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# Prosecutorial Discretion and the Rule of Law: Is it Time for a Little Formalism? (Or, Mr. Prosecutor: How Formalists Learned to Stop Worrying and Love Discretion)

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PROSECUTORIAL DISCRETION AND THE RULE OF LAW: IS IT TIME FOR A  
LITTLE FORMALISM?  
(OR, MR. PROSECUTOR: HOW FORMALISTS LEARNED TO STOP  
WORRYING AND LOVE DISCRETION)  
by  
Nathan Piwowski

Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
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TABLE OF CONTENTS

INTRODUCTION ..... 3

    A. The Speluncean Explorers, “Duke Lacrosse Case,” and the Dilemma of Prosecutorial Discretion..... 3

    B. Roadmap ..... 5

    C. Two Preliminary Notes ..... 7

        1. *We Should Take Formalism Seriously* ..... 7

        2. *This Essay is Written with the Deepest of Respect for Prosecutors’ Professionalism and Integrity* ..... 8

I. A THUMBNAIL OF LEGAL FORMALISM AND TEXTUALISM, ITS MOST PROMINENT MANIFESTATION ..... 9

    A. Formalism ..... 9

    B. The Textualist Methodology ..... 10

II. FORMALISTS EMBRACE THE LEGAL PROFESSION’S RELATIVE NON-REGULATION OF PROSECUTORIAL DISCRETION ..... 12

    A. Prosecutorial Discretion is Lightly-Regulated..... 12

        1. *Charging and Charge-Bargaining*..... 13

            a. Institutional Limitations on Charging ..... 13

            b. Reasons for Charging Decisions ..... 15

        2. *Plea Bargaining* ..... 17

        3. *Agreements to Cooperate* ..... 19

    B. Formalists Tend to Afford Executives Wide Discretion..... 21

III. WIDE PROSECUTORIAL DISCRETION VIOLATES THE VALUES UNDERLYING FORMALISM AND TEXTUALISM ..... 23

    A. Autonomy and Impersonality of the Law ..... 24

        1. *The Formalist Rationale for Autonomy and Impersonality of the Law* ..... 24

        2. *Broad Prosecutorial Discretion May Inject Personal Preferences into the Administration of the Law*..... 26

    B. Consistent, Principled Decision-making..... 30

        1. *Formalists Believe that Uniform and Equal Application is Essential to the Rule of Law*..... 30

        2. *Broad Prosecutorial Discretion Invites the Use of Inconsistent, Non-Statutory Considerations in the Administration of the Law* ..... 32

    C. Predictability and Reliability ..... 34

        1. *Formalists Believe Uniformity and Predictability are Essential to the Rule of Law*..... 34

        2. *Prosecutorial Discretion May Encourage Unpredictable Results between Different Jurisdictions and Individual Cases* ..... 38

    D. The Role of the Legislature: Political Responsiveness under Bicameralism and Presentment Requirements and the Non-delegation Doctrine ..... 40

        1. *The Formalist Conception of the Legislative Role* ..... 40

            a. Enforcing “the Deal”..... 40

            b. Holding the Legislature to “the Deal” ..... 42

        2. *Wide Prosecutorial Discretion Breaks the Legislative Deal and Encourages Statutory Vagueness*..... 45

|     |  |    |
|-----|--|----|
| E.  | The Role of the Legislature’s Agents .....   | 46 |
| 1.  | <i>Formalists’ Conception of the Legislative Role</i> .....  | 46 |
| 2.  | <i>Similarities in the Executive Role</i> .....  | 48 |
| F.  | Institutional Independence .....   | 50 |
| 1.  | <i>Clear Ex Ante Rules Help Courts Make Consistent, Albeit Unpopular Decisions in “Tough Cases”</i> .....          | 50 |
| 2.  | <i>Clear Ex Ante Rules May Help Prosecutors Make Consistent, Albeit Unpopular Decisions in “Tough Cases”</i> ..... | 51 |
| IV. | POLITICAL ACCOUNTABILITY IS AN INADEQUATE COUNTERBALANCE TO DANGERS .<br>.....                                     | 51 |
| V.  | POSSIBLE REMEDIES .....  | 53 |
| A.  | Curbed Discretionary Mechanisms.....   | 54 |
| B.  | Increased Judicial Review.....   | 55 |
| C.  | Extralegal Restraints .....  | 55 |
| D.  | Substantive Criminal Penalty Reform .....  | 56 |
|     | CONCLUSION.....  | 56 |

*[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself.*

—Federalist No. 51<sup>1</sup>

## INTRODUCTION\*

### A. The Speluncean Explorers, “Duke Lacrosse Case,” and the Dilemma of Prosecutorial Discretion

In Lon Fuller’s classic exposition on jurisprudence, *The Case of the Speluncean Explorers*,<sup>2</sup> a hypothetical court grapples with the conviction of a party of cavers who killed one of their number for food while trapped underground.<sup>3</sup> As perhaps an aside to

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<sup>1</sup> FEDERALIST NO. 51 (Hamilton or Madison).

\* I would like to thank Dean Kevin Saunders and Professor Barbara O’Brien for their comments on earlier drafts of this Essay, as well as Professor Glen Staszewski for discussing some of the most important underpinnings of this Essay with me. Special thanks to Professor Saunders for first exposing me to Lon Fuller’s *Case of the Speluncean Explorers*, which sparked this Essay. All errors are my own.

<sup>2</sup> Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARVARD L. REV. 616 (1949).

<sup>3</sup> The statute in Fuller’s scenario provided, “Whoever shall willfully take the life of another shall be punished by death.” *Id.* at 619.

the main debate,<sup>4</sup> two of the court’s formalist judges wished aloud that executives—the president or prosecuting attorney—would give them an “out.” Justice Tatting bemoaned that “the Prosecutor saw fit to ask for an indictment for murder. . . . [and i]f no other charge suited to the facts of this case could be brought against the defendants, it would have been wiser . . . not to have indicted them at all.”<sup>5</sup> The more committed formalist on the court, Judge Keen, punted to the executive, saying clemency “is a question for the Chief Executive, not for [the court.]”<sup>6</sup> The court’s realist, Justice Handy, handily responded: “Strict as he [Tatting] is himself in complying with the demands of legal theory, he is quite content to have the fate of these men decided out of court by the Prosecutor on the basis of common sense.”<sup>7</sup>

While Justice Handy’s retort was intended to support greater judicial discretion, in this Essay I use it as a springboard for a different inquiry entirely. Rather than embracing broad and insulated discretion as intrinsically good, I adopt some formalist critiques of discretion. But this Essay criticizes formalist scholarship—using an internalist approach<sup>8</sup>—for failing to answer Handy’s challenge: if judicial discretion can be

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<sup>4</sup> The role of the judiciary in our system of government.

<sup>5</sup> Fuller, *The Case of the Speluncean Explorers*, *supra* note 2 at 631. The more committed formalist on the court, Judge Keen, punts to the executive, saying clemency “is a question for the Chief Executive, not for [the court.]” *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 641.

<sup>8</sup> I borrow this term from Professor Ali Khan, he uses it to describe the differing effectiveness of critiques of Islamic law. “Internalist” critiques that presume Islam is a valid religion naturally are going to be accepted within the community of Islamic jurists and legal scholars. On the other hand, “externalist” critiques, which presume that Islam is untrue, are much more likely to be rejected out of hand. See Liaquat Ali Khan, Symposium, The Future of Islamic Law Jurisprudence, *Free Markets of Islamic Jurisprudence*, 2006 MICH. ST. L. REV. \_\_ (2006) (forthcoming). As this Essay will

dangerous, why not also prosecutorial discretion? This challenge is timely, given the ongoing debates regarding judicial discretion on the Supreme Court, and public scrutiny of one particular prosecutor's exercise of discretion. The controversy surrounding North Carolina district attorney, Mike Nifong's, charging of several students at Duke University with rape—the so-called “Duke lacrosse case”—raises issues regarding prosecutorial discretion that are normally taken for granted. While the circumstances of the case are exceptional,<sup>9</sup> the exercise of prosecutorial discretion may have grave consequences under even the most mundane circumstances.<sup>10</sup>

The Essay seeks to establish that contemporary formalist critiques concerning judicial discretion often apply equally to *prosecutorial* discretion, particularly prosecutors' charging and plea-bargaining choices. To curb these dangers, I argue that prosecutors should submit to similar restraints on their discretion, ranging from self-imposed guidelines (mirroring the self-restraint of judicial interpretive methodologies) to institutional and statutory reforms.

## B. Roadmap

Proving this thesis entails five primary steps. Part I quickly describes formalism in contemporary practice—primarily the textualist approach to statutory interpretation. This is necessary to establish what practice—and what thinkers—I am primarily

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demonstrate, I adopt an internalist approach not only for persuasive purposes, but also because there is great value to formalist critiques of discretion.

<sup>9</sup> Including the socioeconomic disparities between the alleged victim and defendants, town-gown relations, and intense media scrutiny.

<sup>10</sup> “North Carolina State Bar Files Ethics Complaint Against Duke Lacrosse Rape Prosecutor,” FOXNews.com, <http://www.foxnews.com/story/0,2933,239664,00.html> (last visited 3/30/07).

criticizing. It would be difficult to demonstrate the incongruity between the contemporary formalists' approach to statutory interpretation and enforcement discretion without this brief outline.

Part II discusses the remarkably wide discretion enjoyed by criminal prosecutors. While other categories of prosecutorial discretion exist, I discuss three "classic" examples: (1) charging and charge bargaining; (2) plea bargaining; and (3) plea bargaining coupled with agreements to cooperate. I chose these examples because a well-developed literature covers them in depth, and because they profoundly affect trial strategy, prosecutorial ethics, and the procedural protections practically available to defendants. Prosecutors enjoy wide discretion in each category, and I will show, textualists tend to endorse this (or at least its cognates in administrative enforcement).

Part III demonstrates that formalists' acquiescence to prosecutorial discretion fundamentally contradicts the political and jurisprudential values animating formalism and its current manifestation, textualism. I outline these values in some detail, and then stack them up against the categories of discretion that I described in Part II. Prosecutorial discretion violates all of the values animating textualism.

Even after seeing that the critiques and policy concerns of formalists apply equally to prosecutors as they do to judges, some may reply that prosecutors are different because they are politically accountable to the people. Part IV addresses this counter-argument. Finally, I offer some formalist solutions to better restrain prosecutorial discretion in Part V.

## C. Two Preliminary Notes

### 1. *We Should Take Formalism Seriously*

One may legitimately ask at this point: “I think formalism is fundamentally flawed—so what can I get out of this? After all, aren’t we ‘all legal realists now?’”<sup>11</sup> I offer three reasons why we should study contemporary legal formalism.

First, perhaps surprisingly, latter-day formalism draws biting insights from realist understandings of the legislative process and judicial operation. In other words, the formalist critique is grounded in practical observation of how contemporary political institutions work—and a practical normative vision of how they should work. If one values a reliable, predictable legal system, they ignore textualism’s critique of intent-based statutory interpretation at their own peril.

Second, irrespective of one’s agreement with it, formalism is both a conceptual lens and a pragmatic tool to achieve better results. As a lens, it helps us evaluate prosecutorial discretion in a new way—and see whether we are comfortable with how it is regulated. As a tool, it may help us protect those values—and to elicit better results from the government irrespective of one’s agreement with formalism. I thus agree with Professor Cass Sunstein that the real question is “what degree of formalism?” rather than “formalist or not?”<sup>12</sup>

Third, even if one vehemently disagrees with it, formalism often sets the terms of the debate in statutory and constitutional interpretation. As an important player in the

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<sup>11</sup> See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (book review of LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

<sup>12</sup> Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 640 (1999).

current debate, formalism merits intense scrutiny. If, for example, textualists' positions on executive discretion prove inconsistent with their approach to judicial discretion, this may suggest basic conceptual weaknesses to their approach.

2. *This Essay is Written with the Deepest of Respect for Prosecutors' Professionalism and Integrity*

I hold prosecutors and their calling in our system of justice in the highest esteem. Prosecutors, in my experience, are dutiful public servants who do their best to achieve justice in their communities. They often forego more lucrative careers in favor of public service, courageously face considerable dilemmas daily as they satisfy their complex ethical and public duties.

Rather than impugn prosecutors' integrity, this Essay recognizes that prosecutors face enormous workloads and other institutional pressures. While prosecutors, like most people in public service, try to do right in each individual case, they may—without the proper incentives—cause undesired results at the system level.

This actually is why formalism offers a particularly attractive framework for evaluating and reforming the prosecutorial system. After all, formalist critiques of discretion-conferring doctrines of statutory interpretation do not presume that judges are bad people, either. Exactly the opposite: in their efforts to achieve justice in individual cases, the argument goes, judges cause systemic problems. To the extent, then, formalistic restraints have helped encourage better judging, they may also foster better prosecution.

I. A THUMBNAIL OF LEGAL FORMALISM AND TEXTUALISM, ITS MOST PROMINENT MANIFESTATION

A. Formalism

While the thinkers I discuss in this Essay would most readily identify themselves as textualists, they belong to a larger school of legal thought known as formalism. Although formalism has often been defined negatively—more as foil of legal realists and critical legal theorists than a form of positive self-identification<sup>13</sup>—its tenets are widely agreed-upon. Black’s Law Dictionary economically describes legal formalism as “[t]he theory that law is a set of rules and principles independent of other political and social institutions.”<sup>14</sup> Professor Lawrence Slocum describes it more elaborately as the belief that:

1. The law consists of rules.
2. Legal rules can be meaningful.
3. Legal rules can be applied to particular facts.
4. Some actions accord with meaningful legal rules; other actions do not.
5. The standard for what constitutes following a rule vel non can be publicly knowable and the focus of intersubjective agreement.<sup>15</sup>

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<sup>13</sup> See, e.g., GRANT GILMORE, *DEATH OF CONTRACT* (2d ed. 1995) (retroactively applying the term to Christopher Columbus Langdell).

<sup>14</sup> BLACK’S LAW DICTIONARY (8th ed. 2004), legal formalism.

<sup>15</sup> Lawrence Solum’s Legal Theory Lexicon, *Formalism and Instrumentalism*, <http://legaltheorylexicon.blogspot.com/2005/05/legal-theory-lexicon-043-formalism-and.html> (last visited 3/27/07); see also Sunstein, *Must Formalism Be Defended Empirically?*, *supra* note 12 at 638 (“[Formalism] entail[s] three commitments: to promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case), to ensuring rule-bound law (even if application of the rule, statutory or contractual, makes little sense in the individual case), and to constraining the discretion of judges in deciding cases.”).

Beyond being a belief system regarding the nature and potential of rules, legal formalism typically carries with it certain political values with it, which I outline in Part II.

## B. The Textualist Methodology

Legal formalism is today most prominent in the discussion of constitutional and statutory interpretation, using the approaches of originalism and textualism.<sup>16</sup> In contrast to the Supreme Court majority's eclectic, and oft-times intentionalist, approach to statutory interpretation,<sup>17</sup> textualists believe courts should analyze statutes based on their "plain meaning." While textualists decry the use of legislative history more than earlier formalists,<sup>18</sup> their primary emphasis is positive. Justice Scalia, the Supreme Court's most outspoken textualist, believes the court can discern a statute's objective meaning using a discrete set of linguistic and logical tools:

[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not -- and especially if a good reason for the ordinary meaning appears plain -- we apply that ordinary meaning.<sup>19</sup>

Statutory meaning, then, exists independently of the subjective consciousness of the legislature or a particular person reading the law. Judge Frank Easterbrook, perhaps

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<sup>16</sup> See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (describing the tenets of the "new textualism," embodied in the jurisprudence of Justices Scalia and Thomas, as well as Judge Easterbrook).

<sup>17</sup> Professor Eskridge has characterized this as a "soft plain meaning rule." *Id.*

<sup>18</sup> Justices Burger and Rehnquist may be better understood as formalists than textualists, as they regularly reviewed legislative history, even if they did not weigh them heavily. See, e.g., *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (Burger, J.) (reasoning that statutes, not appropriations, legitimately signify legislative intent); *Griffin v Oceanic Contractors*, 458 U.S. 564 (1982) (Rehnquist, J.) (imposing trebled back pay between discharge and satisfaction of trial court's judgment to injured seaman because plain language of statute so required—despite his quick reemployment).

<sup>19</sup> *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

textualism's second-most-prolific advocate, says statutes "should be read, like a contractual offer, to find their reasonable import."<sup>20</sup> Justice Scalia has alluded to the common law negligence "reasonable person standard"<sup>21</sup> as well as well as the "objectified intent" one might use interpreting a contract.<sup>22</sup> Textualists find the objective meaning from common legal understandings of terms,<sup>23</sup> the structure of the interpreted statute,<sup>24</sup> and the use of words and phrases in other statutes (the "whole code" approach).<sup>25</sup>

Textualists' strict interpretive methodology is as much inspired by hermeneutics as by particular views about the proper relationship between the branches of government. As I will demonstrate at length in Part III, the first three values animating textualism are, unsurprisingly, tied the "rule of law" and formalism:

- (1) Neutral principles, or impartiality and equality before the law;
- (2) Consistent, principled decision-making; and,
- (3) Predictable and reliable methods and decisions.

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<sup>20</sup> Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988).

<sup>21</sup> *United States v. O'Gilvie*, 519 U.S. 79, 98 (1996) (Scalia, J., dissenting) (using "a reasonably diligent lawyer" standard to measure validity of an interpretation).

<sup>22</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997) ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.")

<sup>23</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 717-718 (1995) (Scalia, J., dissenting) (drawing from specialized legal usage to understand Endangered Species Act's prohibition on the "taking" of endangered species).

<sup>24</sup> *See, e.g., United Savs. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (Scalia, J.).

<sup>25</sup> *See, e.g., W. Virg. Univ Hosp v Casey* [1991](Scalia, J.) (when Congress wanted fees for experts of prevailing Ps, it did so; therefore no expert fees under § 1988).

These values echo the traditional formalist concerns that I outlined in Part I.A. Additionally, textualists subscribe to corollary or necessary substantive political values.

Without them, textualists would argue, there cannot be rule of law:

- (1) empowerment and accountability for the legislature;
- (2) limiting the risks of legislation by the judiciary; and,
- (3) institutional independence to enforce unpopular rules.

Each of these principles disfavors current deference to prosecutorial discretion.

## II. FORMALISTS EMBRACE THE LEGAL PROFESSION'S RELATIVE NON-REGULATION OF PROSECUTORIAL DISCRETION

Keeping in mind the values that I discussed above, consider current regulation of prosecutorial discretion. In Subpart A, I briefly outline four areas where prosecutors enjoy nearly unfettered power. In Subpart B, I demonstrate that, to the extent formalists even recognize these powers as controversial, they are disposed to endorse them.

### A. Prosecutorial Discretion is Lightly-Regulated

“The legal profession has left much of a prosecutor’s day-to-day decision-making unregulated, in favor of [a] catch-all ‘seek justice’ admonition.”<sup>26</sup> True, the rules of evidence, criminal procedure, and professional conduct, regulate criminal prosecutors’ conduct.<sup>27</sup> But these rules allow prosecutors to decide which cases to prosecute, choose

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<sup>26</sup> R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 637 (2006).

<sup>27</sup> See, e.g., MODEL RULES OF PROF’L CONDUCT 3.8; ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.11(a) (3d ed. 1993).

charges, recommend bail, negotiate pleas, and enter agreements to cooperate.<sup>28</sup> Each of these powers may prove path-determinative for a criminal defendant.

### 1. *Charging and Charge-Bargaining*

Criminal codes typically offer prosecutors a wide menu of options for charging under a set of facts. Professors Wright and Engen note, for example, that “in North Carolina, a stabbing might support charges ranging from assault ‘with a deadly weapon with intent to kill and inflicting serious injury,’ all the way down to misdemeanor ‘simple assault.’”<sup>29</sup> Using the North Carolina example, if a police officer refers a stabbing incident, a prosecutor must decide what initial charge to file a minimal charge, such as simple assault, all the way up to assault with a deadly weapon with intent to kill. Considering that the prosecutor’s initial charges sets her posture for plea negotiation—which resolves almost all criminal cases nationwide<sup>30</sup>—her charging decision may often determine the outcome of the criminal proceeding.

#### a. Institutional Limitations on Charging

Depending on the prosecutor’s office, a prosecutor may be subject to extensive or weak limitations on how they charge crimes. The United States Attorney’s office, for example, imposes many limitations on Assistant United States Attorneys’ charging

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<sup>28</sup> Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1935 (2006).

<sup>29</sup> *Id.* at 1940 (references omitted).

<sup>30</sup> See Bureau of Justice Statistics, *Criminal Case Processing Statistics*, available at <http://www.ojp.usdoj.gov/bjs/cases.htm> (last visited Aug. 30, 2006) (relating that 95 percent of felony convictions are achieved through plea bargains); see also GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH* 233 (2003) (relating that 90 percent of cases were resolved through plea bargains). See also *infra* Part II.A.2.

discretion. Most importantly, they are bound by the U.S. Attorneys' Manual ("Principles of Federal Prosecution")<sup>31</sup> and a series of memos from the Attorney General on charging and plea agreements. The most important of these, the 2003 "Ashcroft memo,"<sup>32</sup> requires that, "in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case."<sup>33</sup> Under the memo, "charges should not be filed simply to exert leverage to induce a plea,"<sup>34</sup> a directive enforced by strict limitations on when prosecutors can withdraw charges.<sup>35</sup> Furthermore, DOJ's bureaucracy ensures both individual review of prosecutors' charging decisions, as well as a system-wide review of charging consistency.<sup>36</sup> Federal administrative agencies like the EPA have similar, if less detailed, self-imposed guidelines for criminal investigation and prosecution.<sup>37</sup>

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<sup>31</sup> Available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/index.html](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html).

<sup>32</sup> Memo from Attorney General John Ashcroft to All Federal Prosecutors, Memo Regarding Policy On Charging Of Criminal Defendants (September 22, 2003), , [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm) (hereinafter "Ashcroft memo").

<sup>33</sup> *Id.* at § I.A; see also U.S. Attorney's Manual 9-27.300 ("[O]nce the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. . .").

<sup>34</sup> *Ashcroft Memo*, *supra* note 32 at § I.A.

<sup>35</sup> *Id.* ("Once filed, the most serious readily provable charges may not be dismissed except to the extent permitted in [one of] Section B['s limited exceptions.']; see also *id.* at § I.B (providing exceptions for when sentences wouldn't be affected, where the prosecutor has determined that the most serious offense is not readily provable, etc.).

<sup>36</sup> Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1081-84 (2006).

<sup>37</sup> See, e.g., Memorandum from Office of Criminal Enforcement Director Earl Devaney to All EPA Employees Working in or in Support of the Criminal Enforcement Program

It is unclear, by contrast, what guidelines thousands of local prosecutors impose upon themselves. Moreover, Professor Michael Cassidy points out that, while a statement of factors in a charging policy manual serve as

useful guidepost[s], obviously it would be both ineffectual and unenforceable as an ethical norm, because highly subjective determinations such as relative value and relative culpability are each components of the overall equation. These are the sort of difficult decisions that even the most seasoned prosecutors lose sleep over, particularly in cases involving violent crimes such as murder or rape.<sup>38</sup>

#### b. Reasons for Charging Decisions

The most straightforward reason behind a charging decision is likely the prosecutor's evaluation of the facts. Going back to the example of the knifing in North Carolina, the most obvious difference between the simple assault and assault with intent to kill is scienter. A prosecutor, with the help of law enforcement, would gather and evaluate facts shedding light on the defendant's state of mind: is there evidence of premeditation, did the defendant act in self-defense, was the knifing the result of an impulsive bar fight? Doubtless many if not most charging decisions arise from these kinds of legitimate fact-based considerations.

In the background, though, many other pressures and motivations could influence a charging decision. The most unavoidable of these considerations is the prosecutorial and judicial workload. Defense counsel for poor clients, prosecutors, and trial courts all benefit from resolving cases quickly. Numerous studies of public defenders' offices, prosecutors' offices, and criminal courts, indicate that plea- and charge-bargaining is not

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Regarding the Exercise of Investigative Discretion (Jan. 12, 1994), *available at* <http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf>.

<sup>38</sup> Cassidy, *Character and Context*, *supra* note 26 at 660.

done necessarily in the interests of individual clients, but rather to deal with the overwhelming caseload.<sup>39</sup> At least one court has gone so far as to say that guilty pleas “literally stave[] off collapse of the law enforcement system.”<sup>40</sup> And charging decision (especially where the facts could support charging a crime with a mandatory minimum sentence) may determine whether a defendant pleads or mounts a vigorous, lengthy, and expensive defense.

Empirical scholarship notes less obvious incentives for both over- and under-charging defendants, too. In federal sentencing research, for example, scholars found that in a substantial minority of cases—25 to 35 percent—prosecutors use charge-reduction to avoid mandatory minimum sentencing.<sup>41</sup> This is particularly common with drug and weapon possession cases.<sup>42</sup> When the Minnesota legislature introduced a mandatory sentencing scheme, prosecutors became more likely to engage in charge-bargaining for more serious offenses, particularly child sexual offenses.<sup>43</sup> On the other end, prosecutors

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<sup>39</sup> Richard Klein, Symposium: The Promise of *Gideon*: Unfulfilled?, *Judicial Misconduct in Criminal Cases: It’s Not Just the Counsel Who May Be Ineffective and Unprofessional*, 4 OHIO ST. J. CRIM. L. 195, 196-98 (2006).

<sup>40</sup> *People v. Selikoff*, 318 N.E.2d 784, 788 (N.Y. 1974).

<sup>41</sup> Wright & Engen, *The Effects of Depth and Distance*, *supra* note 28 at 1945-46.

<sup>42</sup> *Id.*

<sup>43</sup> Professor Frase notes that prosecutors seem to be making policy choices by consistently charging some offenses below the mandatory-minimum level, but not others:

As would be expected in a conviction-offense system that regulates sentences but not prosecutorial discretion, the proportion of cases involving charge bargaining increased, while the overall rate of sentence bargaining decreased. Increases in charge reduction (“vertical” charging) were especially great for [serious offenses like felony DWI, robbery, first degree criminal sexual conduct, and second- and third-degree murder] . . . , with criminal histories of zero or one point. The changes were greatest for child sex abuse cases (most of which were committed by white offenders);

can use “multiple charging” to increase their bargaining power over defendants under certain circumstances, since the Federal Sentencing Guidelines allow for sentencing enhancement based on the same conduct to enhance multiple charges.<sup>44</sup>

And prosecutors may face other practical pressures on their charging decisions. They may, for example, be motivated to seek “a high conviction rate, a good relationship with influential private attorneys, and an absence of high-profile trial losses,” though these factors do not necessarily promote the public’s interest in effective crime control.<sup>45</sup> Indeed, as has been recently alleged against the current presidential administration, external political pressure might prompt a prosecutor to pursue a particular charge.<sup>46</sup>

## 2. *Plea Bargaining*

Aside from modest judicial scrutiny of plea entry, plea bargaining is “almost completely unregulated.”<sup>47</sup> Rule 11 of the Federal Rules of Criminal Procedure provides only that the court evaluate such a plea “in consideration of the views of the parties and

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charge reduction rates increased from 50 percent of the cases in 1978 to 80 percent in 1981.

Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 177-78 (2005). While Professor Frase highlights the troubling racial aspect of these decisions, I would underscore a political-structural problem: executives are essentially selectively nullifying legislative deals. But when a legislative deal comports with litigation strategy, policy preferences, or whatnot, they do aggressively enforce it.

<sup>44</sup> See Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245, 268-71 (2002).

<sup>45</sup> Stephen J. Schulhofer, Symposium: Punishment, *Plea Bargaining as a Disaster*, 101 YALE LAW J. 1979, 1987 (1992).

<sup>46</sup> See, e.g., William Yardley, *Gonzales Bowed to Politics, a Former U.S. Attorney Says*, N.Y. TIMES, Mar. 21, 2007, at A16 (relating Congressional testimony from fired federal prosecutors who believed that they were dismissed for handling politically-sensitive cases in a manner the White House disapproved).

<sup>47</sup> Cassidy, *Character and Context*, *supra* note 26 at 654.

the interest of the public in the effective administration of justice.”<sup>48</sup> Yet 95 percent of felony convictions nationally result from guilty pleas,<sup>49</sup> and judges reject guilty pleas in only two percent of cases.<sup>50</sup> This is largely because, unless they take initiative, trial judges “have no independent access to information by which to assess the strength of the case against defendants who offer to plead guilty.”<sup>51</sup>

Why do prosecutors plea bargain? As discussed above, prosecutors may value getting more convictions over getting serious convictions.<sup>52</sup> Acquittals, after all, might adversely affect one’s career.<sup>53</sup> Prosecutors’ averseness to overly harsh penalties may matter, too. In North Carolina, Professors Wright and Engen found that the *availability* of lower charges increased the odds that prosecutors would enter plea deals.<sup>54</sup> This may

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<sup>48</sup> FED. R. CRIM. PROC. 11.

<sup>49</sup> See Bureau of Justice Statistics, Criminal Case Processing Statistics, *available at* <http://www.ojp.usdoj.gov/bjs/cases.htm> (last visited Aug. 30, 2006); *see also* GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 233 (2003) (relating that 90 percent of cases were resolved through plea bargains).

<sup>50</sup> Klein, *Judicial Misconduct in Criminal Cases*, *supra* note 39 at 212-13 (citing William F. McDonald, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 135 (1985)). This is especially troubling, given that “it is common for defense counsel in our large urban courts to offer a guilty plea on behalf of their client within minutes of having first met the defendant.” *Id.* at 203.

<sup>51</sup> Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006); *see also* Wright & Engen, *Effects of Depth and Distance*, *supra* note 28 at 1937 (“In addition to remaining beyond the reach of conventional sources of law, these discretionary choices are easier to hide than a judge’s discretion in sentencing and remain largely outside the spotlight of academic inquiry.”).

<sup>52</sup> *See* Wright & Engen, *The Effects of Depth and Distance*, *supra* note 28.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1958. They note:

[T]he frequency of charge reductions is much higher among more serious crimes than among less serious crimes. Rates of charge reduction are very high (ranging from 60% to 82% of all cases) among offense classes B1 to D, for which a prison sentence is essentially mandatory. Charge reductions

stem from prosecutors' senses of moral responsibility—such as whether they consider it intrinsically wrong to let off a defendant who committed a reprehensible crime.<sup>55</sup> Or it could reflect their judgments regarding public policy—whether conviction at a particular level sufficiently protects the public.<sup>56</sup> More pragmatically, a plea decision could “respond to a defense attorney’s tactical pressures, to penalize a defendant because he has taken an inordinate share of the court’s and the prosecutor’s time, to do favor for particular defense attorneys in the hope of future cooperation, or to attempt to please victims and policemen for political reasons.”<sup>57</sup>

### 3. *Agreements to Cooperate*

Professor Cassidy explains that decisions to offer plea deals in exchange for investigative or trial assistance implicate the same concerns as normal plea deals, plus the prosecutor’s duty to find the truth:

Every decision whether to “flip” an indicted co-conspirator requires a contextual assessment of the strengths and weakness of the case, the relative culpability of the codefendants, the credibility of the accomplice and whether his testimony can be corroborated, the prior criminal records

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are also common (65%) at class E, where a sizeable minority of offenders also fall into the Active portion of the sentencing grid. Below that, charge reductions are still very common, but much less so than for the cases falling in the upper portion of the offense distribution. This appears to correspond with the findings from Minnesota, described above, that charge reductions were more common among cases that would have a presumptive prison sentence if convicted as originally charged.

*Id.*

<sup>55</sup> Cassidy, *Character and Context*, *supra* note 26 at 654-56.

<sup>56</sup> *Id.*

<sup>57</sup> Albert Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 UNIV. CHICAGO. L. REV. 50, 79 (1968).

of both the accomplice and the other codefendants, and a balancing of law enforcement priorities and resources.<sup>58</sup>

Yet, like other plea agreements, agreements to cooperate are rarely subjected to meaningful scrutiny. Under Federal Rule of Criminal Procedure 48(a), “leave of court” is required before a United States Attorney may dismiss an indictment. But in practice courts are generally unwilling to interfere with bargains to cooperate.<sup>59</sup> And even though prosecutors are sometimes criticized by media commentators for entering agreements to cooperate, “the public does not seem to react to such news accounts with alarm or dismay, at least at the voting booth.”<sup>60</sup>

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<sup>58</sup> *Id.* at 659.

<sup>59</sup> See *The Whiskey Cases*, 99 U.S. 594, 603 (1878); *United States v. Gonzalez*, 58 F.3d 459, 462-63 (9th Cir. 1995); see also Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 125-28 (1994) (demonstrating that it is rare for a judge to second-guess the prosecutor’s request for leniency).

<sup>60</sup> Professor Cassidy explains the reasons why prosecutors may not be punished politically for entering agreements to cooperate:

Democratic processes similarly provide very little check on a prosecutor’s decision to “flip” an accomplice. Most prosecutors on the state and local level are elected officials. While the news media may sometimes question the wisdom and fairness of deals made with accomplice witnesses, the public does not seem to react to such news accounts with alarm or dismay, at least at the voting booth. It is exceptionally rare in this country for an incumbent prosecutor to be voted out of office. The electorate may assume that cooperation agreements are inappropriate subjects for lay scrutiny, because the prosecutor has access to behind-the-scenes information not available to the average citizen. Or, high-profile convictions that follow accomplice bargaining may foster public perception of prosecutorial competence and zeal.

Cassidy, *Character and Context*, *supra* note 26 at 657 (internal footnote references and citations omitted).

## B. Formalists Tend to Afford Executives Wide Discretion

As a general matter, textualists (like pretty much everyone else) seem disposed to grant executives wide discretion in enforcing the law. Renowned formalist Frank Easterbrook, for example, has argued that prosecutors' ability to plea-bargain is part of a well-functioning "market system" that sets the price of criminal conduct.<sup>61</sup> This comports with Judge Easterbrook's general friendliness to the delegation of policymaking powers to executive agencies.<sup>62</sup>

Justice Scalia, on the other hand, has not spoken directly to the issue of criminal prosecutorial discretion. He has, however, joined the Court in sustaining broad delegations of power to administrative agencies.<sup>63</sup> He subscribes to the *Chevron*

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<sup>61</sup> See Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. OF LEGAL STUDIES 289 (1983).

<sup>62</sup> See, e.g., *NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 633 (7th Cir. 1995) (Easterbrook, J.) ("No Member of Congress can anticipate all questions that will come to light; and a body containing hundreds of members with divergent agendas can't answer even a small portion of the questions that do occur to its members. That is one reason why Congress frequently delegates power to executive officials . . . ."); *Estate of Kurz v. Commissioner*, 68 F.3d 1027, 1030 (7th Cir. 1995) (Easterbrook, J.) ("Regulation-writers have substantial leeway in their interpretation . . . because the delegation of the power to make substantive regulations is the delegation of a law-creation power, and interpretation is a vital part of the law-creation process.") (internal citation omitted).

<sup>63</sup> See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 926-29 (2006) (Scalia, J., dissenting) (deferring to agency's interpretation of controlled substance statute); *Touby v. United States*, 500 U.S. 160 (1991) (joining in Justice O'Connor's opinion that Congress's allowing DOJ temporarily schedule controlled substance "to avoid an imminent hazard to the public safety" under criminal statute did not violate nondelegation doctrine); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989) (joining in Justice O'Connor's opinion that statute that directed Secretary of Transportation to establish system of user fees to cover costs of administering federal pipeline safety programs was not an unconstitutional delegation of taxing power by Congress to executive branch).

doctrine<sup>64</sup> and a toothless nondelegation doctrine.<sup>65</sup> Justice Scalia and Judge Easterbrook are not alone among formalists in deferring to agencies.<sup>66</sup>

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<sup>64</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (Stevens, J.). Professor Gregory Maggs aptly describes the famed "Chevron two-step:"

Chevron's first step requires a court interpreting a statute to determine whether Congress has "directly spoken" to the question at issue by expressing its intent unambiguously. If Congress has spoken directly to the question, the court must interpret the statute according to what Congress has directed. The court does not need to defer to a construction that an administrative agency has put on the statute.

If Congress has not spoken directly to the question at issue, then the court must move to Chevron's second step. In the second step, the court must decide whether an agency which administers the statute has adopted a "permissible"-- which generally means a reasonable--interpretation of the statute. If the agency has adopted a permissible interpretation, then the court must defer to that interpretation.

Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 399 (1996). Justice Scalia was not on the Court when it decided *Chevron*, but is doubtless an adherent. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("a certain degree of discretion, and thus of lawmaking, inheres in most executive and judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine--up to a point--how small or how large that degree shall be."). Under *Chevron*, according to Justice Scalia,

there is no longer any justification for giving "special" deference to "long-standing and consistent" agency interpretations of law. That venerable principle made a lot of sense when we assumed that both court and agency were searching for the one, permanent, "correct" meaning of the statute; it makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose. Under the latter regime, there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 (1989).

<sup>65</sup> *See Whitman v. American Trucking Associations*, 531 U.S. 457, 472-77 (2001) (Scalia, J.).

In fairness to textualists, they are perhaps less likely to find statutes ambiguous under the *Chevron* doctrine, and therefore may defer to executive agencies less than their eclectic colleagues.<sup>67</sup> Professor Gregory Maggs, for example, systematically analyzed Justice Scalia's first 52 *Chevron*-related opinions on the Court, and found that he deferred to administrative agencies about as often as everyone else.<sup>68</sup> In any case, Justice Scalia and other textualist commentators seem about as disposed as non-textualists to defer to executive agencies.

### III. WIDE PROSECUTORIAL DISCRETION VIOLATES THE VALUES UNDERLYING FORMALISM AND TEXTUALISM

Having established that formalists generally seem unconcerned with broad executive discretion, I now evaluate this stance against the values animating their critiques of discretion-conferring rules of statutory interpretation:

- (1) neutral principles, or impartiality and equality before the law;
- (2) consistent, principled decision-making;

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<sup>66</sup> See, e.g., *Massachusetts v. NRC*, 924 F.2d 311, 324 (D.C. Cir. 1991) (Buckley, J.) (“[T]he Commission’s licensing decisions are generally entitled to the highest judicial deference because of the unusually broad authority that Congress delegated to the agency under the Atomic Energy Act.” (internal citation omitted)); Richard M. Wagner, *Gonzalez v. Oregon: The Assisted Suicide of Chevron Deference*, 2007 MICH. ST. L. REV. \_\_\_\_ (2007) (forthcoming) (manuscript on file with author) (“A major social gain from the *Chevron* doctrine is, perhaps paradoxically, an increase in the democratic accountability of policymaking. . . . [since] rulemaking bureaucrats are not chosen by the people, true, but in many cases they are chosen by the person who was chosen by the people—the President.”); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 307-10 (1986) (preferring *Chevron* deference because it circumscribes the role of the judiciary, which is the only unelected branch).

<sup>67</sup> Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky. L.J. 527, 586-90 (1997-1998).

<sup>68</sup> Maggs, *Reconciling Textualism and the Chevron Doctrine*, *supra* note 64 at 409-17.

- (3) predictable and reliable methods and decisions;
- (4) empowerment and accountability for the legislature;
- (5) limiting the risks of legislation by the judiciary; and,
- (6) institutional independence to enforce unpopular rules.

In many cases, prosecutorial discretion risks the same kinds of dangers as judicial discretion. This necessitates, as I explain in Part IV, serious introspection by formalists, and formalist reforms of the prosecutorial profession.

#### A. Autonomy and Impersonality of the Law

##### 1. *The Formalist Rationale for Autonomy and Impersonality of the Law*

Uniformity is a good in itself, say formalists. This is because they agree with Paine's claim that, in America, the law is king.<sup>69</sup> This grounded in constitutional, prudential, and practical principles.

In a republic, the legislature enacts the law, the executive enforces it, and the judiciary applies it. Under this understanding, a rule is undemocratic if it does not undergo the rigorous constitutionally-mandated legislative process. The separation of powers, coupled with the safeguards of the legislative process ensures that citizens are never governed by the whims of one person or faction. Justice Scalia, for example, warns that "Statutes that are seen as establishing rules of inadequate clarity or precision are

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<sup>69</sup> THOMAS PAINE, COMMON SENSE (1776) ("[I]n America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law OUGHT to be King; and there ought to be no other.").

criticized . . . as undemocratic--and, in the extreme, unconstitutional--because they leave too much to be decided by persons other than the people's representatives."<sup>70</sup>

At the prudential level, the formalist worldview posits that the administration of justice is most effective and fair when conduct is regulated impersonal ex ante rules. This is not to say that formalists do not recognize that rules can be explicitly stated to apply to any possible situation that they are supposed to govern. Indeed, Justice Scalia acknowledges that "[e]xecutives and judges handle individual cases; the legislature generalizes."<sup>71</sup>

Finally, at a practical level, impartial law is more likely to be *perceived* as fair and legitimate. If the law announces abstract principles in advance, the argument goes, a party suffering an adverse ruling is less likely to feel they lost because the judge "didn't like them" or the politics of their position.<sup>72</sup> Textualists claim that interpretive methods

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<sup>70</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

<sup>71</sup> *Id.* at 1176.

<sup>72</sup> Justice Scalia explains:

Besides its centrality to the rule of law in general, consistency has a special role to play in judge-made law. . . . The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic. . . . [C]ourts apply to each case a system of abstract and entirely fictional categories developed in earlier cases, which are designed, if logically applied, to produce "fair" or textually faithful results.

Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588-89 (1989-90).

that leave too many options to judges cannot *appear* impartial, even if the court in fact was fair.<sup>73</sup>

2. *Broad Prosecutorial Discretion May Inject Personal Preferences into the Administration of the Law*

Formalists believe that the law should be abstract and impersonal—something achieved by the imposition of discretion-constraining rules on judges’ interpretive powers. Executives’ powers of application arguably implicate the same concerns, and should be subjected to similar constraints.

If prosecutors choose to not enforce a law because they disagree with it, they effectively repeal it without satisfying the constitutional requirements of bicameralism and presentment. And in fact they undercharge frequently, especially when the legislature has set a mandatory minimum for the highest defense supported by the facts.<sup>74</sup> This undercharging subverts the legislature’s textually-expressed desire to ensure greater uniformity and punitiveness for these offenses.

At the prudential level, prosecutorial discretion seems particularly troublesome. In contrast to the rule-of-law values animating textualist approaches to judicial discretion, the current regime of prosecutorial discretion—to which they acquiesce—looks a lot like

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<sup>73</sup> Scalia, *The Rule of Law as a Law of Rules*, *supra* note 70 at 1178 (“[T]he trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice [equality before the law] very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*.”).

<sup>74</sup> See Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 177-78 (2005).

rule-by-men.<sup>75</sup> Part II.A demonstrated that, outside of the exceptional example of the United States Attorneys, prosecutors can use an amalgam of strategic, ethical, policy-based, or even political and personal considerations (including “moral outrage”<sup>76</sup>) when choosing whether to enforce the law at all, let alone interpret it any particular way.

Indeed, interdisciplinary research into prosecutorial behavior reveals of great diversity of influences on prosecutorial decision-making. Prosecutors, for example, may follow unconscious heuristics that result in unequal treatment.<sup>77</sup> Psychological literature suggests that prosecutors, like police investigators, are vulnerable to: confirmation or expectancy bias;<sup>78</sup> coherence bias;<sup>79</sup> attribution bias, including gender<sup>80</sup> and race<sup>81</sup>

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<sup>75</sup> BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 199 (1997) (suggesting that indeterminacy of rules leads to reliance on person values in judicial decisions).

<sup>76</sup> Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 WILLIAM AND MARY L. REV. 251 (1993).

<sup>77</sup> Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 119, 130 (1994) (explaining that that one cannot eliminate an unwanted mental process unless they are aware of it); Chris Guthrie, et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 820 (2001) (applying concept to judges specifically); Dan Simon, *A PSYCHOLOGICAL MODEL OF JUDICIAL DECISION MAKING*, 30 RUTGERS L.J. 1, 36-37 (1998) (“[Judges’] opinions do not include all the reasons which actually influenced the judge’s decision. Naturally, judges leave out reasons of which they are not consciously aware . . .”).

<sup>78</sup> D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002); Keith A Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 309-16 (2006). This may be exacerbated by the fact that prosecutors offices are usually structured to respond to cases brought to them. Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* 11 (Harvard Univ. Program in Criminal Justice Policy & Mgmt., Working Paper No. 00-02-04, 2000), available at [http://www.ksg.harvard.edu/criminaljustice/publications/community\\_prosecution.pdf](http://www.ksg.harvard.edu/criminaljustice/publications/community_prosecution.pdf).

<sup>79</sup> Keith A Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 317-23 (2006)

attributions; and commitment bias.<sup>82</sup> Further, prosecutors may commit to prosecuting a case on account of non-legal institutional pressures, including: public<sup>83</sup> and political pressure<sup>84</sup> for guilty verdicts pleas;<sup>85</sup> the exigencies of the adversarial trial system;<sup>86</sup> high

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<sup>80</sup> See, e.g., Jennice Vilhauer, Essay, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 *FORDHAM URB. L.J.* 953, 956-60 (2000); Alexi Nicole Vital, *Mandatory Reporting Statutes and the Violence Against Women Act: An Analytical Comparison*, 10 *GEO. MASON U. CIV. RTS. L.J.* 171, 183 (2000).

<sup>81</sup> Lynn Hecht Schafran & Norma J. Wilker, *Gender Fairness in the Courts: Action in the New Millennium* 31 (State Justice Institute 2001) (“What judges can and must do is recognize [suspect] elements in their own thinking and consciously try to counter their influence by rendering fair and impartial decisions.”).

<sup>82</sup> See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 *SW. U. L. REV.* 113 (1975) (arguing that a prosecutor, because he believes it is morally wrong to prosecute an innocent person, may personally convince himself of guilt); C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* 111 (1996); cf. Amanda T. Snellinger, *Commitment as an Analytic: Reflections on Nepali Student Activists’ Protracted Struggle*, 29 *POLAR POL. & LEGAL ANTHROPOLOGY REV.* 351, 354 (2006) (“Hardship reconfirms the nature of selflessness and devotion to the country that people exercise through political struggle.”).

<sup>83</sup> JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE* 47 (1977) (“Individual prosecutors’ effective performance is generally measured by the number of trials (with violent crimes most highly valued), the percentage of convictions (including pleas), and the length of sentence for repeat and violent offenders.”); William F. McDonald, *Plea Bargaining: Critical Issues and Common Practice* 10 (Dept. of Justice, 1985); Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* (Harvard Univ. Program in Criminal Justice Policy & Mgmt., Working Paper No. 00-02-04, 2000), available at [http://www.ksg.harvard.edu/criminaljustice/publications/community\\_prosecution.pdf](http://www.ksg.harvard.edu/criminaljustice/publications/community_prosecution.pdf).

<sup>84</sup> Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 *WM. & MARY L. REV.* 397 (2006).

<sup>85</sup> Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *U. PA. L. REV.* 79, 90 (2005); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 *B.Y.U. J. PUB. L.* 189, 211 (2002).

<sup>86</sup> See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 *SW. U. L. REV.* 98, 99, 114 (1975); Franklin Strier, *Making Jury Trials More Truthful*, 30 *U.C. DAVIS L. REV.* 95, 142-51 (1996); Darryl K. Brown, *The Decline of Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 *CAL. L. REV.* 1585 (2005); Daniel Givelber, *The Adversary System and Historical Accuracy: Can We Do Better?*, in *WRONGLY CONVICTED* 253,

caseloads;<sup>87</sup> and the agenda-setting effects of most prosecutor offices' reactive case intake structures.<sup>88</sup> Further, heuristics may also reinforce each other—as illustrated in many of the Innocence Project cases. An attribution bias, for example may lead investigators to look for a suspect of a particular race, a commitment bias may cause prosecutors to stick to an indictment even in the face of considerable counterevidence, and courts' hindsight biases may prevent a retrial and successful appeal.<sup>89</sup>

Finally, at the practical level, unrestrained prosecutorial discretion could reduce the perceived legitimacy of prosecutors' decisions. Plea bargains are particularly problematic because (the defendant's entry of the plea aside) prosecutors neither create a

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253-54 (Saundra D. Westervelt & John A. Humphrey eds., 2001); Bruce A. Green, *Why Should Prosecutors 'Seek Justice'?*, 26 FORDHAM URB. L.J. 607, 609 (1999).

<sup>87</sup> Ample research has been conducted regarding time and caseload pressures that police officers face, and how that may foster bias. *See, e.g.*, JOHN E. ECK, MANAGING CASE ASSIGNMENTS: THE BURGLARY INVESTIGATION DECISION MODEL REPLICATION 71-72 (1979); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1159 (2005); NAT'L RESEARCH COUNCIL, FAIRNESS & EFFECTIVENESS IN POLICING: THE EVIDENCE 227-28 (2004). This principle may similarly apply to perpetually busy prosecutors.

<sup>88</sup> Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 553 (1997) ("Not surprisingly, the picture presented to the prosecutor almost always shows a guilty defendant."). This may be exacerbated by prosecutors' reactive case intake structures. *See also* Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* 11 (Harvard Univ. Program in Criminal Justice Policy & Mgmt., Working Paper No. 00-02-04, 2000), available at [http://www.ksg.harvard.edu/criminaljustice/publications/community\\_prosecution.pdf](http://www.ksg.harvard.edu/criminaljustice/publications/community_prosecution.pdf).

<sup>89</sup> *See* Keith A Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 295-300 (2006) (relating the Innocence Project case of Marvin Anderson, where precisely this happened).

record establishing the factual basis for a conviction, nor survive the crucible of a trial—both which foster accountability and legitimacy in the adjudicatory process.<sup>90</sup>

In any case, “the law,” in any objective sense, seems almost secondary to the pressures and preferences of the individual prosecutor. Under textualists’ approach to statutory interpretation, the legislature cannot create rule-by-men through unconstitutional delegations to executives and legislative committees, and judges cannot impose their personal preferences when applying statutes. Executives, including prosecutors, apparently are given free reign to apply the law according to personalized, *ex post* principles.

## B. Consistent, Principled Decision-making

### 1. *Formalists Believe that Uniform and Equal Application is Essential to the Rule of Law*

Not only should the law be autonomous, formalists argue: it should also be consistent, applied equally to every similar situation. They have therefore traditionally criticized judicial methodologies that afforded judges wide discretion to consider the facts of a case.<sup>91</sup> These criticisms in part relate to the belief that, to have the rule of law, all people should be treated equally and fairly.

This is not to say, however, that modern-day formalists think that decision makers can totally strip policy judgments from their thinking. Instead, in cases where authorities

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<sup>90</sup> See John Langbein, *Torture and Plea Bargaining*, 46 UNIV. CHICAGO LAW REV. 3 (1978).

<sup>91</sup> Scalia, *The Rule of Law as a Law of Rules*, *supra* note 70 at 1178 (“[T]he trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice [equality before the law] very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so.*”); see also *id.* at 1179-80.

are forced to make a substantive choice in applying the law, formalists recommend that they choose a consistent normative framework to ensure uniform, fair application.<sup>92</sup>

For example, in a biting dissent to *Silveira v. Lockyer*, where the Ninth Circuit denied an individual-rights-based Second Amendment claim, Judge Alex Kozinsky acknowledged that in areas where there is little constitutional guidance that judges must—rather than mechanically apply the law—make value-laden choices.<sup>93</sup> Nonetheless, he argued, courts must impose consistent rules on themselves: “If we adopt a jurisprudence sympathetic to individual rights, we must give broad compass to *all* constitutional provisions that protect individuals from tyranny.”<sup>94</sup>

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<sup>92</sup> See *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2002) (denying rehearing to decision denying individual-rights-based Second Amendment claim).

<sup>93</sup> See *id.* at 568-70 (emphasis added).

<sup>94</sup> *Id.* at 569 (emphasis added). Judge Kozinsky warns that, beyond endangering individual rights, the selective enforcement of a particular constitutional philosophy undermines the legitimacy of the judiciary:

Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. . . . When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases--or even the white spaces between lines of constitutional text. . . . [But] when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there.

It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. *As guardians of the Constitution, we must be consistent in interpreting its provisions.* If we adopt a jurisprudence sympathetic to individual rights, we must give broad compass to all constitutional provisions that protect individuals from tyranny. If we take a more statist approach, we must give all such provisions narrow scope. Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences.

Similarly, Professor Daniel Farber convincingly observes that Justice Scalia likewise will eschew the textualist methodology where a particular area law is firmly rooted in judge-made law.<sup>95</sup> This, Professor Farber claims, shows that Scalia is a formalist before he is a textualist—after all, formalists value uniformity and predictability above all else. In cases where discretion must be exercised, then, formalists believe decision-makers should systematically constrain their discretion to further the uniformity and impartiality of the law.<sup>96</sup>

2. *Broad Prosecutorial Discretion Invites the Use of Inconsistent, Non-Statutory Considerations in the Administration of the Law*

To the extent one believes formalism prevents adjudicators from “finding their friends in the crowd,” they are comforted that judicial participants can receive fair, equal treatment. If a prosecutor is bound by something similar to the Ashcroft Memo, they are forced to treat each case according to the ex ante rules set by Congress, much as a textualist believes she is bound by the objective meaning that arises from the legislative deal. Their only role, theoretically, is to evaluate the facts of the case and see where they fit under the rules.

To the extent prosecutors make the sundry extra-statutory considerations described in Part II.A (trial strategy, conviction rate, political pressure, disagreement with mandatory minimums, etc.) however, they depart from the statutorily-supplied neutral

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*Id.* at 568-69 (emphasis added).

<sup>95</sup> See Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 101 (1995) (in cases where there is a non-textualist jurisprudence in place, Justice Scalia will follow that instead of being textualist. This, Farber argues, shows Scalia values consistency over the particular methodology of textualism).

<sup>96</sup> Scalia, *The Rule of Law as a Law of Rules*, *supra* note 70 at 1179-80.

principles. Individual prosecutors surely strive to achieve justice in each individual case, whether to ensure they get *some conviction* rather than none, or if they give a defendant what they believe is a well-deserved second chance. At a meta-level, however, the ability to treat seemingly-like cases differently may diminish judicial participants' perceptions of the evenhandedness of the judicial process.

## C. Predictability and Reliability

### 1. *Formalists Believe Uniformity and Predictability are Essential to the Rule of Law*

Formalists desire uniformity for more than its own sake. The creation of readily-applicable laws also benefits citizens and authorities by promoting predictability and reducing the burdens of on-the-spot decision-making on executives and courts.<sup>97</sup> Textualists particularly emphasize predictability's importance, arguing that a formalist mode helps the legislature, judiciary, and citizens predict results and plan accordingly.

From the legislative perspective, Justice Scalia has argued that “[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of language it adopts.”<sup>98</sup> The legislature arguably benefits from textualist methods because the textualist's interpretive toolkit is relatively limited.<sup>99</sup> This contrasts with intent-based and eclectic statutory interpretation.

From the judicial perspective, textualists use legal realism and public choice theory to illustrate why intent-based legislative history causes unacceptably-unpredictable judicial administration. Since individual legislators are motivated by different things when voting,<sup>100</sup> they argue, queries into individual legislative intent are at best a fiction.

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<sup>97</sup> Sunstein, *Must Formalism Be Defended Empirically?*, *supra* note 12 at 636.

<sup>98</sup> *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J.).

<sup>99</sup> Doubtless, this effort to help the legislature is hurt by Congressional expectations that courts review legislative history. *See, e.g.*, Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994) (arguing that textualism damages congressional authority and hinders essential requisites to the legislative process). This debate, however, is beyond the scope of this Essay, which explicitly takes an internalist approach to textualism.

<sup>100</sup> Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (discussing how unlikely it would be for hundreds of legislators to possess the same intent when voting in favor of legislation). Professor Radin was a realist, not a formalist. But textualists have taken his argument as their own. *See* Frank H. Easterbrook, *Text*,

Each legislator could innocently express their intent, but misrepresent the deal reached by the body.

Other innocent errors can arise because of the increasingly-complex institutional realities of modern legislatures. For example, statutory language often results from logrolling that is not part of the legislative record. Trying to divine the relationship of one statutory provision to the rest of the deal embodied in an omnibus bill, for example, would face almost insurmountable difficulty. Equally innocuously, legislative history materials may reflect the understanding of the staff that prepared them rather than their legislative principals.<sup>101</sup>

But sometimes, textualists note, expressions of “legislative intent” are not so innocent. Sometimes, textualists charge, expressions of legislative intent by committee members, bill sponsors, and those who enter statements into the record are outright manipulations.<sup>102</sup> Legislators can plant evidence of contrary “intent” for intentionalists

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*History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983). (“Because legislatures comprise many members, they do not have “intents” or “designs,” hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (“[T]he quest for the ‘genuine’ legislative intent is probably a wild-goose chase.”).

<sup>101</sup> See *Blanchard v. Bergeron*, 489 U.S. 87, 97-99 (1989) (Scalia, J., concurring) (charging that committee reports are often drafted by staff members at their own initiative or at suggestion of lawyer-lobbyist); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) (“[L]egislative history is a poor guide to legislators’ intent because it is written by the staff rather than members of Congress . . .”).

<sup>102</sup> Just as formalists have drawn from realism, see Radin, *supra* note 100, they have used public choice theory. They claim that the ordering of choices, for example, prevents clear expressions of legislative intent. See Symposium on the Theory of Public Choice, 74 VA. L. REV. 167 (1988); Easterbrook, *Statutes’ Domains*, *supra* note 100 at 547-48. This, of course, comes from “Arrow’s theorem.” See KENNETH J. ARROW, SOCIAL

to find later. The legislative “statements” of Senators Lindsey Graham and John Kyl during the enactment of the Detainee Treatment Act<sup>103</sup> exemplify this concern. After the act passed, Senators Graham and Kyl inserted an extensive “colloquy” into the Congressional Record.<sup>104</sup> In this colloquy—which was never uttered on the floor—the senators claimed that Congress knew the act would remove the Supreme Court’s jurisdiction to hear pending Guantanamo detainees’ cases. They then filed an amicus

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CHOICE AND INDIVIDUAL VALUES (2d ed., 1963); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 38-39 (1991).

<sup>103</sup> Detainee Treatment Act of 2005, Pub.L. 109-241, Title II, § 218(a), 120 Stat. 526, codified at 10 U.S.C. § 801. *See also* Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2766 n. 10 (2006). The significance of using or not using legislative history goes even deeper in *Hamdan*. The majority finds import in Senator Levin, a cosponsor’s, statements to others that the Act wouldn’t strip the Court of jurisdiction on pending cases. *See id.* Justice Scalia, using only the language of the statute, finds that the language, “[N]o court, justice, or judge shall have jurisdiction to hear” a detainee case “is simply not ambiguous as between pending and future cases.” *Id.* at 2810 (Scalia, J., dissenting) (quoting 119 Stat. 2742, section 1005(e)(1)).

<sup>104</sup> Emily Bazelon explains:

The problem is that Kyl and Graham’s colloquy didn’t actually happen on Dec. 21. It was inserted into the *Congressional Record* just before the law passed, which means that the colloquy did not alert other members of Congress to the views it contains. Inserting comments into the *Record* is standard practice in Congress. What’s utterly nonstandard is implying to the Supreme Court that testimony was live when it wasn’t. The colloquy is evidence of what Kyl and Graham thought about the meaning of the DTA. But it doesn’t show that any other member of Congress shared their understanding. Everything else in the record that directly addresses whether the DTA forces the Supreme Court to toss *Hamdan* comes from Levin or another Democrat—and explicitly states that the DTA leaves *Hamdan* alone.

Emily Bazelon, *Invisible Men*, SLATE MAGAZINE, <http://www.slate.com/id/2138750> (March 27, 2006).

brief with the Supreme Court in *Hamdan v. Rumsfeld*, arguing that their statements represented Congress's intent.<sup>105</sup>

Textualists also draw on public choice criticisms to show how unreliable queries into legislative intent can be. Using Arrow's Theorem, Judge Easterbrook explains how subjective legislative intent is impossible to discern:

Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made. Legislatures customarily consider proposals one at a time and then vote them up or down. This method disregards third or fourth options and the intensity with which legislators prefer one option over another. Additional options can be considered only in sequence, and this makes the order of decision vital. It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support. The existence of agenda control makes it impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.<sup>106</sup>

In sum, textualists believe that sources of legislative history are legion and unreliable. “[L]egislative history is itself often murky, ambiguous, and contradictory [and its interpretation] . . . has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in ‘looking over a crowd and picking out your friends.’”<sup>107</sup>

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<sup>105</sup> *Hamdan v. Rumsfeld*, Appellate Brief, Brief of Senators Graham and Kyl as Amicus Curiae in Support of Respondents, at 16 (February 23, 2006), *available at* 2006 WL 467689 (citing 151 Cong. Rec. S14,260-S14,268) (“[T]he legislative history of Section 1005 confirms that congress intended all of Section 1005 to be immediately effective, governing pending cases and any newly filed lawsuits alike. The . . . colloquy between Senators Graham and Kyl—two of the primary sponsors of the amendment—makes that unmistakably clear.”)

<sup>106</sup> Easterbrook, *Statutes' Domains*, *supra* note 100 at 547-48 (internal references omitted).

<sup>107</sup> *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.) (internal quotation marks omitted) (quoting Patricia M. Wald, *Some*

By comparison, with the relatively spare interpretive tools—statutory language, statutory structure, linguistic canons, and similar use of terms in other statutes—legislators arguably are better able to predict how textualists will implement the statutes. Legislators, then, do not have to police each other’s statements through the long and winding road between a bill’s introduction and signature by the President.

Limiting permissible sources of legislative meaning arguably benefits normal citizens, too.<sup>108</sup> Innumerable attorney hours spent on legislative history would be saved. And the law—even if still complex—would become a bit more understandable to laypeople.

2. *Prosecutorial Discretion May Encourage Unpredictable Results between Different Jurisdictions and Individual Cases*

One of the reasons Justice Scalia worries about judicial discretion is that it will lead to non-uniformity across the United States’ many federal jurisdictions.<sup>109</sup> Multiply this concern by the thousands for prosecutors’ offices. Professor Wright and Engen’s study of charging discretion in North Carolina demonstrates that, even within a particular jurisdiction, prosecutorial discretion results in non-uniform charging. Instead, “the evidence clearly shows that offenders who are charged with similar crimes--especially the most serious crimes--often receive very different punishments.”<sup>110</sup>

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*Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L.REV. 195, 214 (1983)).

<sup>108</sup> See Sunstein, *Must Formalism Be Defended Empirically?*, *supra* note 12 at 650 (footnote omitted).

<sup>109</sup> Scalia, *The Rule of Law as a Law of Rules*, *supra* note 70 at 1178-79.

<sup>110</sup> Wright & Engen, *Effects of Depth and Distance*, *supra* note 28 at 1978; see also Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent*

At a minimum, Wright and Engen's study in North Carolina and Professor Fraser's study in Minnesota show that legislators are not necessarily getting the results they predicted. Prosecutors seemed particularly disposed to reducing charges to avoid mandatory minimum laws and stiffened criminal sexual conduct law<sup>111</sup>—both of which of reflect the legislature's textually-expressed desire to ensure greater uniformity and punitiveness regarding these offenses. Likewise, criminal defendants and their counsel face higher bargaining costs and uncertainty.

In fact, prosecutorial discretion likely imposes *greater* information costs than judicial discretion. Courts at least generate readily-reviewable orders and opinions; these explain courts' decision-making processes and can be criticized and invalidated if unfair or unlawful. In contrast, a charging decision or plea-bargaining decision does not necessarily generate any record, other than an unexplained act of filing or entering the agreement.

And as a practical matter, courts are disinclined to review prosecutors' charging and plea-bargaining decisions.<sup>112</sup> Without meaningful review, the same prosecutor might impose different criteria to similar situations with little consequence, and different prosecutors could impose different criteria with no consequences. Legislatures attempting to make the law, and parties attempting to follow it, may not reliably predict

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*Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 550-51 (1978).

<sup>111</sup> See Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 177-78 (2005).

<sup>112</sup> Ross, *The Entrenched Position of Plea Bargaining*, *supra* note 51 at 717.

what the law practically *is*, because prosecutorial discretion replaces rule-of-law with rule-by-prosecutors.<sup>113</sup>

D. The Role of the Legislature: Political Responsiveness under Bicameralism and Presentment Requirements and the Non-delegation Doctrine

1. *The Formalist Conception of the Legislative Role*

Transparency achieves advantages beyond citizen understanding. Textualists claim that their interpretive approach ensures that courts serve as faithful agents of the legislature, and that the legislature is politically accountable for its decisions. Courts thus become both the legislature’s faithful agents—and in a roundabout way—their taskmasters. Both roles, formalists claim, inhere to the American system of government.

a. Enforcing “the Deal”

Formalists believe that the legislature is the primary and only constitutionally-legitimate lawmaker in our system of government.<sup>114</sup> If it is the legislature’s job to create

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Wright & Engen, *Effects of Depth and Distance*, *supra* note 28 at 1937.

<sup>114</sup> Aside, of course, from the interstitial lawmaking inherent to judicial application and legislatively-authorized administrative rulemaking. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (conceding that “a certain degree of discretion, and thus of lawmaking, inheres in most executive and judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine--up to a point--how small or how large that degree shall be.”); *NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 633 (7th Cir. 1995) (Easterbrook, J.) (acknowledging that “[n]o Member of Congress can anticipate all questions that will come to light; and a body containing hundreds of members with divergent agendas can’t answer even a small portion of the questions that do occur to its members.”).

law, it is the judiciary's role to faithfully apply it.<sup>115</sup> Otherwise, the judiciary has denied citizens their right to republican representation.<sup>116</sup>

The court's role, then, is to enforce "the deal," whatever it is. The "deal" resulted from a democratic process: give and take, extensive debate, heated opposition.<sup>117</sup> It may not live up to the stated ideals of the sponsors, but then again, that compromise was likely necessary to assuage others' concerns.<sup>118</sup> The deal may not match up with any individual legislator's intent, or the sponsors' for the matter.<sup>119</sup> It may even contradict itself at times.<sup>120</sup> In the end, "deal" is represented by the statute's text.<sup>121</sup>

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<sup>115</sup> See, e.g., *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 221 (1979) (Rehnquist, J., dissenting) ("our duty is to construe rather than rewrite legislation").

<sup>116</sup> Although Professor Muriel Spence interestingly argues that textualism robs the legislature of its prerogatives. He claims that Congress *expects* courts to use legislative history, and that refusing to consult it thus diminishes congressional authority. Moreover, he argues, discounting legislative history may discourage the legislature to engage in the fact-finding that's requisite to modern legislation. See Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994). While there may be merit to Prof. Spence's argument, it does little to diminish the theoretical values underlying textualism—which I submit are fundamentally opposed to the currently broad discretion afforded executives.

<sup>117</sup> Easterbrook, *Statutes' Domains*, *supra* note 100 at 540-45 (characterizing statute as a "deal").

<sup>118</sup> See, e.g., *United Steelworkers of America*, 443 U.S. at 221-54 (Rehnquist, J., dissenting) (arguing that amendment to Title VII was to alleviate concern of mandated racial preferences to detriment of whites—even though this didn't achieve the highest possible ideals of the legislation's sponsors).

<sup>119</sup> See, e.g., *Livingston Rebuild Ctr., Inc. v. Railroad Retirement Bd.*, 970 F.2d 295, 298 (7th Cir. 1992) (Easterbrook, J.) ("Congress does not enact 'intents', and certainly not the intents of witnesses; it enacts texts, which may differ from the expectations of the sponsors.").

<sup>120</sup> *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 100 (1991) (Scalia, J.) (arguing that imaginative reconstruction "profoundly mistakes our role . . . [which is] to make sense rather than nonsense out of the corpus juris. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed

If the text represents the only legitimate deal to which the legislature assented, imaginative reconstruction of it “profoundly mistakes [the judicial] role . . . .”<sup>122</sup> Imaginative interpretation, aside from being vulnerable to the interpretive pitfalls described above, is essentially anti-legislative, as it disrupts the delicate compromise embodied in the legislative text.

b. Holding the Legislature to “the Deal”

Textualists do not enforce the legislative deal as an act of kindness. Instead, they do it to hold the legislature politically accountable for its deal: if they struck it, they are stuck with it. If legislators can avoid the political consequences of their deals, they become unaccountable to their constituents.

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inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently.”).

<sup>121</sup> See *Livingston Rebuild Ctr.*, 970 F.2d at 298 (Easterbrook, J.). Justice Scalia forwards a structural constitutional argument to make the same point—that “intents” are not subjected to the procedural obstacle course that a bill’s text must survive to become law:

No one would think that the House of Representatives could operate in such fashion that only the broad outlines of bills would be adopted by vote of the full House, leaving minor details to be written, adopted, and voted upon, only by the cognizant committees. Thus, if legislation consists of forming an ‘intent’ rather than adopting a text (a proposition with which I do not agree), Congress cannot leave the formation of that intent to a small band of its number, but must, as the Constitution says, form an intent of the Congress.

*Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S.Ct. 637, 645 (1996) (Scalia, J., concurring in part and concurring in the judgment). For more discussion of the bicameralism and presentment argument, see *Begier v. IRS*, 496 U.S. 53, 67 (1990) (Scalia, J., concurring); *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1980) (Scalia, J., concurring); *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring).

<sup>122</sup> See *West Virginia Univ. Hosp.*, 499 U.S. at 100 (Scalia, J.).

Intentional vagueness allows legislators to escape accountability on two levels. During the enactment process, most legislators are not forced to defend their decisions. Instead, they leave the statute's terms vague, and the sponsors strategically sprinkle legislative history and take the heat. After enactment, most legislators enjoy the best of both worlds: If the law proves popular when enforced, they can say that their intent was properly discerned; but if the same law proves unpopular, they can say that the courts misunderstood their intent.<sup>123</sup>

Professor John Manning gives this claim a constitutional basis in the article, *Textualism as a Nondelegation Doctrine*.<sup>124</sup> Professor Manning argues that political accountability is written deeply into our constitutional system. Congress enters a deal,

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<sup>123</sup> One can see this play out in the legislative response to *TVA v. Hill*, which held that the Endangered Species Act's plain terms required the Tennessee Valley Authority to halt the construction of a dam that endangered a local fish. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Congress immediately established an administrative mechanism for granting exemptions to Act, and it specifically exempted the dam halted by TVA. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 294 (1989) (discussing 16 U.S.C. § 1536 (1976) (amended 1979)). Justice Powell, who dissented in *TVA*, may have smartly replied that they understood Congress's intent when it passed the original ESA, but that perhaps misses the point. *See id.* at 209-10 (Powell, J., dissenting); *see also* RONALD DWORKIN, *LAW'S EMPIRE* 348-49 (1986). But perhaps judicial *faithfulness* differs from judicial *slavishness*: one implies an equal relationship where the judiciary requires the legislature to fulfill its constitutional roles, whereas the other covers for and perhaps enables legislative abdication of its constitutional responsibilities. Under this latter view, Justice Burger's *TVA* majority forced Congress to express its intent in a politically-accountable way. Development and environmental protection were locked in zero-sum competition. The *TVA* majority forced Congress to take from one and give to the other. It forced Congress to admit that the ESA's lofty rhetoric was sometimes exactly that—rhetoric. *See also* Farber, *Statutory Interpretation and Legislative Supremacy*, *supra* note 123 at 298 (“Judges must not allow legislators to use statutes to strike poses, knowing that courts will bail them out later. Not only does the supremacy principle act as a constraint on courts, it also, indirectly, disciplines the legislature.”).

<sup>124</sup> John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

but its “say” is complete once the deal becomes law. The executive should faithfully enforce the law, and courts should interpret and apply it.

At this point, Congress cannot interfere with the law’s application, short of amending it. If those applying the law are faithful, the public can readily see what Congress has done, and then hold it accountable. Intentionally-vague legislation, however, *delegates* decision-making and accountability to committees and sponsors. This, Manning argues, is an abdication—an unconstitutional delegation—of legislative power and accountability.<sup>125</sup>

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<sup>125</sup> According to Manning, Congress now expects courts to resolve ambiguities using legislative history:

That basic understanding of interpretive reality, which textualists ultimately share, leaves ample room for the claim that courts rely on legislative history not because it reflects actual intent, but because legislators now expect their ambiguities to be resolved according to its lights. If that is the case, then one might argue that Congress implicitly delegates law elaboration authority to committees and sponsors, when it enacts an ambiguous statute accompanied by a committee’s or sponsor’s explanation of its meaning.

*Id.* at 673. This “out” perversely encourages legislators to punt on controversial issues while still maintaining control over a law’s implementation:

[T]he exercise of law elaboration authority by constitutionally independent actors supplies Congress with a crucial structural incentive to resolve important issues in the enacted text. To the extent that Congress enacts a vague or ambiguous statute that leaves an important policy question unanswered, the separation of powers ensures that the question will be answered for Congress by an entity beyond its immediate supervision. If, however, Congress can effectively delegate law elaboration authority to its own committees or members, that structural incentive is substantially undermined; *issues left unresolved by a duly enacted statute will be clarified in accordance with the views of actors firmly under congressional control, operating outside the constraints of bicameralism and presentment.*

*Id.* at 706-07 (emphasis added).

Whether one subscribes to the bicameralism and presentment criticism of as Justice Scalia does, or a separation of powers critique of Professor Manning, textualism enforces the formal separation of powers in the Constitution. This separation ensures legislative accountability and protects the procedural crucible necessary to protect the citizenry from rule-by-faction. And, as a final analytic step, protection from rule-by-faction inheres to the formalist conception of the rule of law.

2. *Wide Prosecutorial Discretion Breaks the Legislative Deal and Encourages Statutory Vagueness*

The legislature is the first among three equal branches. Courts, formalists argue, must enforce the deals reach by the legislature to prevent legislative disempowerment and abdication.<sup>126</sup> It is not immediately clear why the executive should take a different tack than courts in enforcing legislative deals.

On one hand, prosecutorial discretion threatens to deny citizens the policies that they supported. If the people vote for legislators who want harsh mandatory minimums, then they should get them. On the other hand, the legislature must be held accountable for its decisions. It is hardly healthy for our political system if legislators can reap the political benefits of tough-on-crime rhetoric, and then not have to pay the price—escalating corrections and judicial costs. Yet this is exactly what is happening, for example, in North Carolina and Minnesota, where prosecutors use charge reduction to dull the impact of mandatory minimum laws.<sup>127</sup>

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<sup>126</sup> See *supra* Part II.D.

<sup>127</sup> See Wright & Engen, *The Effects of Depth and Distance*, *supra* note 28 at 1957-58 (discussing how, in North Carolina, prosecutors particularly dull the impact of criminal offense statutes that require prison time); Frase, *Sentencing Guidelines in Minnesota*,

## E. The Role of the Legislature's Agents

### 1. *Formalists' Conception of the Legislative Role*

The flip side of legislative non-delegation is the prevention of judicial legislation. Although both are typically couched in terms of separation of powers, they center on the fundamentally different natures of the institutions: the legislature is politically accountable by design but is tempted insulate to itself; the judiciary is politically-insulated by design, and is tempted to think of itself as politically accountable. For the former, the danger is abdication of legislative authority; for the latter, it is seizure of legislative authority. Just as textualists claim their interpretive methodologies ensure that legislatures legislate, they ensure that courts adjudicate rather than legislate.<sup>128</sup>

Doubtless centralization of power was one of the Founders' animating concerns. The *Federalist Papers* outline how the separation of powers into the functions of enactment, enforcement, and interpretation protected liberty.<sup>129</sup> While the Federalists claimed the judiciary was the most harmless of branches, formalists argue it is more dangerous in practice. Through lifetime tenure, the judiciary is insulated from political pressure.

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1978-2003, supra note \_\_ at 177-78 (showing that, in Minnesota, prosecutors reduced charges especially in child sex abuse cases).

<sup>128</sup> For a classic discussion of the "counter-majoritarian difficulty," see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962).

<sup>129</sup> FEDERALIST NO. 51 (Hamilton or Madison).

Under principles of separation of powers, one branch cannot exercise its powers such that it usurps those of another.<sup>130</sup> To allow otherwise would undermine a system designed to use one branch's ambition to check that of the others.<sup>131</sup> Under our system of government, courts' power is to "declare the sense of the law"; if they go farther by "exercis[ing their] WILL instead of JUDGMENT," they overturn the legislative power.<sup>132</sup>

Judicial usurpation need not happen outright: if a court uses interpretive methods so elastic that they are effectively legislation, it has appropriated the legislative function.<sup>133</sup> Textualists attempt to avoid the temptation of legislation through self-

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<sup>130</sup> William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1529 (1998) (book review of ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

<sup>131</sup>

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

FEDERALIST 51 (Hamilton or Madison).

<sup>132</sup> THE FEDERALIST NO. 78 (Madison). Professor Eskridge rather persuasively argues that it was the losers in the constitutional debate—the anti-Federalists—who were concerned with freewheeling judicial interpretation of statutes, rendering formalists' reliance on the Federalist Papers a bit ironic. See Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 130 at 1530-31 (citing FEDERAL FARMER XV, N.Y.J., Jan. 18, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST at 315-16). Nonetheless, as a matter of political philosophy, contemporary formalists' approach arguably best serves the concerns outlined by Madison in Federalist 78.

<sup>133</sup> *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 470-472 (1989) (Kennedy, J., dissenting) (quoting Federalist No. 78 in his criticism of the liberal use of the "absurd results" rule). See also Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 130 at 1529; Scalia, *The Rule of Law as a Law of Rules*, *supra* note 70 at 1184-85.

imposed constraints: “a solid textual anchor or an established social norm from which to derive the general rule . . . .”<sup>134</sup>

All of this again ties into rule-of-law values. The limitation of the judicial function to interpretation is necessary to prevent rule-by-men—in this case, an insulated judicial elite.

## 2. *Similarities in the Executive Role*

Doubtlessly prosecutor discretion does not implicate the same concerns regarding judicial usurpation of the legislative function. As already discussed in this Part, however, prosecutors can usurp the legislative function by under-enforcing (or even not enforcing) particular laws. While the ability to under-enforce is a “negative power,” it is nonetheless profound: a prosecutor assumes the legislative power of repeal when he chooses to not charge where the facts support it.

Some argue that it is the job of the judiciary and the prosecutor to ensure that justice is done in each case. Sometimes the legislature sets inflexible or arbitrary rules. For example, Professor Kevin Saunders has illustrated how the courts’ duty to be the legislature’s faithful agent can be at odds with doing justice.<sup>135</sup> The inflexible mandatory minimum sentences under the Federal Sentencing Guidelines, he observes, compelled federal judges to stringent sentences arbitrarily:

[I]f one defendant is convicted of possession of 4.99 grams of crack cocaine and another is convicted of possession of 5.01 grams of crack cocaine, the two would seem equally culpable. Under the minimum sentencing requirements, however, the first would face a maximum

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<sup>134</sup> Scalia, *The Rule of Law as a Law of Rules*, *supra* note 70 at 1184-85.

<sup>135</sup> See Kevin W. Saunders, A Symposium on Film and the Law, *Billy Budd and the Federal Sentencing Mandates*, 22 OKLA. CITY U. L. REV. 211 (1997).

sentence of one year, while the second would face a mandatory minimum of five years.

*Id.* at 218. In response to these kinds of arbitrary results, some judges threatened to resign or used procedural rules to reach the just result. Professor Saunders submits that system that overly constrains judicial discretion, like the Federal Sentencing Guidelines, is unjust because it ignores all of the case's elements. In cases like the one described above, the guidelines failed to consider any other aspect of the defendant, such as that he might be a first-time offender, or had highly or less culpable motivations when committing the crime. In others, they create arbitrary distinctions that treat like cases differently, as when the Guidelines mandatory minimum sentences jumped by several years when was convicted of possessing just more or less than 5.0 grams of rock cocaine.<sup>136</sup>

Observations like these seem to support the argument that it is part of the executive and judiciary's roles to exercise discretion, and that overzealous efforts to dampen this role will cause injustice. This argument is convincing—as far as it goes.

Recalling Professor Sunstein's admonition, however, we do not face a binary choice between unconstrained discretion and no discretion.<sup>137</sup> We need not, like Congress, attempt to strip context out of the system. We can, instead, attempt to design institutions and substantive law to at least modestly observe and regulate the exercise of prosecutorial discretion. I in fact offer a range of proposals in Part VI that would temper prosecutorial discretion without squeezing contextual decision-making out of our legal system.

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<sup>136</sup> *Id.*

<sup>137</sup> See Sunstein, *supra* note 12 at 640.

Moreover, if judges or prosecutors choose to nullify, on a case-by-case basis, laws that they perceive to be unjust, they may be failing the broader system of government even if they achieve better results in an individual case. While one prosecutor may choose to not charge a particular offense, another in a different jurisdiction will. Now, like defendants are being treated differently for no good reason—exactly the injustice identified above.<sup>138</sup> At least if an unfair law was prosecuted frequently, there would be a chance that it would cause a public outcry and legislative change.<sup>139</sup>

## F. Institutional Independence

### 1. *Clear Ex Ante Rules Help Courts Make Consistent, Albeit Unpopular Decisions in “Tough Cases”*

Institutional independence is the final corollary value animating textualism. Equitable statutory interpretation is tempting. Sometimes, it is unpopular to hold the legislature to “the deal,” and in other cases to find its acts unconstitutional. If a decision-maker caves and use their “exercise [their] WILL instead of JUDGMENT,” they replace the rule of law with rule-by-men.<sup>140</sup> It is much easier to take an unpopular stand,

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<sup>138</sup> See *supra* Parts III.B.-C (emphasizing how overly wide prosecutorial discretion may damage equality before the law).

<sup>139</sup> See *supra* Part III.D (explaining how overly wide prosecutorial discretion may damage the legislature’s role by confounding majority preferences and eliminating democratic accountability).

<sup>140</sup> THE FEDERALIST NO. 78 (Madison). Professor Eskridge persuasively argues that it was the losers in the constitutional debate—the anti-Federalists—who were concerned with freewheeling judicial interpretation of statutes, rendering formalists’ reliance on the *Federalist Papers* a bit ironic. See Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 130 at 1530-31 (citing FEDERAL FARMER XV, N.Y.J., Jan. 18, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST at 315-16). Nonetheless, as a matter of political philosophy, contemporary formalists’ approach arguably best serves the concerns outlined by Madison in *Federalist* 78.

however, if it comports with a long-established, discretion-constraining principle.<sup>141</sup> Formalism offers these discretion-constraining—and surprisingly empowering—principles: originalism in constitutional adjudication; textualism in statutory interpretation; and bright line rules and *stare decisis* in the common law.

2. *Clear Ex Ante Rules May Help Prosecutors Make Consistent, Albeit Unpopular Decisions in “Tough Cases”*

Just as with courts, it would be easier for a prosecutor to make an unpopular stand, if it comports with a long-established, discretion-constraining principle.<sup>142</sup> Prosecutors, who are political appointees or elected officials, arguably would be subject to more public pressure than courts. As with courts, prosecutors may find discretion-constraining, formalist rules surprisingly empowering in the face of public pressure.

IV. POLITICAL ACCOUNTABILITY IS AN INADEQUATE COUNTERBALANCE TO DANGERS

Only one argument can mitigate the concerns outlined in Part IV. Executives, this argument goes, are publicly accountable for what they do.<sup>143</sup> Administrative agencies, for example, often participate in the legislative process and are subjected to legislative oversight. Prosecutors are either appointed by the executive (as with Assistant United States Attorneys) or are publicly-elected themselves, as is common at the state level.

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<sup>141</sup> Scalia, *The Rule of Law as a Law of Rules*, *supra* note 70 at 1180 (“The changes that frail men and women will stand up to their unpleasant duty [of being just to an unpopular party] are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases.”).

<sup>142</sup> *Id.* (“The changes that frail men and women will stand up to their unpleasant duty [of being just to an unpopular party] are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases.”).

<sup>143</sup> See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574-76 (1985) (arguing that administrative agencies are closer to the legislature and therefore more likely to successfully implement the legislative “deal”).

If executives are publicly-accountable, they are more likely to be faithful agents of the legislature. If they subvert the legislative will, after all, they face unpleasant appointment, budget, and oversight meetings (in the case of administrative agencies) and public pressure and election challenges (in the case of prosecutors).

Election or appointment does not necessarily translate into accountability for one's discrete decisions for three reasons. First, prosecutors make countless decisions, few of which receive the public's attention.<sup>144</sup> Prosecutors rarely lose reelection.<sup>145</sup> Second, prosecutors make decisions daily that are likely outcome-determinative for defendants, yet face no meaningful judicial review.<sup>146</sup>

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<sup>144</sup> Brian Forst, *The Prosecutor and the Public*, in *THE SOCIO-ECONOMICS OF CRIME AND JUSTICE* 291, 294 (Brian Forst, ed. 1993).

Professor George Christie illustrates this principle with the more-familiar example of legislative political accountability:

Sometimes, however, the people to whom a decisionmaker is accountable are unable to exercise very much ongoing supervision of the decisionmaker's performance. A legislator, for example, is accountable to his constituents. But these constituents [*sic*] form an amorphous group, able to exercise their right to discipline their legislative representatives only at discrete intervals that may be separated by substantial periods of time. Under these conditions, the constituents can neither specify an exclusive, all-encompassing set of criteria for the legislator to consider in making choices nor enforce conformity to these criteria on a day-to-day basis. They must inevitably be prepared to accept relatively untrammelled decisionmaking from their legislative representative.

George C. Christie, *An Essay on Discretion*, 1986 *DUKE L.J.* 747, 754-755 (1986).

<sup>145</sup> Cassidy, *Character and Context*, *supra* note 26 at 657; Ross, *The Entrenched Position of Plea Bargaining*, *supra* note 51 at 717.

<sup>146</sup> While discretion that simply causes variable results, i.e., "primary discretion," Stuart S. Nagel, *Discretion in the Criminal Justice System: Analyzing, Channeling, Reducing, and Controlling It*, 31 *EMORY L. J.* 603, 604-05 (1982); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 *COLUM. L. REV.* 359, 363, 378 (1975), is problematic in itself, see *supra* Part I.A, prosecutorial discretion is especially problematic, the most significant forms of prosecutorial discretion

Third, even if a prosecutor is politically accountable, accountability may have discomfiting results. The public may reward a good “batting average” more than faithful implementation of legislative mandates. Or it may call for prosecution where it is warranted (as in the Duke Lacrosse case)—or exoneration where the law calls for conviction.

## V. POSSIBLE REMEDIES

Under a formalist evaluative lens, unrestricted prosecutorial discretion may threaten the health of American government. Other commentators have identified some of these problems in isolation, but have not situated them within an overarching theoretical critique. But what solution can there be? After all, each case is different: different defendants, different victims, different lawyers, and different evidence. Perhaps this is why most solutions involve selecting prosecutors of “better character.”<sup>147</sup>

Professor Christie explains that our tendency to constrain discretion increases in proportion to our pre-existing ability to constrain it. Thus while, today, mainstream opinion may be that it is too difficult to review prosecutorial decision, the creation of institutions to conduct such review may bootstrap a different attitude into existence.<sup>148</sup>

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(particularly charging and plea-bargaining) are of particular because they constitute “secondary discretion,” i.e. they are insulated from further review. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971); Keith A Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351-52 (2006) (“most [nondisclosure] violations are never detected because, by definition, the defense does not know about them; violations can be litigated only if the defense learns of the nondisclosed information through some fortuity that usually occurs sometime after trial.”).

<sup>147</sup> Cassidy, *Character and Context*, *supra* note 26 at 639-41.

<sup>148</sup> George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 756-757 (1986) (“The more capable we feel of closely supervising people ostensibly accountable to us,

Additionally, as Professor Sunstein observed, formalism is not an all-or-nothing proposition.<sup>149</sup> Rather, the question is one of *how much* formalism is desirable to solve a particular problem. In this final Part, I tentatively describe possible formalist solutions to the problem of prosecutorial discretion.

#### A. Curbed Discretionary Mechanisms

The simplest, if most drastic, solution, is to strip prosecutors of discretion in particular contexts. The most extreme version of this would be a mandatory charging rule, where prosecutors were required to file the highest possible charges for which they believed there was probable cause.<sup>150</sup> This proposal's flaws are quickly apparent. On one hand, a mandatory charging rule would swamp prosecutors' offices.<sup>151</sup> On the other, it would still leave prosecutors wriggle room to reduce charges based on their assessment

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the more likely we are to try to exercise that supervision by curtailing the range of choices available to those people.”).

<sup>149</sup> See Sunstein, *Must Formalism Be Defended Empirically?*, *supra* note 12 at 640.

<sup>150</sup> Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining*, *supra* note 51 at 717.

<sup>151</sup> Absent a radical reconsideration of the prosecutor's role, the judicial resource argument is overwhelming. One possible alternative, however, would be to return to older models of prosecution, which did not necessarily involve prosecutor's offices:

In the last century prosecutors were used to write indictments and to try felony cases (or dismiss or plead them). The justice process was largely controlled by the police and the judiciary. Prosecutors were absent from the lower courts, often referred to as ‘police courts,’ where the police served as prosecutors. If the cases were screened out of the system at all, it was done by the judicial officer at either the initial appearance or the preliminary hearing (or by prosecutors nol-prossing (dismissing) cases after they were indicted). These arrangements still exist in many jurisdictions or have only recently been changed. . . .

William F. McDonald, *Plea Bargaining: Critical Issues and Common Practice* 10 (Department of Justice, 1985).

of a case's facts. A softer version of this proposal would be to establish relatively rigorous charging policies like those followed by Assistant United States Attorneys.<sup>152</sup>

#### B. Increased Judicial Review

While it may seem counterintuitive to a textualist, increased judicial discretion may in fact strengthen our government's checks and balances. Judicial review could assume many guises, from trial courts' intensified review of plea bargaining to appellate courts' use of harmless error and prejudice rules when considering criminal appeals.<sup>153</sup> Further, increasing trial judges' sentencing discretion may check prosecutorial over-charging and over-reaching during plea negotiations.<sup>154</sup>

#### C. Extralegal Restraints

Various extra-legal programs could increase prosecutors' political accountability. First, legislatures could collect charging, plea, and conviction data to legislature. This will assist the legislature in determining whether prosecutors are being its "faithful agents." Second, prosecutor's offices can impose guidelines on themselves, as the U.S. Attorney's office has done.<sup>155</sup> Third, prosecutor's offices can create internal separations of powers, splitting quasi-judicial functions (investigation, case evaluation, and plea

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<sup>152</sup> See *supra* notes 31-37 and accompanying text (describing the Department of Justice's charging guidelines in greater detail).

<sup>153</sup> Keith A Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 355 (2006).

<sup>154</sup> Ross, *The Entrenched Position of Plea Bargaining*, *supra* note 51 at 718.

<sup>155</sup> Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1 (2006).

bargaining) and adversarial functions (litigation) to ensure that “the pressures of the adversarial process do not corrupt the independence of a prosecutor’s judgment.”<sup>156</sup>

#### D. Substantive Criminal Penalty Reform

Finally, the North Carolina and Minnesota research discussed throughout this Essay illustrates the profound effect that substantive criminal penalty law has on prosecutorial behavior. If prosecutors have many charging options for a particular fact pattern, which Wright and Engen call “depth,” they are far more likely to engage in plea or charge bargaining, which in turn risks contravention of legislative intent. Additionally, if prosecutors are forced to choose between relatively different punitive options—for example, between only crime with a community-based correctional option and one with mandatory prison time—they are less likely to engage in plea bargaining. To the extent one believes that prosecutors’ plea and charge bargaining risks derogation from “the deal,” they may wish to decrease the “depth” and increase the “distance” in the penalties for similar conduct.<sup>157</sup>

#### CONCLUSION

Hopefully this Essay has delivered on its promise. While many have misgivings about the wide discretion currently held by executives, especially criminal prosecutors, formalism and textualism offer a conceptual lens through which to understand this discretion’s effects on the rule of law. After brief examination, prosecutors’ charging and

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<sup>156</sup> See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *Fordham L. Rev.* 1695, 1716 (2000).

<sup>157</sup> Wright & Engen, *supra* note 28 at 1973.

plea negotiation powers raise particular concerns, namely that prosecutors can distort the legislative “deal” and thereby replace the rule of law with rule by men.

On a theoretical level, formalists and textualists face a dilemma: can they support broad executive discretion while advocating the limitation of judicial discretion? This Essay suggests that no, this cannot be done without compromising the fundamental political critique upon which textualism is based. Instead, a consistent formalist critique suggests that, like the judiciary, the executive must impose restraints on itself so that the legislature has the power to effectively enact the people’s will into law—and be held accountable for its decisions. I have tentatively outlined a menu of reforms that may restore the executive’s rightful place in our tripartite system of government.