussion of clemency reform as well.

But cost savings in this manner may come with a less obvious price. The new function assigned to the existing agency may take a backseat to the primary reason for establishing the agency in the first place.[207] Or, if an agency is set up from the outset with more than one goal, one may dominate because of the politics surrounding it.

We have seen this dynamic play out with regulatory agencies tasked both with maximizing economic development and protecting the environment. These missions often conflict, and when they do, economic development typically trumps environmental concerns.[208] For example, when the Forest Service was created, its primary goal was to promote timber production.[209] As the agency's mission expanded to include wildlife protection and recreation, it struggled to balance these aims with its initial charge of resource production and usually sided with economic interests.[210] Similarly, the Federal Energy Regulatory Commission ("FERC") operates under a primary mandate to promote hydropower, but several laws also insist that it work to preserve the environment.[211] Here, too, for most of its history, the agency resisted the secondary missions and focused on its primary task of promoting hydropower.[212]

A similar conflict between primary and secondary missions—and the triumph of the primary mission—can be seen in agencies charged both with ensuring the safety and soundness of financial institutions and protecting consumer interests. When these goals seem to conflict—as they

[205] See supra note 37 and accompanying text.

[206] See supra note 198 and accompanying text.

[207] See J.R. DeShazo & Jody Freeman, Public Agencies As Lobbyists, 105 Colum. L. Rev. 2217, 2220 (2005) ("Agencies frequently resolve such interstatutory conflicts by prioritizing their primary mission and letting their secondary obligations fall by the wayside.").

[208] See Eric Biber, Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies, 33 Harv. Envtl. L. Rev. 1, 3 (2009); Sara A. Clark, Taking A Hard Look at Agency Science: Can the Courts Ever Succeed?, 36 Ecology L.Q. 317, 324–25 (2009).

[209] Clark, supra note 208, at 324.

[210] Biber, supra note 208, at 17–20.

[211] DeShazo & Freeman, supra note 207, at 2219–20.

[212] Id. at 2303.

often do[213]—the banking regulators have time and again favored what the financial institutions claim is necessary for safety and soundness, even when it comes at the expense of consumer interests.[214]

Scholars have identified several reasons for the tilt toward one mission over another, with the main reason rooted in public choice theory. In their study of FERC's longtime reluctance to comply with environmental protection mandates, Professors Jody Freeman and J.R. DeShazo document several political and economic pressures that generally push agencies toward their primary mission:

> [C]ongressional committees that reward an agency's pursuit of its primary mission to the exclusion of its obligations under other statutes, executive oversight that fails to force agency compliance with multiple and potentially conflicting obligations arising in different statutes, interest group pressure that supports the agency's primary mission but not its secondary ones, and aspects of agency culture and organization that create obstacles to full compliance with all mandates.[215]

Put another way, an agency will focus on the mission that its political overseers take the greater interest in.[216] That mission, in turn, will be defined by the politics of the situation. In the case of the Forest Service, for instance, "resource extraction industries and the local economies they support tend to exert a disproportionate influence" because of their relative political pull.[217] Similarly, financial institutions have far more political muscle because of their greater wealth and organization than the dispersed community of consumers, leading political overseers and financial regulatory agencies to disproportionately favor their interests.[218]

A related factor that will lead an agency to favor one mission over another involves monitoring and measurement. Agencies will tend to

---

[213] As Professors John Coffee and Hillary Sale observe, "[i]t approaches the self-evident to note that conflict exists between the consumer protection role of a universal regulator and its role as a 'prudential' regulator intent on protecting the safety and soundness of the financial institution." John C. Coffee, Jr. & Hillary A. Sale, Redesigning the SEC: Does the Treasury Have a Better Idea?, 95 Va. L. Rev. 707, 724 (2009).

[214] Barkow, Insulating Agencies, supra note 204, at 72–73; Christopher L. Peterson, Federalism and Predatory Lending: Unmaking the Deregulatory Agenda, 78 Temp. L. Rev. 1, 73 (2005).

[215] DeShazo & Freeman, supra note 207, at 2221.

[216] Barkow, Insulating Agencies, supra note 204, at 21–22.

[217] Clark, supra note 208, at 325.

[218] Barkow, Insulating Agencies, supra note 204, at 22–23.

choose the goals that are more easily measured so they can demonstrate progress.[219] This often means taking an approach that focuses on short-term concerns with tangible outputs, as opposed to long-term effects that might be harder to predict and quantify and that offer little to politicians' reelection efforts. Again using the Forest Service as a case in point, it is easier to measure the economic effects of greater timber production than it is to calculate long-term environmental effects.[220]

To take an example from another context, the primary mission of the Department of Housing and Urban Development is to develop affordable housing; but it also has a secondary mission to ensure equal access to housing and combat racial segregation.[221] These goals compete for the agency's limited resources, and the agency has favored its main mission at the expense of the pro-integration goals.[222] Professor Chris Bonastia argues that one reason for this tilt in agency priorities is that short-term indicators of residential desegregation are not unequivocally viewed as progress (and could be viewed as "white flight" or a neighborhood in decline) and the longer term success of a desegregation program (in home appreciation or better life outcomes for children) is not immediately apparent or easy to quantify.[223] Thus, the goal of racial desegregation fares poorly as compared to the mandate for affordable housing, which is more easily measured and immediately visible.

Agency culture and structure are also important in understanding how one goal can override others. As Professor James Q. Wilson observed, "[c]ulture is to an organization what personality is to an individual. Like human culture generally, it is passed on from one generation to the next. It changes slowly, if at all."[224]

---

[219] See, e.g., Neil Barofsky, Bailout: An Inside Account of How Washington Abandoned Main Street While Rescuing Wall Street 53 (2012) (noting how Inspector General funding hinged on performance statistics and metrics like the number of audits completed, the percentage of recommendations adopted by agencies, and, where relevant, the number of arrests).

[220] Biber, supra note 208, at 25–27.

[221] Dep't of Hous. & Urban Dev., Mission, http://portal.hud.gov/hudportal/HUD?src=/about/mission (last visited Nov. 1, 2012).

[222] Thaddeus J. Hackworth, Note, The Ghetto Prison: Federal Policy Responses to Racial and Economic Segregation, 12 Geo. J. on Poverty L. & Pol'y 181, 195–96 (2005).

[223] See Chris Bonastia, Why Did Affirmative Action in Housing Fail During the Nixon Era? Exploring the "Institutional Homes" of Social Policies, 47 Soc. Probs. 523, 533 (2000).

[224] James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 91 (1989).

Culture is formed in part when the agency is first set up, so its initial mission is likely to shape what comes after.[225] While a later mission can come to dominate an earlier one, based on the politics of a given situation, the temporal order in which an agency gets its marching orders may matter because of the ways in which the agency builds itself around its initial functions. This may also be tied to the agency's leadership. One formative experience can lead to organizational "imprinting," where a founding member "imposes his or her will on the first generation of operators in a way that profoundly affects succeeding generations."[226]

Agency personnel decisions also shape its culture. The composition of an agency and the views it represents will be critically important to how it views competing interests and whether it can successfully achieve its mission.[227] The Forest Service, for instance, has had a history of hiring predominantly from a pool of forest school graduates who are eager to fit into existing agency culture, and it weeds out those who challenge the agency's existing goals and methods.[228] Additionally, Forest Service managers typically live in the communities that benefit economically from timber production. Thus, as one scholar observes, that makes it difficult for them "to make decisions that directly and adversely affect the economic well-being of one's neighbors."[229] FERC's culture was shaped by the engineers who comprised most of the initial staff, leading to an emphasis on dam safety instead of wildlife conservation.[230] At the financial regulatory agencies, employees often come from the financial services sector—and hope to return to it upon leaving government—making them prone to be sympathetic to the interests of the financial institutions they know so well, as opposed to the consumer interests which may be more foreign to them.[231]

[225] See Terrence E. Deal & Allan A. Kennedy, Corporate Cultures: The Rites and Rituals of Corporate Life 158 (2000) (noting how important history and heroic figures are to an organization's development).

[226] Wilson, supra note 224, at 96.

[227] Barkow, Administering Crime, supra note 4, at 800–04 (describing the importance of sentencing commission membership and its relationship to political impact).

[228] Biber, supra note 208, at 24–25 (citing Herbert Kauffman, The Forest Ranger: A Study in Administrative Behavior 166, 207 (1960)).

[229] Clark, supra note 208, at 325.

[230] See DeShazo & Freeman, supra note 207, at 2217, 2239–40.

[231] Barkow, Insulating Agencies, supra note 204, at 23; Barofsky, supra note 219.

The leadership and personnel decisions can thus help to foster a self-perpetuating culture that will be particularly powerful if it feeds into the political dynamics that support the agency's dominant mission.[232] The agency's leadership can further cement the dominance of the primary interest and guard against subdivisions pursuing conflicting goals—in the parlance of political scientists, can tighten up principle/agent slack—by requiring those subdivisions to seek approval before acting in a particular way or to report on their functions. Monitoring, in other words, can keep the agency personnel in line so that they pursue the dominant mission.

B. Agency Design at the Department of Justice

Applying these insights about public choice, monitoring, and culture to the Department, it is easy to see why the law enforcement mission will trump all others.

The dominance of law enforcement interests at the Department is a reflection of the dominance of law enforcement interests in the politics of criminal justice. For the last four decades, tough-on-crime politics by law enforcement officials has beat out just about any competing concern at the federal level.[233] Prosecutors have an interest in making the consequences of convictions relatively harsh because, all else being equal, it gives them greater bargaining leverage to obtain pleas. Thus, not only do they have an interest in longer sentences and mandatory punishments, they also have an interest in opposing corrections reforms that make the conditions of confinement more relaxed or that result in earlier release times. Anything that makes the threat of a sentence after trial less severe limits their bargaining power to some extent.[234]

Similarly, prosecutors have an interest in opposing routine grants of clemency because it reduces the time a defendant needs to serve and if

[232] If an agency's initial mission has less political support than a subsequent mission that the agency takes up, there would be an issue of how long it takes the agency's culture to shift gears to respond to the more politically powerful interests that support the subsequent mission. Ultimately, one would expect the agency will shift to that new goal in the case of a conflict, but the cultural forces may be sufficiently embedded that it takes some time. In the case of the functions under discussion here, the law enforcement interests both dominate in terms of politics and came first in terms of DOJ's history, so they point in the same direction.

[233] Barkow, Administering Crime, supra note 4, at 728 ("No other group comes close to prosecutorial lobbying efforts on crime issues.").

[234] Id. ("The more risky going to trial becomes, the easier it is for prosecutors to get a plea.").

clemency became routine enough, defendants might not take plea bargains as quite the all-or-nothing proposition they are today. Currently, however, given the low rates of clemency grants, it is unlikely that prosecutors hold a tight rein over clemency for this reason. Instead, the bigger conflict arises from the fact that every request for clemency is, in effect, a critique of the decision to prosecute (either at all or to seek a parparticular charge or sentence). Prosecutors have a stake in maintaining their reputations and therefore opposing any second look at their decision-making process.

Prosecutors are also motivated to maintain the status quo in forensic policy—a status quo, as the NAS describes, in which forensic methods are not subject to scientific standards or scrutinized for accuracy.[235] Prosecutors want to make it as easy as possible for them to win at trial, and that will-to-win can create cognitive biases in even the most well-intentioned prosecutors.[236] Prosecutors may therefore place greater faith in existing forensic science methods than empirical evidence would justify because they have used this information in cases where they believed the defendant to be guilty.[237]

In all these areas, prosecutors have cognitive biases—not as a result of bad faith, but out of what we know to be common human development—that may make it hard for them to see beyond short-term law enforcement interests in winning cases and give full measure to competing interests.[238]

---

[235] See House Judiciary May 2009, supra note 181 (examining the current problems with forensic science used in law enforcement).

[236] Keith A. Findley, Conviction of the Innocent: Lessons from Psychological Research 316–17 (Brian L. Cutler ed., 2012); Dan Simon, In Doubt: The Psychology of the Criminal Justice Process 22–25 (2012); Barkow, Institutional Design, supra note 6, at 883.

[237] For example, for more than a decade prosecutors and FBI analysts used invalid scientific testimony without any empirical support to make arguments that bullets "must have come from the same box"—arguments that at times played an important role in securing convictions. Comm. on Scientific Assessment of Bullet Lead Elemental Composition Comparison, Nat'l Research Council of the Nat'l Acads., Forensic Analysis: Weighing Bullet Lead Evidence 90–94 (2004).

[238] See, e.g., Simon, supra note 236, at 22–25 (explaining tunnel vision among law enforcement officers, including prosecutors); Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 Wm. & Mary L. Rev. 1587, 1611 (2006) (explaining that a prosecutor might be biased not only because she is "engaged in a 'competitive enterprise,' but because the theory has developed from that enterprise might trigger cognitive biases, such as confirmation bias and selective information processing"); Bruce A. Green & Ellen Yaroshefsky, Prosecutorial Discretion and Post-Conviction Evidence of Innocence, 6 Ohio St. J. Crim. L. 467, 488 (2009) (describing the risk of "tunnel

Given prosecutors' interests and perspectives, it is no wonder the Department of Justice is a regular player in criminal law issues before Congress.[239] And for the most part, other powerful interests (victim groups, rural communities interested in prison jobs, private prison companies) and the public at large are on the same side as prosecutors, not lining up against them.[240]

Those who do oppose prosecutors tend to have little sway in the political arena. The direct targets of tougher crime policies—criminal defendants—are about as weak as a political interest can get. With the exception of white-collar defendants facing certain regulatory and corporate crimes, generally most criminal defendants are dispersed, disorganized, poor, and in many instances, barred from voting.[241] They are thus poorly situated to push for reforms in corrections, clemency, or forensic science.

Other groups that may share an interest in criminal defendants' rights are similarly powerless, particularly as compared to law enforcement. While judges may have an interest in these areas,[242] they too are poorly

vision" with prosecutors that may make them prone to view evidence "through the lens of . . . preexisting expectations and conclusions"); Ellen Yaroshefsky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 Fordham L. Rev. 917, 945–47 (1999) (explaining how cognitive bias develops in prosecutors).

[239] Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 587–88 (2002).

[240] Barkow, Administering Crime, supra note 4, at 729 (observing that "[o]ther groups with influence tend to join forces with prosecutors," including rural communities, private prison companies, corrections officers, and victims' groups).

[241] Id. at 725–26 (explaining the relative political weakness of criminal defendants); Christopher Uggen et. al, State-Level Estimates of Felon Disenfranchisement in the United States, 2010, at 1 (July 2012), available at http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

[242] See e.g., Judicial Conf. of U.S., Report of the Proceedings 13 (Sept. 15, 2009) (endorsing the commission of a study to assess the efficacy and cost-effectiveness of reentry programs). When she was on the bench, then-Judge Nancy Gertner was a major advocate for reform, especially in the forensic science area. In *United States v. Green*, faced with a challenge to firearms evidence, Judge Gertner remarked, "[t]he more courts admit this type of toolmark evidence without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more." 405 F. Supp. 2d 104, 109 (D. Mass. 2005). Judge Gertner has urged that the validity of forensic science evidence "ought not to be presumed" and that defense attorneys should vigorously challenge fingerprints, bullet identification, handwriting, and other trace evidence. Nancy Gertner, Commentaries on the Need for a Research Culture in the Forensic Sciences, 58 UCLA L. Rev. 789, 792 (2011); see also Jonathan Saltzman, US Judge Urges Skepticism on Forensic Evidence: Gertner Says She'll Expect Defense Lawyers to Challenge Its Validity, Bos. Globe, Mar. 29, 2010, at B1.

positioned to push for change. For starters, they are not unified in their views on these topics, so they do not advocate for change as a group. And even if they agreed on an issue, they do not control or influence large numbers of votes or possess financial pull.[243] Plus, there are limits on how much they can lobby.[244]

Corrections officials and workers may want to push for greater authority or changes in policies—though, as with judges, their interests may not be unified.[245] But as long as they are under the auspices of the Department of Justice, it is unlikely that they will be authorized to lobby for any shifts in practice.

Scholars and scientists may advocate for forensic reform,[246] but they lack much political muscle. They are not able to deliver voting blocs or financial benefits to representatives. And the public at large increasingly seems skeptical about expert views on criminal justice policies, preferring instead to follow a tough-on-crime policy.[247]

Given this stark imbalance of power, the Department's primary mission of law enforcement is the one that wins out at the political level. The secondary interests in corrections, clemency, or forensic science reform typically do not stand much of a chance. Politicians want to keep the powerful interests and the public happy, and that means giving the Department what it wants.[248]

---

[243] Barkow, Administering Crime, supra note 4, at 724.

[244] See Leslie B. Dubeck, Note, Understanding "Judicial Lockjaw": The Debate Over Extrajudicial Activity, 82 N.Y.U. L. Rev. 569 (2007) (examining the historical limits on extrajudicial conduct).

[245] In fact, these organizations may be more likely to side with law enforcement. See Franklin E. Zimring, Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California, 28 Pac. L.J. 243, 246 (1996) (noting that a coalition lobbying to put a three strikes law on the ballot in California included the California Correctional Peace Officers Association and the prison guard union); Developments in the Law, A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons, 115 Harv. L Rev. 1868, 1872–73 (2002) (noting that both the private prison industry and prison guard unions often lobby for tough-on-crime candidates and tougher sentencing).

[246] See supra notes 235–237.

[247] Barkow, Administering Crime, supra note 4, at 730, 734–35 (noting that, among the public, "there seems to be a settled perception that keeping criminals behind bars for as long as possible is a good thing" and little "need for expert advice" on the topic).

[248] See Stuntz, supra note 4, at 510 (explaining that "American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes" and that "[l]egislators are better off when prosecutors are better off").

In this political environment, measurable results that are monitored are convictions, long sentences, and tough policies.[249] Reforms that will not yield immediate results but that may, over a period of years, lower crime rates or save money will likely lose out to more immediate actions. So, investing in corrections or clemency reforms that help with reentry by placing offenders in halfway houses or clearing their records may not be politically viable because their benefits come over that offender's lifetime if he stays out of trouble and successfully reintegrates. And these are benefits that are unlikely to grab the attention of the media or the public.

The media is interested in the cases that go bad, making reforms that give particular offenders a break particularly fraught with political danger, because if even one offender who receives such a benefit goes on to commit a heinous crime, it will undoubtedly call the entire reform effort into question—a result we have seen time and time again.[250] The paradigmatic example is the Willie Horton ad campaign.[251] Horton's violence overshadowed the fact that the program overall had a 99.5% success rate.[252] One of the victims of Horton's crimes reflected what seemed to be the prevailing public view when he stated that "when you're dealing with people that are this dangerous and this violent, anything short of 100 percent is not successful."[253] The lesson for politicians was clear: one pardon gone awry can ruin a campaign.

The politics of forensic science reform is less one-sided because the public is sympathetic to innocent individuals who are wrongfully convicted. Each case in which an innocent person is convicted grabs media headlines, and prosecutors are in a tougher position to resist reforms that are designed to improve the accuracy of the system. The public, however, is unlikely to pay sufficient attention to the details of the reforms. Thus, if law enforcement opposes particular changes that would improve forensic science, the public may not notice or fully understand the larger debate over scientific reliability. The public's diffuse and marginal in-

[249] Barkow, Administering Crime, supra note 4, at 731–32.

[250] Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent'g Rep. 153, 155 (2009) [hereinafter Barkow, The Politics of Forgiveness] (explaining that "[i]t takes just one offender who benefited from a pardon or commutation to reoffend to call into question an executive's judgment").

[251] See supra note 88.

[252] Joseph E. Kennedy, Monstrous Offenders and the Search for Solidarity Through Modern Punishment, 51 Hastings L.J. 829, 892 (2000).

[253] Id. at 893–94 (quoting Cliff Barnes).

terest in the issue will be no match for the intensity of the Department's preferences about how to handle forensic science—particularly when the Department can make a plausible claim that its preferred approach is the right one for law enforcement objectives.

This political environment helps foster a culture at the Department that also favors the law enforcement mission. This is the central mission of the Department, and it has been from its founding. The Department's leadership reflects this. The Attorney General and Deputy Attorney General typically have prosecution experience,[254] so the tone is set from the top that the Department is devoted to prosecutors. Thus, even to the extent that there are lawyers and other personnel who belong to a culture other than law enforcement, they are likely to find themselves in a losing battle against the dominant culture of prosecution.[255]

To be sure, sometimes a subculture can develop.[256] One reason that the Bureau of Prisons had a long history of relative independence from prosecutorial influence was that its leadership created a corrections culture within the Bureau.[257] The first director, Sanford Bates, made it a condition of his appointment that he be given the discretion to institute a prison system built around rehabilitation rather than punishment.[258] The Bureau's second director, James Bennett, served from 1937 to 1964, spanning five presidential administrations and ten Attorneys General. This longevity allowed him to build up enormous institutional capital that permitted him to foster the subculture of reform in corrections and resist any pressures that may have arisen.

But even independent leaders can find themselves at the mercy of the formal hierarchy and the dominant culture within the agency as a whole. Bates, for example, disagreed with the need for creating a new maxi-

[254] See supra notes 95–97.

[255] Wilson, supra note 224, at 101 (explaining that organizations with two or more cultures will see a struggle for supremacy and resist tasks that are incompatible with the dominant culture).

[256] Wilson cautions against assuming that agencies have a uniform culture. "One mistake is to assume that an organization will have *a* culture; many, perhaps most, will have several cultures that often are in conflict." Id. at 92.

[257] Boin, supra note 48, at 108–09.

[258] Keve, supra note 24, at 95–96. True to his agenda, the Bureau of Prisons under his watch engaged in a broad reformist agenda. The BOP modernized not only the federal prisons, but also state and local jails where the bulk of federal prisoners were housed well into the 1940s. Among its reforms, the Prison Bureau introduced a comprehensive classification scheme, abolished the use of billy clubs, and brought all correctional officers under the civil service. Id. at 160–64.

mum-security prison at Alcatraz to house the infamous gangsters, kidnappers, and racketeers arrested by the FBI. Attorney General Homer Cummings proposed the idea in 1933 as part of a coordinated campaign to raise the profile of federal policing. Despite his doubts about the wisdom of the proposal, Bates ultimately relented.[259] And it is hard to believe that the Bureau wanted its community correction center policy second-guessed and ultimately overruled.

Thus, even with a fairly strong subculture, there have been limits to the BOP's independence, and over time, there are ways in which the dominant mission will erode those subcultures to the extent there is a conflict. The BOP has kept quiet as its prisoner population has soared, and it has failed to address pressing corrections issues from such a large population, including greater needs for reentry resources. Some of the BOP's state counterparts, who operate independently of prosecutors' offices, are meeting these issues head-on. Thus one must worry that the rehabilitative culture within the Bureau is fading, and it has become part of the team that furthers the Department's larger mission of prioritizing law enforcement interests without giving sufficient weight to its mission of preparing offenders for reentering the community.

Given the political pressures that emphasize law enforcement and being tough on crime, one can expect that the culture of the Department will continue to be dominated by those interests.

Monitoring has also been critical to the focus on law enforcement at the expense of other interests. The Department is able to maintain the law enforcement culture by keeping tabs on its subdivisions. For instance, as noted, the Pardon Attorney must report to the Deputy Attorney General ("DAG"), so the DAG is well positioned to check what he or she sees as excessive pardon grant recommendations. The DAG also oversees the Bureau of Prisons. The BOP must seek the DAG's approval for compassionate release decisions. Any testimony by DOJ bureaus or divisions must be cleared by the Office of Legislative Affairs.[260] As Paul Giannelli has documented, the Department has also kept a close watch on NIJ studies of forensic science. With this intense monitoring in place, it is harder for the subdivisions to pursue an agenda without DOJ noticing, particularly when preclearance is required in many cases. These

[259] Id. at 174–75.

[260] E-mail from Margaret Colgate Love to author (July 25, 2012) (on file with author).

subdivisions cannot even mobilize support because they cannot get a project off the ground without DOJ's blessing.

Thus, a combination of culture and formal structures within the Department provide the mechanisms by which the dominant mission gets enforced and any conflicting missions are stifled.

III. INSTITUTIONAL REFORM

Thus far, the aim of this article has been to make the case that the current institutional arrangement is flawed if the goal is to have an agency consider questions of corrections, clemency, and forensics without a prosecutorial bias. This Part turns to the question of what institutional reforms make the most sense in each of these contexts. Section III.A considers where the incentives for institutional reform lie. Section III.B provides an overview of the kinds of institutional reforms that are available given where the incentives stand.

A. The Motivation for Change

The same political economy that pushes law enforcement concerns to the top of DOJ's agenda creates an obstacle to any institutional change. Indeed, the current institutional design of law enforcement dominance—though initially a product of historical accident and later path dependency—may be precisely the model most politicians would select today if operating on a blank slate. Where, then, could the motivation arise for making a change? This Section considers separately the politics in each of the three areas under discussion.

1. Corrections

A main reason for prosecutorial administration is the increasingly dysfunctional political landscape in which federal criminal justice policy is addressed. When federal criminal law was itself largely outside of the political fray and used sparingly, it did not matter much that DOJ also exercised responsibility for related criminal justice matters, including corrections. This explains why the BOP's early history is one of relative independence. Federal corrections could become in many ways a model regime because it was operating outside the political sphere. Even today,

the conditions of confinement within federal facilities are laudable as compared to conditions in state facilities.[261]

But when the politics of crime started to shift, so too did the ability of the BOP to resist external pressure. Thus, the BOP is now the subject of criticism for its silence on the question of overcrowding, for how it has addressed new populations (including women and immigrants), and for its inability to resist attacks on its use of community confinement centers.[262] To be sure, these could be seen as relatively minor criticisms, especially as compared to the stark conflicts and pressures seen in clemency and forensics. But these are likely harbingers of things to come. The BOP is poorly positioned to be an independent voice on corrections because its officials must speak through DOJ, which deemphasizes corrections concerns, including rehabilitation and reentry, in favor of prosecutors' interests, which are to maintain longer sentences on the books and sufficiently harsh conditions of confinement so that prosecutors maintain the bargaining leverage that allows them to obtain pleas so easily. Prosecutors do not have the same long-term interest in reintegrating offenders into society after they have served their sentences, keeping incarceration costs down to free up funds for other law enforcement expenditures such as policing, or lowering recidivism risks by offering programming in prisons or alternatives to incarceration. Prosecutors care more about how punishment can help them win cases and be used to lock up people they view as dangerous. They are institutionally poorly situated to think about what happens after someone is sentenced and what inmates need to reenter society when that sentence is up.

Where are the incentives for modifying this state of affairs? Prosecutors are unlikely to seek changes because the current regime gives them the power they feel they need to win their cases and a menu of sanctions that allows them to mete out harsher punishment when they deem it appropriate. Congress, too, is unlikely to be a key agent of change. To be sure, many state legislatures have been reforming their sentencing and corrections policies (such as releasing prisoners early or scaling down the sentences for nonviolent crimes) in the wake of the economic downturn because of tightened state budgets.[263] But Congress typically pays

[261] Jayne O'Donnell, State Time or Federal Prison?, USA Today, Mar. 18, 2004, at 3B, available at http://www.usatoday.com/money/companies/2004-03-18-statetime_x.htm.

[262] See supra text accompanying notes 52–75.

[263] See Mary D. Fan, Beyond Budget-Cut Criminal Justice: The Future of Penal Law, 90 N.C. L. Rev. 581, 583 (2012); see also Randal C. Archibold, Driven to a Fiscal Brink, A

little attention to corrections expenditures because they are such a small part of the federal budget, and because the benefits of tough-on-crime politics have thus far been viewed as greater than any efforts toward fiscal restraint in crime spending.[264] Some conservatives have started to call attention to the fiscal issue of incarceration, with Right on Crime assembling a list of notable Republicans who seek corrections reform.[265] But as of yet, this has not produced a legislative response. Congress, as has become apparent, is increasingly unable to pass legislation opposed by a significant bloc, and certainly any corrections reform would be met with strong resistance, particularly by individual legislators worried about being viewed as soft on crime.

The courts might spur action by ruling certain corrections practices unconstitutional. For example, California corrections is undergoing a massive overhaul in the wake of decisions finding its overcrowded prison conditions to be cruel and unusual punishment in violation of the

State Throws Open the Doors to Its Prisons, N.Y. Times, Mar. 24, 2010, at A14 ("The California budget crisis has forced the state to address a problem that expert panels and judges have wrangled over for decades: how to reduce prison overcrowding."); Monica Davey, Safety Is Issue as Budget Cuts Free Prisoners, N.Y. Times, Mar. 5, 2010, at A1 (documenting state early release programs and sentence reforms in response to budgetary pressures); Cindy Horswell, Texas Cuts Costs Amid Prison Reform, Hous. Chron., Dec. 15, 2009, at B1, available at http://www.chron.com/news/houston-texas/article/Treatment-efforts-credited-as-prison-population-1750304.php (documenting the decrease in state prison population as a result of the "reinvestment movement" which "invests state funds in drug, alcohol and mental health programs to treat offenders rather than just prisons to house them"); Polly Ross Hughes, Study's Ideas Counter Prison Sprawl, Hous. Chron., Jan. 31, 2007, at B1, available at http://www.chron.com/news/houston-texas/article/New-prison-policies-could-save-millions-1837907.php (discussing the Texas "Justice Reinvestment" report which suggests organizational changes to cut prison spending); Marty Roney, 36 States Offer Release to Ill or Dying Inmates, USA Today, Aug. 14, 2008, at 4A (examining the wave of states implementing early release for ill or dying prisoners in order to cut costs); Bob McEwen, Budget Crisis Could Curtail Oregon's Prison Boom, The Oregonian, (May 25, 2009, 9:20 PM), http://www.oregonlive.com/news/index.ssf/2009/05/budget_crisis_could_curtail_or.html (explaining that in response to major budget shortfalls, some Oregon legislators are "pushing for a new approach to criminal justice—one that allows for a range of sanctions for lawbreakers so fewer people end up in prison").

[264] Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276, 1299–1312 (2005) (explaining why cost considerations have a lesser influence at the federal level than in the states).

[265] Right On Crime, http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/ (last visited Aug. 20, 2012) (listing national signatories that include Jeb Bush, former Governor of Florida, Newt Gingrich, former Speaker of the U.S. House of Representatives and Republican presidential candidate, and Edwin Meese, III, former U.S. Attorney General under Ronald Reagan).

Eighth Amendment.[266] But the odds are long that a decision along these lines will be forthcoming for the federal system, much less an institutional response to such a decision that would involve institutional change in corrections, as opposed to merely a narrow response to whatever defect the court might identify.

A more likely source for prompting change would be an Executive with a strong vision for reforming corrections. There are, admittedly, few signs of this happening in the current political climate. But as mass incarceration stays with us, its glaring racial disparities continue, and the economic and social consequences it leaves in its wake continue to mount, it is possible that a President will eventually seek a new model, particularly as he or she focuses on questions of class and poverty. The criminal justice system is currently designed to keep people in poverty, not to help them get out of it. But to pursue a new model that focuses on reform, the President would likely have to override what will be a push by his or her Attorney General and other law enforcement officials to maintain the status quo.

This would be a difficult task. But although the uphill climb is steep, it is not impossible to envision a President who is sufficiently concerned with America's status as an outlier in the world for its use of incarceration. And the fact that the federal system is now the most punitive of all within the United States may well prompt a sufficiently interested leader to act. It is a costly system, and it is far from clear that it yields benefits to justify those costs. Thus, a President interested in cost-benefit analysis more generally might decide to analyze corrections more rigorously. And a more rigorous analysis should be an objective inquiry that includes the benefits to prosecutors but does not stop the analysis there. The costs to communities and to longer-term strategies for combatting crime and poverty might yield different conclusions about some types of

[266] See Brown v. Plata, 131 S. Ct. 1910, 1932–34, 1937 (2011) (citing, among other factors, unsafe and unsanitary prisoner living conditions and lack of proper medical care resulting from overcrowding in holding that such a prison environment constitutes cruel and unusual punishment and therefore runs afoul of the Eighth Amendment). In the wake of the *Plata* ruling, California has begun complying with the court-mandated state prisoner reduction by realigning its prison population from overcrowded state facilities to local jails. See, e.g., Douglas A. Berman, A Year After Plata Ruling, a "Picture of Success" Fixing California's Overcrowded Prisons, Sent'g L. and Pol'y (May 29, 2012, 9:49 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/05/a-year-after-plata-ruling-a-picture-of-success-fixing-californias-overcrowded-prisons.html ("The prison population is declining . . . [as] a new state law shifted the responsibility for some lower-level offenders to the county jails, which are filling up.").

crimes and offenders than the prosecution-driven model we currently have.

2. Clemency

The politics of clemency bear a strong resemblance to the politics of corrections, but there are differences. Congress's incentives in both contexts are largely the same. Congress has paid little attention to the use of the pardon power except in instances where it has seemed that the President has been too generous with his clemency grants.[267] To the extent that there has been any political push to shape the exercise of the clemency power, it has been in the direction of curbing clemency grants still further. For instance, in the wake of President Ford's decision to pardon Richard Nixon, Walter Mondale proposed a "constitutional amendment to empower two-thirds majorities in both houses of Congress to disapprove of presidential pardons."[268] Republicans in Congress introduced similar measures in the wake of President Clinton's outgoing pardon of Mark Rich and other close associates and friends.[269] To be sure, some critics aired their concerns about the atrophy of presidential clemency at the congressional hearings, but Congress paid little attention.[270] Instead, congressmen present at the hearings seemed more interested in finding ways to give prosecutors more power over pardons. Asa Hutchinson, for example, queried whether it was important to codify a requirement that prosecutors be notified of a pending pardon application.[271] Bob Goodlatte similarly wondered whether Congress could, under its Necessary

[267] See, e.g., Use and Misuse of Presidential Clemency Power for Executive Branch Officials: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 1–2 (2007); 2001 Hearings, supra note 97, at 1–6; Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary, 93rd Cong. 1–2 (1974).

[268] John Dinan, The Pardon Power and the American State Constitutional Tradition, 35 Polity 389, 390 (2003).

[269] Pardon Attorney Reform and Integrity Act, H.R. 3626, 106th Cong. (2000); Pardon Attorney Reform and Integrity Act, S. 2042, 106th Cong. (2000). For a description of Clinton's pardons, see Alschuler, supra note 95, at 1137–52.

[270] 2001 Hearings, supra note 97, at 20 (statement of Daniel T. Kobil, Professor of Law, Capital University Law School) ("[T]he real danger posed by the controversy over the Clinton pardons is that it will cause clemency, with its attendant benefits to the public welfare, to disappear entirely."); id. at 25 (statement of Margaret Colgate Love) ("[I]t is the Justice Department's reluctance to recommend cases favorably for clemency that was, at least in part, responsible for the extraordinary breakdown of the pardon process at the end of the Clinton administration.").

[271] Id. at 8 (statement of Rep. Asa Hutchinson).

and Proper Clause authority, require the President to consult with prosecutors before issuing a pardon.[272]

Congress's treatment of the pardon authority shows that, if change is going to come, it is more likely to emerge from a presidential administration committed to maximizing the influence of professional judgment, untainted by bias and competing interests. Here, the prospect for reform might be slightly more promising than it is for corrections, though admittedly still somewhat bleak.

For a time early in President Obama's first administration, it appeared that he might provide an example of how leadership in this field could take hold. When President Obama took office, incoming White House Counsel Greg Craig proposed that an "independent commission of former judges, prosecutors, defense attorneys and representatives of faith-based groups" take responsibility for making pardon recommendations to the President.[273] Craig enjoyed the backing of Deputy Attorney General David Ogden—a noteworthy base of support given that Ogden's office would be the one that would lose power if such reforms were adopted. But Craig and Ogden resigned before their proposal could be put in place. Instead, the White House proposed to review the criteria for granting clemency under the existing regime.[274]

Despite the lack of reform so far, there are reasons to believe a future President (or even President Obama in his second term) might yet be open to change. The pardon power has become a source of embarrassment for recent Presidents, and it is largely the result of institutional dysfunction. The controversy over the pardon of Mark Rich resulted in part because of President Clinton's "dissatisfaction with the general approach to clemency cases being taken by his own Justice Department" that led him, ultimately, to "[rely] instead on his own White House staff and any other sources of advice he found useful."[275] President George W. Bush also experienced difficulties with the Justice Department because of its stinginess with favorable pardon recommendations:

---

[272] Id. at 9–10 (statement of Rep. Bob Goodlatte).

[273] Dafna Linzer & Jennifer LaFleur, A Racial Gap for Criminals Seeking Mercy, Wash. Post, Dec. 4, 2011, at A1, available at http://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElnVQO_story.html.

[274] Joe Palazzolo, Despite Efforts, Pardon System Still Unchanged, Main Justice (Apr. 20, 2010, 6:55 PM), http://www.mainjustice.com/2010/04/20/despite-efforts-pardons-system-still-unchanged/.

[275] 2001 Hearings, supra note 97, at 25 (statement of Margaret Colgate Love).

> In 2006, White House Counsel Harriet Miers became so frustrated with the paucity of recommended candidates that she met with [Pardon Attorney] Adams and his boss, Deputy Attorney General Paul McNulty.
>
> Adams said he told Miers that if she wanted more recommendations, he would need more staff. Adams said he did not get any extra help. Nothing changed.
>
> "It became very frustrating, because we repeatedly asked the office for more favorable recommendations for the president to consider," said Fielding, who was Bush's last White House counsel. "But all we got were more recommendations for denials."[276]

The disagreement between the White House and the Justice Department grew still more heated as Bush neared the end of his presidency and the Pardon Office continued to recommend against clemency in almost all cases. Bush was thus forced, like Clinton, to work outside the system, which resulted in his own ill-considered pardon of a New York real estate developer, a pardon which drew extensive negative publicity and that Bush ultimately was forced to revoke.[277]

And those are not the only controversies. Recently, *ProPublica* and the *Washington Post* have published a series of alarming articles about flaws with the clemency power. One article examined racial disparities in clemency grants, noting that "[w]hite criminals seeking presidential pardons over the past decade have been nearly four times as likely to succeed as minorities."[278] Another article documented that "[a]pplicants with a member of Congress in their corner were three times as likely to win a pardon as those without such backing."[279]

---

[276] Linzer & LaFleur, supra note 273, at A21.

[277] Id.

[278] Dafna Linzer & Jennifer LaFleur, Presidential Pardons Heavily Favor Whites, ProPublica (Dec. 3, 2011, 11:00 PM), http://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites; see also Dafna Linzer, Inmate Still in Prison After Facts Kept from Bush Team, Wash. Post, May 14, 2012, at A1, available at http://www.washingtonpost.com/investigations/clarence-aaron-was-denied-commutation-but-bush-team-wasnt-told-all-the-facts/2012/05/13/gIQAEZLRNU_story.html (examining the "extraordinary, secretive powers wielded by the Office of the Pardon Attorney" and the records showing "that Ronald Rodgers, the current pardon attorney, left out critical information in recommending that the White House deny Aaron's application").

[279] Dafna Linzer, Pardon Applicants Benefit From Friends in High Places, ProPublica (Dec. 4, 2011, 11:00 PM), http://www.propublica.org/article/pardon-applicants-benefit-from-friends-in-high-places.

Still more recent coverage has highlighted the Justice Department's role in concealing the institutional support from both the prosecuting attorney and trial judge for the pardon of Clarence Aaron, currently serving three life terms for a first-time drug offense.[280] This latest revelation has spurred yet another round of condemnation in the press, prompted Representative John Conyers to call for an investigation,[281] and led a group of academics to call for congressional hearings on how DOJ uses its pardon authority.[282] In the wake of media stories on Aaron's case, once again the Obama administration is signaling receptivity to reform, noting that it is preparing for a "comprehensive, independent study" of "how petitions for pardon are adjudicated and whether any discernible bias exists."[283]

Whether meaningful change to the pardon process comes as a result remains to be seen,[284] but these kinds of controversies illustrate what might ultimately lead a President to seek broader institutional changes to the current structure.

[280] Dafna Linzer, Pardon Attorney Torpedoes Plea for Presidential Mercy, ProPublica (May 13, 2012, 7:00 PM), http://www.propublica.org/article/pardon-attorney-torpedoes-plea-for-presidential-mercy.

[281] See, e.g., Azmat Khan, Why Was Clarence Aaron's Pardon Request Denied?, Frontline (May 14, 2012, 3:28 PM), http://www.pbs.org/wgbh/pages/frontline/criminal-justice/why-was-clarence-aarons-pardon-request-denied/; Debra J. Saunders, When Will Obama Reform Presidential Pardons?, S.F. Chron., May 27, 2012, at E3, available at http://www.sfgate.com/opinion/saunders/article/Obama-must-reform-presidential-pardons-3588734.php; Scott Horton, Blocking Pardons at Justice, Harper's (May 16, 2012, 9:20 AM), http://harpers.org/archive/2012/05/hbc-90008619/.

[282] See, e.g., Letter from Rachel E. Barkow, Professor, N.Y. Univ. Sch. of Law, et al., to Hon. Patrick Leahy, Chairman, Comm. on the Judiciary, and Hon. Charles Grassley, Ranking Member, Comm. on the Judiciary (June 26, 2012), available at http://sentencing.typepad.com/files/062612-law-professor-letter-opa.pdf.

[283] Linzer, supra note 106.

[284] A parallel history of the clemency power as it evolved in the states—virtually all of which vest the pardon power in the governor in consultation with an independent board—offers a minor caveat to what would otherwise appear to be a grim forecast for the future of presidential clemency. As political scientist John Dinan notes, state constitutional amendments placing limits on unilateral executive pardon authority and entrusting the responsibility at least in part to independent boards were generally introduced in response to perceived abuses of an overly politicized pardon process. In short, the very systems intended to restrict a governor's ability to issue pardons freely have, as a largely unintended consequence, resulted in arrangements that actually permit governors to use the process more freely. See Dinan, supra note 268, at 396 ("In the view of the vast majority of state convention delegates from the mid-nineteenth to the late-twentieth century, executive responsibility for the pardon power was plagued by frequent and flagrant abuses.").

As Presidents near the end of their terms in office and focus on their legacies more than reelection, they typically want to exercise their clemency power to show that they have the ability and leadership to forgive and believe in redemption. No President wants to be known historically as unforgiving and too fearful to give anyone a second chance. Thus, Presidents typically want to grant pardons and commutations when they reach the end of their time in office, and they need a functioning system so they can do so intelligently.

It is also possible that a President will simply have a personal conviction that clemency is a core executive duty to be exercised. It is, admittedly, hard not to be a cynic and dismiss this possibility out of hand, but some governors provide an example of just this kind of leadership. When Mike Huckabee was Governor of Arkansas, he granted clemency to more than 1000 people, and many of those grants took place in his first term.[285] Former Virginia Governor Tim Kaine also granted a large number of pardons and commutations.[286] Huckabee's and Kaine's attitudes toward clemency were driven in part by religious and moral convictions.[287] Robert Ehrlich, the former Governor of Maryland, was also active with his pardon power, and in his case, it was a deep belief in the constitutional duty of the executive to take that power seriously.[288]

The odds are long that a President will hold similar views, given that a strong position on clemency might mean sacrificing other critical national goals. But the chances of a President holding this view increase as the number of individuals with federal convictions swells, the enormous racial and economic disparities in this population remain, and a huge share of this group represents casualties of a drug policy that has been widely criticized, including by the White House's Drug Control Policy Director.[289]

---

[285] Barkow, The Politics of Forgiveness, supra note 250, at 153.

[286] Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction (2008 ed.), available at http://www.sentencingproject.org/tmp/File/Virginia08.pdf (forthcoming in Margaret Colgate Love, Collateral Consequences of Criminal Convictions: Law, Policy and Practice (2012–13 ed.)).

[287] Barkow, The Politics of Forgiveness, supra note 250, at 153 n.11.

[288] Matthew Mosk, Ehrlich Prolific in Granting Clemency, Wash. Post, Aug. 25. 2006, at A1.

[289] Congress OKs Fair Sentencing Act, UPI (July 28, 2010), available at http://www.upi.com/Top_News/US/2010/07/28/Congress-OKs-Fair-Sentencing-Act/UPI-22641280367802/ (quoting White House Drug Control Policy Director).

3. Forensics

Forensics provides probably the most likely place for institutional change. A political push is currently on by scientists, academics, defense lawyers, and judges,[290] all of whom are pointing to the NAS report and its recommendation for an independent commission. The effort is currently stalled, but a few more wrongful convictions and post mortems showing lab failings might tilt the balance.

Indeed, this is an area where Congress might end up leading the charge. Congress was concerned enough to fund the NAS report. And because forensics is about identifying the right people, it is easy to tell a political story in defense of these reforms that does not subject someone to a soft-on-crime attack. The political strength of the innocence movement is a testament to what can be done under this banner.[291]

It is also possible that a President with a great enough interest in scientific objectivity might override Department pleas to keep forensics within its grasp. Some states have shifted to a more independent forensic agency oversight model, which proves that this is politically feasible.[292] For example, the Houston City Council voted this year to make its forensic lab independent of police control after revelations of abuse and misconduct.[293] And in 2011, North Carolina passed the Forensic Science

[290] See, e.g., Jennifer Friedman, A Path Forward: Where Are We Now?, Champion, Jan.–Feb. 2012, at 16, 17 ("Since the issuance of the NAS Report, defense attorneys in state and federal trials and postconviction cases have challenged forensic science evidence and, in particular, pattern impression evidence, raising many of the deficiencies described in the report."); Radley Balko & Roger Koppl, C.S.Oy, Slate (Aug. 12, 2008, 12:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/08/csoy.html (noting that Mississippi terminated its twenty-year relationship with medical examiner Dr. Steven Hayne after pressure from criminal justice groups like the Innocence Project); Innocence Project, New Pressure on Mississippi Medical Examiner, Innocence Blog (May 7, 2008, 3:12 PM), http://www.innocenceproject.org/Content/New_pressure_on_Mississippi_medical_examiner.php.

[291] Susan A. Bandes, Framing Wrongful Convictions, 2008 Utah L. Rev. 5, 5 (2008) ("Concern over wrongful convictions has led to an 'innocence movement' that has managed to bridge ideological divides, rouse people to action, and achieve unprecedented success in reforming the operation of the death penalty."); Daniel S. Medwed, Innocentrism, 2008 U. Ill. L. Rev. 1549, 1549 (2008) (describing "the increasing centrality of issues related to actual innocence in courtrooms, classrooms, and newsrooms").

[292] Fifteen states now have forensic science oversight boards or committees. Robert J. Norris et al., "Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions, 74 Alb. L. Rev. 1301, 1327 tbl.2 (2010–2011).

[293] Chris Moran, Council Gives OK to Crime Lab Plan, Hous. Chron., June 7, 2012, at B1, available at http://www.chron.com/news/houston-texas/article/Council-hands-crime-lab-to-independent-board-3615078.php.

Act, which creates a forensic science advisory board designed to eliminate human error in forensic evaluation, require certification of forensic science professionals, and implement other best practices.[294] The fact there has been political will in the states suggests that it could exist at the federal level as well.

4. The Long View

There is no denying that the current politics of criminal law make big changes unlikely. Prosecutorial administration reflects prosecutorial and law enforcement power. Those same powers will fight any efforts that they see as undermining their ability to win cases or that challenge their views of what is in the best interests of law enforcement needs and priorities. Indeed, we have already seen this resistance when efforts have been made to shift authority from DOJ.

But a President concerned with law enforcement should look closely at the current setup, because it leaves much to be desired. It is a system focused on the short-term interests of prosecutors—winning cases here and now, judged from their perspective and vantage point—and the short-term electoral interests of politicians worried about creating soundbites instead of real policy reforms that look to longer-term interests.

In fact, the current system of mass incarceration may not be in the long-term interests of the country, including the long-term interests of law enforcement. It is extremely costly, both in actual dollars spent and social costs to communities. And it may produce more criminals than it deters.[295] Corrections reform might therefore produce less crime and at a lower cost—as the states are finding out.[296] Clemency reform may also

[294] 2011 N.C. Sess. Laws 25–27; see also State Legislative Initiatives, Nat'l Ass'n of Criminal Def. Lawyers, http://www.nacdl.org/criminaldefense.aspx?id=22113 (last visited July 26, 2012) (describing the legislation).

[295] Raymond V. Liedka et al., The Crime-Control Effect of Incarceration: Does Scale Matter?, 5 Criminology & Pub. Pol'y 245, 260–62, 272 (2006) (finding that, at a certain point, an increase in incarceration increases crime); Joanna Shepherd, The Imprisonment Puzzle: Understanding How Prison Growth Affects Crime, 5 Criminology and Pub. Pol'y 285, 286–87, 290 (2006) (explaining that increases in prison population will have a varying effect on crime, depending on the type of offenders coming into the system, with increases in nonviolent and drug offenders having no effect or even a negative effect on crime rates).

[296] Michael Jacobson, Downsizing Prisons: How To Reduce Crime and End Mass Incarceration 126 (2005); Ryan S. King et al., The Sentencing Project, Incarceration and Crime: A Complex Relationship 4 (2005) (surveying states trends to find that, "[s]ince 1998, 12 states experienced stable or declining incarceration rates, yet the 12% average decrease in crime rates in these states was the same" as those states with increasing incarceration rates).

improve public safety, allowing individuals to reintegrate into society instead of facing obstacles because of their criminal records. It may serve as a needed corrective to mandatory sentences that should have never been meted out in the first place. Forensic science reforms could similarly make the system better by ensuring we convict the right people.

Currently, though, we have no way of knowing if we are reaching the right results in these areas because the decision-makers are not objective. Forensic science reforms may make sense in the long term, but if they cause upheaval in cases in the short term, prosecutors may resist when an objective assessment would argue in favor of taking the long view. Prosecutors are similarly poorly positioned to play a decision-making role in clemency when those decisions second-guess prosecution decisions. And corrections determinations should likewise stretch beyond what prosecutors think they need for bargaining or for deterrence.

It may turn out that prosecutors make the right policy decisions in many of these areas. But it is asking a lot of prosecutors to expect them to step outside of themselves to reach decisions that may undercut their own interests. Even when they act in good faith—as most likely do—cognitive biases may blind them to the strength of opposing arguments.[297]

Sound institutional design should take these conflicts and biases into account to allow for better decision making. Indeed, this is the motivation behind our entire system of government and the separation of powers.[298] Unfortunately, these lessons were forgotten when DOJ began accumulating additional powers. But for a leader who wants to improve decision making, it is never too late to shift course.

B. The Nature of Institutional Reform

If one wants to improve upon the current institutional design, the next question is how. It is beyond the scope of this Article to catalog and evaluate every institutional possibility and its likelihood for success because there are so many unique dynamics that require detailed and sepa-

[297] See supra note 238.

[298] See Jeremy Waldron, Separation of Powers or Division of Power? 2 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-20, 2012), available at http://ssrn.com/abstract=2045638.

rate evaluation.[299] This Section will instead provide a more general overview of some of the main design options and the issues they raise, beginning with reforms that could take place if these functions stay within the Department and then considering options for moving these functions elsewhere.

1. Changes Within the Existing Department of Justice Structure

One possible avenue—and the one that would require the least amount of political capital to be spent—is to make changes while keeping corrections, clemency, and forensics within DOJ. Margaret Love has at times urged changes of this nature. She has proposed, for instance, placing the Attorney General once again in charge of the pardon authority, instead of having the Pardon Attorney report to the DAG.[300] She has similarly called for changes in BOP leadership, as opposed to the wholesale removal of the BOP from DOJ. As she puts it, "[i]f the right candidate can be found, perhaps it will not be necessary to consider a more complete separation of prisons and prosecutors."[301] And there are some components within DOJ (such as the Office of the Solicitor General and the Office of Legal Counsel) that are, in fact, more independent, showing that it is possible to create independence even when an agency exists within the larger Department.

The key is determining what mechanisms would make corrections, clemency, and forensics more independent, given that they do not have the same tradition of independence as the Solicitor General's Office or OLC. Those offices are protected, in the words of Adrian Vermeule, "by unwritten conventions that constrain political actors from attempting to bully or influence them."[302] But we have already seen that corrections,

[299] For example, a thoughtful designer would want to pay particular attention to how to staff an agency to maximize its effectiveness, but that inquiry is complicated because it will vary based on the issue at stake and the politics at play. See, e.g., Barkow, Administering Crime, supra note 4, at 800–04 (describing ideal staffing for sentencing commissions); Barkow, Insulating Agencies, supra note 204, at 45–50 (listing appointment qualifications and post-employment restrictions as potential mechanisms for guarding against capture). And there are numerous other design characteristics as well. Id. at 26–64 (describing a host of design features for agencies).

[300] See Love, Of Pardons, supra note 77, at 1509–10.

[301] Love, Time, supra note 56.

[302] Adrian Vermeule, Conventions of Agency Independence 2 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 12-32, 2012), available at http://ssrn.com/abstract=2103338; see also Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (And Executive Agencies) 46 (N.Y. Univ. Sch. of Law Pub. Law &

clemency, and forensics lack those same protections. While the early history of the BOP seems to be characterized by similar conventions, times have changed, and all of these functions now seem patrolled by DOJ without much concern about their independence.

So what can be done? Love is correct to call attention to leadership. Leaders matter. A leader willing to call out what he or she sees as too much political pressure by DOJ could raise the political stakes of DOJ's decisions by drawing media attention to the issue. Thus, choosing independent-minded and visionary leaders who are willing in some cases to stand up for their division's independent judgment could make a difference.

But even the strongest leader will struggle against the kind of institutional pressure that comes from pursuing an agenda that conflicts (or is perceived to conflict) with an organization's primary mission. Not every decision can be a battle, and resisting comes at a great political cost to those leaders. Their future employment and political connections hang in the balance. Moreover, getting that kind of leader appointed in the first place will be difficult, in light of the Department's interest in maintaining control over its current fields of operation.

The emphasis should therefore focus on structural changes and not simply personnel decisions. The harder it is for prosecutors to exercise authority within the Department, the easier it is for a subculture to develop that focuses on other interests. Love's proposal to shift pardon oversight to the AG, however, is of a type that seems less likely to matter. The AG will ultimately want to make his or her law enforcement personnel happy, because that is the mission of the Department that gets the most attention. Congress will be more supportive of the Department if it focuses on that primary goal, and the President shares the same agenda. It seems unlikely, then, that AG supervision will in practice be any different than DAG supervision.

Other internal DOJ reforms might be more promising, particularly if they could give the agencies responsible for corrections, clemency, and forensics greater operational independence and make their decisions less transparent to DOJ leadership. The key, here, however is that complete operational independence makes the placement of these agencies within

Legal Theory Research Paper Series, Working Paper No. 12-44, 2012), available at http://ssrn.com/abstract=2125194 (discussing agencies with "practical independence" that are not "structurally independent").

DOJ meaningless. Obviously the reason they are there—and that DOJ fights to keep them there—is so they can be under some degree of control. So the question is what aspects of their operation could be more independent without undermining the reasons that DOJ wants them there in the first place.

If these agencies could shield more of their decisions from direct oversight, they would have greater independence, because DOJ would not be aware of everything they were doing. But presumably one of the main reasons DOJ wants these functions in-house is to be able to keep tabs on what is going on and to ask for reports on what these units are doing. Indeed, it is hard to make sense of a division being within a larger agency if it does not mean reporting obligations. And that monitoring means that DOJ is well positioned to block any efforts it does not like.

Other forms of operational independence might be less threatening to what it means for a unit to be a part of DOJ. One possibility is to create funding independence. That is, perhaps these agencies could be funded directly, without having to get budget allocations from DOJ. This could mean less funding overall, because these units would lose DOJ's powerful political muscle for appropriations.[303] And control over funding might be another one of those features that DOJ deems essential to what it means for a division or office to be within the Department.[304] But if funding independence were possible, it would certainly give these divisions greater leverage to resist Department pressures.[305]

Another source of independence would be to give these units litigation authority. This would be more valuable for the BOP than the others, because it is involved in a fair amount of ligation. But this also seems to go to the heart of what it means to have a division within DOJ. The general rule is that DOJ retains litigation authority over all executive agen-

[303] The Department of Justice is one of the largest federal agencies, and saw its budget increase to $28.2 billion in 2012, a two percent increase over 2010. White House Office of Mgmt. and Budget, http://www.whitehouse.gov/omb/factsheet_department_justice (last visited Aug. 20, 2012).

[304] Although each Division of the Department of Justice submits its own Congressional Budget Justification report, the Department submits a single budget and is in control of that budget. See U.S. Dep't of Justice Overview, http://www.justice.gov/jmd/2012 summary/pdf/fy12-bud-summary-request-performance.pdf (last visited Nov. 11, 2012); The Budget for Fiscal Year 2013, Dep't of Justice, http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/jus.pdf (last visited Nov. 11, 2012).

[305] Barkow, Insulating Agencies, supra note 204, at 42–45 (discussing the importance of funding as a hallmark of independence).

cies, even those outside of DOJ,[306] so presumably it would fight particularly hard to keep its own divisions under its control.

Perhaps one of the least threatening and most effective options would be to allow these divisions to communicate directly with Congress and the media without seeking DOJ clearance. Having this line of communication would mean these divisions would be better able to get political support for their missions.[307] For example, DOJ may perceive a conflict with law enforcement goals where it does not exist or it is at least arguable which side is correct. The disagreement may be over short-term and long-term results, as discussed above. Consider an example involving forensic science reforms. DOJ may worry that forensic reforms may cast doubt on past convictions or make it harder to obtain them in the future. Thus, DOJ would want to retain control over how this information is used. A forensic agency within the Department can only make its case to the AG and his or her delegates, and if it loses there, that is the end of the matter. But if that forensic agency could communicate directly with the public and Congress, it would be better positioned to develop support for its view that, in the long run, better science means more accurate results, which will increase the legitimacy of the system in the eyes of judges and the public—thus helping to obtain convictions. Right now, this discussion is internal to DOJ. An agency with greater freedom to make these claims without DOJ as a filter could potentially get the kind of political support that is necessary to force DOJ to make changes, because it would have a chance to air these views and see how the public responds. The Department's response to the *ProPublica* and *Washington Post* reporting on its prior failure to respond to forensic errors is enlightening in that regard. All the negative publicity prompted DOJ to take a second look at how it was handling those cases.

[306] Datla & Revesz, supra note 302, at 30, 31 tbl.5 (noting that "most agencies do not possess partial or full litigation authority" but instead have to go through DOJ).

[307] Barkow, Administering Crime, supra note 4, at 804–12 (describing the importance of data generation to the success of sentencing commissions); Barkow, Insulating Agencies, supra note 204, at 59–60 ("One of the most powerful weapons policy makers can give agencies is the ability to generate and disseminate information that is politically powerful."); Barofsky, supra note 219, at 65 ("The only way to make things happen in Washington . . . was to ensure that Congress and the public were aware of the problems you saw, so that they could pressure the agency to resolve them. One of the best ways to do that . . . was through the press.").

2. Moving These Functions to an Existing Agency Other than the Department of Justice

A second possible institutional fix would be to move these functions out of DOJ entirely and place them within a different executive agency or department. For example, some have called for the pardon authority to be switched to the White House Counsel's Office.[308] Or, even more radically, corrections could be placed within the judicial branch insofar as it is so closely tied to sentencing.[309]

An institutional shift such as this would add a layer of protection from prosecutorial pressure by allowing a bypass of Department oversight. In this arrangement, the AG would not have direct authority over decision making, either in the form of control over budget requests, the screening of congressional testimony, or direct supervision and approval of individual applications for pardons or compassionate release requests. It would also be less controversial to give an agency outside of DOJ independent litigation authority.

Release from direct DOJ oversight would be no small matter. The main advantage would be to make it much costlier for DOJ to monitor these fields.[310] Less monitoring therefore means that more decisions could escape DOJ notice altogether, except the ones that generate publicity. As a result, more policies would be able to go through without a law enforcement objection.

A major limit to this institutional model is that the agency would still be competing with some other agency mission. If pardons are placed within the White House Counsel's Office, for example, they will vie for resources against the Counsel's Office's many other functions. The Office handles everything from judicial appointments to the proper use of military force, tackling such tough issues as the closing of the Guan-

[308] See, e.g., Alschuler, supra note 95, at 1167–68 ("The Pardon Attorney should be someone whose name the President knows. He should in fact be a presidential appointee, someone the President trusts to help formulate and then implement a consistent clemency policy. . . . His office should be part of the Executive Office of the President, and he should report to the White House Counsel."); see also Evan P. Schultz, Does the Fox Control Pardons in the Henhouse?, 13 Fed. Sent'g Rep. 178 (2000–2001) ("The real solution is removal of the process from Justice. Let the president appoint people inside the White House to help him.").

[309] Thanks to Steve Schulhofer for this provocative and interesting suggestion.

[310] Cf. Kagan, supra note 8, at 2273 ("[N]o President can hope (even with the assistance of close aids) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy.").

tanamo Bay detention facilities and the use of drone strikes.[311] It is hard to imagine pardons winning the battle against those tasks.

Another shortcoming to this approach is that there may not be another institutional home that makes sense for these functions. The reason these tasks were put in DOJ in the first instance is that they were related to law enforcement. Other possible venues may be a poor fit. And the poorer the fit, the weaker the rationale for putting the agency there, because there are few if any efficiency gains to be had.

3. Creating Single-Mission Agencies

The most ambitious model would be to create a separate, single-mission agency for each of the tasks[312]—one for corrections, one for clemency, and one for forensics.[313]

---

[311] The White House, Presidential Department Descriptions, Office of White House Counsel, http://www.whitehouse.gov/about/internships/departments (last visited Aug. 6, 2012); see also Jo Becker & Scott Shane, Secret 'Kill List' Proves a Test of Obama's Principles and Will, N.Y. Times, May 29, 2012, at A1 (indicating the role of the White House Counsel's Office in advising the President on matters of counterterrorism kill orders and rendition policies); Anne E. Kornblut & Dafna Linzer, White House Regroups on Guantanamo, Wash. Post, Sept. 25, 2009, at A1 (discussing the role of the White House Counsel's Office as serving in the initial leadership role in the effort to close Guantanamo); Charlie Savage, Obama Lagging on Filling Seats in the Judiciary, N.Y. Times, Aug. 18, 2012, at A1; Charlie Savage & Mark Landler, White House Defends Continuing U.S. Role in Libya Operation, N.Y. Times, June 16, 2011, at A16 (reporting the conclusion by the White House Counsel's Office that the continued White House-directed military actions in Libya were lawful).

[312] This Article focuses on single- versus multi-mission agency design instead of the traditional marker of independence for federal agencies—preventing the President from removing officials who run these agencies except for good cause—because that fact is unlikely to matter much here. The relevant question for purposes of this Article is whether for-cause removal protection would affect whether the President can direct an agency to take a particular action. But as recent articles have made clear, removal authority is likely to matter less than the President's appointment power and conventions on how the agency operates. See Barkow, Insulating Agencies, supra note 204, at 42–64 (discussing importance of various factors besides removal in insulating agencies from capture); Adrian Vermeule, supra note 302, at 30–34 (discussing the relationship between conventions that protect agency independence and the President's power to direct the exercise of delegated statutory discretion to the agency).

[313] This is a model that is seen in many states. In corrections, for instance, this is the dominant approach, with corrections departments reporting directly to the governor in forty states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, and Wyoming. In nine states, the corrections department reports to a larger executive agency that often includes the parole

The main advantage to this approach is that it creates only one goal for the agency, thus allowing it to lobby for that goal and to generate data that supports the agency's mission.[314] Presumably, the agency would be funded to pursue this goal and could more readily communicate its agenda and arguments to the public or to Congress.[315]

A single-mission agency could mean less funding, given DOJ's strength in getting appropriations, which is a function of its responsibility for law enforcement. But the ability to communicate more directly without DOJ preclearance would allow the agency more freedom to pursue what it believes is the wisest path in the area in which it governs. An independent agency that is studying forensic science, for instance, could use science and peer-reviewed information to make the strongest case for its reforms. It would have the power of information and it would not have to go through a Department filter. Similarly, a pardon office that is not directly within the Department could consider cases without an eye toward what the DAG, who is responsible for the prosecutors within that very same agency, will think. Instead, a more independent pardon board, with enough varying interests represented and expertise on risk factors and criminal justice policy, might produce some political cover for the President who takes its recommendations. That is far harder when the recommendations come from the Department. Although an independent

and police departments. (The corrections department is part of an agency that includes the police in Hawaii, Kentucky, Louisiana, Massachusetts, Virginia, and West Virginia. Maryland, Texas, and Vermont do not place the police in the same agency.) Only Nevada has a model that somewhat resembles the federal one, with the corrections department reporting to a board that includes the attorney general (along with the governor and secretary of state). Nev. Const. art. 5, § 21. Many states also use independent boards for clemency. Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (Executive Summary) 5–6, 8 (2005), available at http://www.sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf [hereinafter Love, Relief] (forthcoming in Margaret Love, Collateral Consequences of Criminal Convictions: Law, Policy and Practice (2012–13)). It is rarer to have independent forensic agencies, as the overwhelming majority of states currently house forensics within their police departments or other law enforcement agencies. Strengthening Forensic Science, supra note 168, at 183. But there are some states that are starting to shift to a more independent model. See infra text accompanying notes 313–322.

[314] Datla & Revesz, supra note 302, at 10 ("Newly created agencies could escape the inertia and capture of existing cabinet departments and could focus on a narrow subject area without giving consideration to competing programmatic interests.").

[315] Currently, all agencies must submit any "proposed legislative program" or "proposed legislation or report or testimony" to the Office of Management and Budget for clearance. But this more general review is less likely to block proposals than the specific oversight of the Department, with its greater focus on prosecution interests.

Bureau of Prisons may look much like the Bureau does now, it too would have greater freedom to speak without DOJ clearance, thus allowing it to disseminate its data and information should it seek broader corrections initiatives. Thus, whatever the benefits of a particular corrections, clemency, or forensic reform, they would get a full airing.

An additional virtue of this institutional change is that the structure of a single-mission agency can be tailored to what would best serve this single interest as opposed to worrying about competing interests. A detailed analysis of what those tailor-made provisions should look like is beyond the scope of this Article, but a few examples can demonstrate how this approach could be advantageous.

Clemency provides one illustration. Many states use boards to make clemency decisions, and among the states in which pardons are regularly given to ordinary citizens, using some kind of independent board seems to be critical. A 2005 study of pardons in the states found nine states where pardoning is done with some regularity, and among those nine, four place the pardon power in an independent board, four require the governor and a board to agree, and one gives the pardon decision to a board of officials that includes the governor among its members.[316] "Thus, in each of these states, an agency possesses significant, if not exclusive, power to make the pardoning decision, thereby taking some or all of the political heat off the governor."[317]

To be sure, this design is hardly a magic bullet for improving clemency. In many states that use independent clemency boards, pardons remain rare.[318] Thus, while this model can be an improvement, it is far from a panacea. But it does seem to be the kind of change in institutional design that holds promise for making a difference, particularly if the agency is set up to be sensitive to the politics of clemency decisions.[319] In the context of clemency, a key design feature is one that gives the executive some distance from the decision-making process so that decisions can be made without fear that one bad case will undercut the entire process.

Forensics offers another illustration. A number of states have also started to experiment with more independent forensic agencies, in many cases after flaws were revealed with the model that had these agencies

[316] Love, Relief, supra note 313, at 8.
[317] Barkow, The Politics of Forgiveness, supra note 250, at 154.
[318] Id. at 155 ("[M]any of the states with low grants of clemency have such a board.").
[319] For a close analysis of those politics, see id. at 153–59.

too closely tied to law enforcement.[320] Arkansas, for instance, has a crime laboratory that operates as a separate agency in the executive branch. It has been independent from the state police force since 1981, and since 1997 it has been housed in a physical facility outside the police department to give it greater independence.[321]

Other states have opted for hybrid models, with labs still closely tied to law enforcement, but with research arms that are more independent. For example, New York's state forensic laboratories are part of the Division of State Police. But New York also has a separate Office of Forensic Services ("OFS"), which operates independently of the state police.[322] Maryland, too, operates under this kind of dual setup. While the state labs are tied to the police, the Secretary of the Department of Health and Mental Hygiene has, since 2007, possessed regulatory oversight of the forensic labs, including licensing and inspection authority.[323] A separate Forensic Laboratory Advisory Committee[324] advises the Secretary on proficiency and certification standards.

These state clemency and forensic agencies thus illustrate that single-mission bodies can be designed to reflect the interests at stake. This can be fostered by having a variety of interests form a part of the decision-making process so that all the stakeholders are involved in devising the right solution.[325] Single-mission bodies can also be physically separated, so they are less likely to face social pressures from individuals with competing interests. Moreover, "an agency with a well-defined mission

[320] Norris et al., supra note 292, at 1325–29.

[321] Arkansas State Laboratory: About Us, Arkansas.gov, http://www.crimelab.arkansas.gov/aboutUs/Pages/default.aspx (last visited July 10, 2012).

[322] OFS works out of the Division of Criminal Justice Services, an independent state agency that collects and analyzes crime and fingerprint data, administers research and training programs, and operates the sex offender registry. Within OFS is an independent Commission on Forensic Science, a fourteen-member board including the Commissioner of Criminal Justice Services, the Commissioner of the Department of Health, and twelve additional members appointed by the governor representing a range of interests within the criminal justice system. N.Y. Exec. Law § 995-a.1–2. (McKinney 1996). The Commission on Forensic Science determines the accreditation standards and best practices for the state's laboratories.

[323] Md. Code Ann., Health-Gen. §§ 17-2A-02(a)(1), 17-2A-04, 17-2A-09 (LexisNexis 2009).

[324] Id. § 17-2A-12(a).

[325] For an analogous evaluation of how composition requirements have affected the success of sentencing commissions, see Barkow, Administering Crime, supra note 4, at 800–04.

will tend to attract bureaucrats whose goals are sympathetic to that mission."[326]

There are limits to this approach, of course. The chief one is that the single-mission agency will still be under the supervision of the President. Presidents do not win elections by focusing on corrections, clemency, or forensic science reform. But they do gain political points for being tough on wrongdoing. And, perhaps equally important, Presidents can lose elections if it looks like they were soft on crime in a manner that allowed an atrocity to take place. No President wants to be the target of a Willie Horton-type ad because he or she gave a pardon to someone who goes on to commit a brutal crime or if a killer's freedom can be traced to a corrections reform relating to where offenders are placed.

If the Department is telling the White House that the reforms proposed by another agency are a bad idea—and one would fully expect that to be the case, given that the Department currently opposes such reforms—then it is hard to imagine the White House being disinterested. The Department's goals are likely to trump the other interests for the same reasons those law enforcement goals win out within the Department.

The biggest difference with this kind of set-up is that the Department is less likely to resist on the same number of issues. As a threshold matter, the Department will not know about the same number of issues because monitoring will be more difficult and costly. Even when the Department does find out about reforms it does not like, the President's time and energy is limited, and the Department is not going to want to go to the President's inner circle every time it disagrees with another agency. As a result, some initiatives that would normally be stopped within the Department may evade its veto.

Moreover, the fact that prosecutors remain a critical part of the process in some number of the decisions in these categories is not a bad thing. Prosecutors *should* have input into the decision-making process. They have important information to add about law enforcement objectives and corrections, and how a corrections environment may or may not affect deterrence. Similarly, prosecutors who work on a particular case are key sources of information when a defendant seeks clemency, and they should always be consulted for their view of the facts and the

[326] David B. Spence, Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control, 14 Yale J. on Reg. 407, 424 (1997).

law.[327] And no forensic science program should ignore how forensics data is actually used by police and prosecutors.

The key is to make prosecutors valuable inputs into the ultimate decision—not to make them the final decision maker. The specifics of the institutional design requires careful study of each area, but the overarching point should be to consider ways to minimize the conflict of interest with a powerful prosecutorial mission and the cognitive biases associated with it, while still tapping into the expertise that prosecutors may bring to these issues.

CONCLUSION

Proponents of a unitary executive model and the consolidation of power in one place often overlook the fact that placing multiple responsibilities with one actor comes at a cost. In particular, not all responsibilities will be treated equally, and when functions conflict with each other, some will dominate because of the politics at play. This has been the case with the Department of Justice's hegemony over varied criminal justice areas. They have not all been treated equally. The law enforcement objectives of prosecutors have trumped other concerns. As a result, decisions about corrections, clemency, and forensics have not been objectively evaluated but have instead been colored by prosecutorial objectives.

The aim of this Article has been to document this regime of prosecutorial administration and explain why prosecution interests have dominated and will continue to dominate unless attention is paid to the institutional design of where authority for these responsibilities should rest. In the search for alternatives, the key is to place the valuable law enforcement perspective of prosecutors in its proper role—as one perspective. Other perspectives are also important. Empirical studies about corrections and risk matter. When clemency is sought, specific information about the facts of a case and the individuals involved matter, as does their behavior since their convictions. The science of forensics matters. But these other sources of information risk being ignored or downplayed

[327] U.S. Dep't of Justice, U.S. Attorneys' Manual § 1-2.111 (1997), available at http://www.usdoj.gov/pardon/petitions.htm ("The United States Attorney can contribute significantly to the clemency process by providing factual information and perspectives about the offense of conviction that may not be reflected in the presentence or background investigation reports or other sources.").

if everything is viewed through prosecutors' unique perspective on law enforcement. The risk of prosecutorial administration is that even the most well-meaning law enforcement officials—and this Article assumes that the officials in the Department are well-meaning and operate in good faith—can suffer from cognitive biases. Ultimately, we need sound criminal justice administration and that will come from many sources, not just those charged with prosecuting cases.