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PARALLEL ENFORCEMENT AND AGENCY INTERDEPENDENCE

ANTHONY O'ROURKE*

Parallel civil and criminal enforcement dominates public enforcement of everything from securities regulation to immigration control. The scholarship, however, lacks any structural analysis of how parallel enforcement differs from other types of inter-agency coordination. Drawing on original interviews with prosecutors, regulators, and white-collar defense attorneys, this Article is the first to provide a realistic presentation of how parallel enforcement works in practice. It builds on this descriptive account to offer an explanatory theory of the pressures and incentives that shape parallel enforcement. The Article shows that, in parallel proceedings, criminal prosecutors lack the gatekeeping monopoly that traditionally defines their relationships with investigating agents. This constitutive feature of parallel proceedings explains many of the institutional design choices that shape our regimes of overlapping civil and criminal enforcement.

INTRODUCTION

Prosecutors and civil regulators routinely combine their resources to pursue concurrent actions against the same defendant in a variety of domains: financial regulation,¹ immigration control,² environmental law,³ tax

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* Professor of Law, SUNY Buffalo Law School; Assistant Federal Defender, Federal Defenders of New York. For feedback at various stages of this project, I am grateful to Christine Bartholomew, Anya Bernstein, Guyora Binder, Luis Chiesa, Matthew Dimick, Russell Gold, Jonathan Manes, Sandra Mayson, Errol Meidinger, Ion Meyn, John Rappaport, Daniel Richman, Jack Schlegel, Christine Varnado, Jim Wooten, participants of Crimfest 2016, and workshop participants at SUNY Buffalo Law School. Christopher DeSanto provided excellent research assistance. I am especially grateful to those I interviewed for their time, insights, and confidence. Because of the sensitive nature of this topic and with respect for the privacy of interviewees, their identities will remain anonymous. I conducted all interviews for and completed a substantive draft of this Article before being offered a position at the Federal Defenders of New York; the views expressed here are my own and not the views of that office. Research for this article was made possible by the generous support of the Baldy Center for Law and Social Policy.

1. See Speech, Mary Jo White, Chair, SEC, All-Encompassing Enforcement: The Robust Use of Civil and Criminal Actions to Police the Markets (Mar. 31, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370541342996#_ftnref4 ("In the vast majority of criminal securities fraud prosecutions, the SEC's Enforcement staff works closely with the criminal authorities, whether it be DOJ, the FBI, or state and local law enforcement.").

enforcement,⁴ and others. To agency outsiders, the mechanics of this practice—known as parallel enforcement—are dimly understood. Indeed, the term “parallel enforcement” itself is a misnomer that contributes to the public’s misunderstanding of inter-agency practices. Lawyers and litigators use the term to refer to cases that criminal and civil regulatory agencies pursue concurrently.⁵ Contrary to what the term “parallel” suggests, however, prosecutors and regulators do not bring these cases “side by side” without crossing investigative paths.⁶ Instead, to the fullest extent the law permits—and the law permits a great deal⁷—these actors coordinate closely to maximize their strategic advantages over defendants.

Consider, for example, the civil and criminal insider trading cases against SAC Capital’s Mathew Martoma. The district court’s decision in

2. See, e.g., Enhancing Public Safety in the Interior of the United States § 11, Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> (“The Attorney General and the Secretary [of Homeland Security] shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.”).

3. See Timothy J. Chapman, *Parallel Proceedings in Federal Environmental Crimes Cases*, U.S. ATT’YS’ BULL., July 2012, at 31 (“Department of Justice . . . litigating components are obligated to pursue parallel proceedings under appropriate circumstances.”).

4. See, e.g., I.R.S. POLICY STATEMENT 4-26, IRM 1.2.13.1.11 (Oct. 5, 2005) (encouraging intra-agency coordination of civil and criminal proceedings).

5. See, e.g., Eli Ewing, Comment, *Too Close for Comfort: United States v. Stringer and United States v. Scrushy Impose a Stricter Standard on SEC/DOJ Parallel Proceedings*, 25 YALE L. & POL’Y REV. 217, 217 (2006) (defining parallel proceedings as “involv[ing] concurrent investigations of the same conduct by different government agencies, as an efficient means of law enforcement”); Charlotte Taylor, *The Rise of Parallel Proceedings in Health Care Fraud Investigations: How to Tell When You’re a Target*, JONES DAY (Apr. 2014), <http://www.jonesday.com/the-rise-of-parallel-proceedings-in-health-care-fraud-investigations-how-to-tell-when-youre-a-target/> (defining “parallel proceedings” as “a shorthand term for simultaneous criminal, civil and administrative investigations”). As it is frequently used by litigators and regulators, the term is under-inclusive in that it often does not refer to any *private* civil lawsuits that are filed concurrently with a criminal or regulatory action. Cf. Jefferson M. Gray, *Potential Ethical Issues in Parallel Proceedings*, U.S. ATT’YS’ BULL., May 2007, at 42, <https://www.justice.gov/sites/default/files/usao/legacy/2008/07/29/usab5503.pdf> (defining “parallel proceedings” as “matters opened as possible federal criminal cases” that are “under active investigation by federal or state regulatory agencies, or even by private civil counsel”). The risk of such private lawsuits is one of the most pressing concerns of the white-collar defense attorneys with whom I spoke. See also Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 796 (2015) (“Unlike government enforcement, which wavers by administrative interest, politics, and economic resources, private class actions have the potential for more constant regulatory oversight . . .” (footnote omitted)). A full examination of this issue, however, is beyond the scope of this Article.

6. *Parallel*, ENGLISH: OXFORD LIVING DICTIONARIES <https://en.oxforddictionaries.com/definition/parallel> (last visited Apr. 30, 2018) (defining “parallel”).

7. See *infra* Part I.A.

*United States v. Martoma*⁸ offers a rare, though incomplete glimpse at the degree of coordination involved in parallel proceedings.⁹ Martoma's case is unusual in that he opted for a criminal trial, but the structure of the government's coordinated investigation was not exceptional.¹⁰ By describing the trajectory of this investigation, the court revealed some of the hallmarks of contemporary parallel proceedings: information-sharing, jointly conducted witness interviews, investigation through means other than confidential grand jury subpoenas, and other forms of close coordination.¹¹

The civil and criminal cases against Martoma were tightly coordinated and devastatingly effective.¹² The Securities and Exchange Commission ("SEC") traced suspicious trades to Martoma and collaborated with Federal Bureau of Investigation ("FBI") agents to build "parallel" civil and criminal cases against him.¹³ As the investigation proceeded, the SEC shared every document it obtained through civil discovery from SAC Capital with prosecutors in the U.S. Attorney's Office for the Southern District of New York ("SDNY").¹⁴ SEC attorneys and SDNY prosecutors also jointly conducted twenty interviews of a dozen witnesses.¹⁵ In advance of a crucial deposition in the civil case, SEC attorneys met with an SDNY prosecutor to discuss the evidence against the deponent.¹⁶ SEC attorneys called this prosecutor during a break in the deposition to discuss the testimony, and they updated the prosecutor after the deposition concluded.¹⁷ The U.S. Attorney's Office

8. 990 F. Supp. 2d 458 (S.D.N.Y. 2014). The case concerned Martoma's use of nonpublic information about a clinical drug trial and appears to have been part of the government's unsuccessful quest to bring criminal charges against billionaire SAC Capital manager, Steven A. Cohen. See Patrick Radden Keefe, *The Empire of Edge*, NEW YORKER (Oct. 13, 2014), <http://www.newyorker.com/magazine/2014/10/13/empire-edge>.

9. See *Martoma*, 990 F. Supp. 2d at 460–62.

10. See *infra* Part I.A.

11. See *infra* Part II.B–C.

12. The parallel proceedings resulted in Martoma's conviction and sentence of nine years imprisonment and a \$600 million SEC settlement with a wholly owned subsidiary of SAC Capital. Press Release, SEC, CR Intrinsic Agrees to Pay More than \$600 Million in Largest-Ever Settlement for Insider Trading Case (Mar. 15, 2013), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513308>; Matthew Goldstein, *Martoma, SAC Capital Ex-Trader, Gets 9 Years in Prison*, N.Y. TIMES (Sept. 8, 2014), <https://dealbook.nytimes.com/2014/09/08/hours-before-sentencing-u-s-judge-says-cohen-trades-should-count-against-martoma/>.

13. See Keefe, *supra* note 8.

14. See *Martoma*, 990 F. Supp. 2d at 461.

15. See *id.*

16. *Id.*

17. *Id.*

then used this information to prepare for one of its witness interviews the following day.¹⁸

While *Martoma* partially demystifies the mechanics of parallel enforcement,¹⁹ larger questions remain unanswered. What are the pressures and incentives that motivate prosecutors and civil enforcers to coordinate, or that deter them from doing so? How do coordination choices influence the organizational design of civil and criminal enforcement agencies? And what practical constraints, if any, does the doctrine governing parallel proceedings impose on the government?

Strangely, scholars have failed to appreciate the need to answer these questions. To say that we need a *new* way of thinking about parallel enforcement is an understatement. We need *a* way of thinking about it.²⁰ This Article is the first to offer one. It uses original interviews, as well as publicly available sources, to describe everyday enforcement practices and large-scale institutional structures that scholars have left unexamined. Building upon this descriptive account, the Article presents a theoretical framework for explaining how prosecutors and regulators decide whether to coordinate, and how these choices influence larger agency decisions concerning hiring, training, operational hierarchy, and more.

This framework reveals that, contrary to received assumptions, the enforcement choices of prosecutors and civil regulators are deeply interdependent. The traditional story about parallel enforcement is one of static institutional competences. Prosecutors have investigative expertise and trial experience that civil enforcers lack.²¹ Civil regulators, meanwhile, possess granular knowledge of complex regulatory regimes that generalist prosecutors cannot hope to (and do not care to) match.²² This dynamic makes prosecutors and regulators susceptible to different sorts of enforcement pathologies. Prosecutors will zealously prosecute (and grandstand about) regulatory cases that experts regard as trivial or unjust.²³ Regulators, by

18. *Id.* This investigation led the district court to conclude that the coordination between the SEC and federal prosecutors was sufficient to require the U.S. Attorney's Office to disclose any exculpatory documents in the SEC's possession. *See id.* at 462.

19. *See also* United States v. Gupta, 848 F. Supp. 2d 491, 492–94, 497 (S.D.N.Y. 2012) (describing parallel investigation practices and holding that the SEC was part of a joint investigation for *Brady* purposes).

20. *Cf.* Brandon L. Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM 159 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (explaining “we know few details about the precise nature” of collaboration between prosecutors and regulators in the area of financial regulation and stating, “[r]elationships between prosecutors and regulators should be studied further”).

21. *See infra* notes 387–388 and accompanying text.

22. *See infra* notes 414–415 and accompanying text.

23. *Cf.* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 33 (1997). Lynch queries,

contrast, will prioritize easily settled cases while failing to adequately sanction misconduct that outsiders justifiably deem outrageous.²⁴

This story contains much truth, but it is woefully incomplete. In determining whether to coordinate on parallel proceedings, the relevant inquiry is not simply whether agency *X* possesses more expertise than agency *Y*. One must also consider whether agency *X* possesses a sufficient level of expertise to pursue its enforcement goals unilaterally. A prosecutor's office can develop the substantive expertise necessary to unilaterally prosecute regulatory crimes, and a civil enforcement agency can build litigation and investigation expertise sufficient to pursue important cases on its own. Comparative transaction costs influence the decision whether to invest in such expertise. A prosecutor may, for example, be influenced by the risk that a civil enforcement agency will inadvertently create documents that are potentially exculpatory and thus discoverable.²⁵ This risk—which this Article is the first to identify and describe—can generate tension between prosecutors and civil regulators and may even tempt prosecutors to decline cases referred from offices they deem problematic.²⁶

Borrowing a concept from institutional economics, this Article contends that the choices of prosecutors and regulators about whether to engage in parallel enforcement are analogous to the “make-or-buy” decisions that shape the contractual relationships between private firms.²⁷ In traditional, standalone criminal cases, prosecutors and investigators are bilaterally de-

Why leave significant aspects of securities, environmental or tax enforcement, for example, to generalist criminal prosecutors, who usually know little about the technicalities of the regulatory regime, and who may for that reason underenforce significant norms whose importance is not apparent to non-experts, or over-enthusiastically pursue claims that appear quixotic, excessive, or even perverse to specialized agencies?

Id.

24. See, e.g., Matt Taibbi, *The Great American Bubble Machine*, ROLLING STONE (Apr. 5, 2010), <http://www.rollingstone.com/politics/news/the-great-american-bubble-machine-20100405>. Taibbi argues,

If you laddered and spun 50 Internet IPOs that went bust within a year, so what? By the time the Securities and Exchange Commission got around to fining your firm \$110 million, the yacht you bought with your IPO bonuses was already six years old. Besides, you were probably out of Goldman by then, running the U.S. Treasury or maybe the state of New Jersey.

Id. For a similar (if less vituperative) critique from a relative insider, see Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> (observing that budget cuts have recently “led the SEC enforcement staff to focus on the smaller, easily resolved cases that will beef up their statistics when they go to Congress begging for money”).

25. Several interviewees described this as “creating *Brady* material.” See *infra* notes 355–371 and accompanying text.

26. See *infra* notes 372–384 and accompanying text.

27. See *infra* notes 209–213 and accompanying text.

pendent: prosecutors must rely on investigators to build a case, and investigators must rely on prosecutors to litigate those cases.²⁸ In parallel proceedings, by contrast, prosecutors and regulators may choose whether to work together. If the transaction costs of coordinating are too steep, an enforcement agency can redeploy its resources toward collaborating with a different agency—what I call “buying” that agency’s expertise. Alternatively, the agency can invest those resources in developing the capacities necessary to “make” its own cases. Over time, an agency will reallocate its resources and terminate an enforcement relationship that generates unacceptable transaction costs.²⁹ Thus, the iterated decisions of individual prosecutors and regulators, in specific cases, serve over time to motivate agency investment choices and, ultimately, shape the architecture of parallel enforcement.

This framework offers new insights into the coordination strategies of prosecutors and regulators. It reveals, for example, that agencies will often face a counterintuitive choice between investing in its own capacities and helping to strengthen the capacities of another agency. To illustrate: in the wake of the Bernie Madoff scandal, the SEC made significant reforms to its Enforcement Division.³⁰ As an outgrowth of these reforms, the SEC invested in building the capacity of various U.S. Attorney’s Offices in order to expand the collaborative options available to the agency on parallel enforcement matters.³¹ That is, the SEC chose to invest *its* resources into building the capabilities of *another* agency. This strategic possibility stands in tension with the requirement that agencies measure their success, and make funding requests to Congress, on the basis of “objective, quantifiable” performance metrics.³² As the SEC’s post-Madoff reforms demonstrate, an agency’s improved performance can sometimes be traced to the decisions of another agency. Measuring an agency’s performance in isolation obscures this reality. It may also create perverse incentives for one agency to avoid investing in another’s success although doing so would redound to the benefit of both agencies in the long run.³³

To develop the Article, I conducted more than twenty interviews with current and former prosecutors (both local and federal), white-collar defense attorneys, and enforcement attorneys at the SEC and Commodity Fu-

28. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758–78 (2003).

29. See *infra* notes 218–220 and accompanying text.

30. See *infra* Part III.A.

31. See *infra* Part III.B.

32. 31 U.S.C. § 1115(b)(2) (2012).

33. Cf. Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1677 (2011) (discussing the potential of poorly designed performance metrics to create perverse agency incentives).

tures Trading Commission (“CFTC”).³⁴ Many of these interviewees have occupied high-level positions in their respective agencies. Others gained salient experience in mid-level enforcement positions before building successful careers in the private sector. Most of the interviewees requested anonymity as a condition of having their views discussed in this Article.³⁵ Sensitive to the concerns this might raise, I use publicly available sources (including congressional testimony and other agency statements) to support claims about institutional reforms that have previously gone unexamined in legal scholarship. I also have refrained from repeating any sensitive or surprising information about prosecutorial or regulatory behavior that I was not able to corroborate with at least two sources. These interviews provide texture and support for my core theoretical claims, but I also support these claims using more conventional sources and evidence.³⁶

This Article has five Parts. Part I describes the formal and informal policies that structure contemporary parallel proceedings and assesses the doctrine that governs—or fails to govern—those policies. Part II illustrates the need for an accurate descriptive theory of parallel enforcement by identifying two systemic normative problems that the practice poses. From a regulatory perspective, parallel enforcement may distort the goals of civil enforcers by incentivizing them to prioritize cases that are not consistent with the distinct goals of civil regulatory enforcement. From a due process standpoint, parallel enforcement deepens information asymmetries between defendants and prosecutors, and can generate new asymmetries between defendants and civil enforcers.

Because courts are reluctant to use doctrine to regulate coordination between prosecutors and civil regulators, any effective institutional-level reforms of parallel enforcement will require a sound descriptive theory of the type this Article offers. The theoretical core of this Article is therefore Part III, which presents the make-or-buy framework and fully describes the considerations that shape prosecutors and civil regulators’ coordination decisions. Part IV uses the make-or-buy framework to analyze specific institutional reforms at the SEC and the CFTC, and in doing so highlights the interdependence of agencies’ structural enforcement choices.

Part V applies the make-or-buy framework to analyze a new—and heretofore unexamined—form of inter-agency coordination. Specifically, it

34. I interviewed ten individuals, most of whom generously granted me multiple interviews.

35. To more fully protect the anonymity of those who made this request, I have chosen to maintain the anonymity of every interviewee. After each interview, I received confirmation from the interviewees that my characterization of their views—relayed using language largely identical to that used in this Article—was accurate.

36. For a model of and precedent for this methodological approach in legal scholarship, see David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 519–20 (2013).

examines agreements that the Department of Justice (“DOJ”) has reached with the SEC and CFTC to embed FBI agents and analysts within those regulatory agencies. These “embed programs” greatly expand the data and information that the participating agencies are legally able to share with one another. By doing so, the programs raise due process questions that have not yet been addressed—and perhaps cannot be addressed—by case law. Any serious normative analysis of these programs requires a careful analysis of the incentives and pressures that have shaped them. The make-or-buy framework facilitates such analysis.

I. CONSTITUTIVE FEATURES OF PARALLEL PROCEEDINGS

The official policy statements of the DOJ and several civil regulatory agencies suggest that the criminal and civil enforcement coordination process is formalized and tightly monitored.³⁷ In reality, parallel enforcement involves close and informal collaboration at every stage of the criminal and civil proceedings. This Part describes these methods of formal and informal coordination and examines the doctrinal framework that permits them. Any efforts to reform this doctrine, it argues, are likely to be futile and perhaps undesirable.

A. *Formal and Informal Coordination Mechanisms*

It is difficult to overstate the zeal with which the DOJ and regulatory agencies have embraced parallel enforcement as a way of facilitating their enforcement objectives.³⁸ The DOJ and many other regulatory agencies ex-

37. See, e.g., *infra* notes 42-50 and accompanying text.

38. See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 253–54 (2015). This claim begs the question, what are those enforcement objectives? In other words, what are this Article’s assumptions concerning what civil and criminal enforcement organizations seek to “maximize”? See also Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 16 n.80 (2015) (noting the scholarly debate on “what prosecutors ‘maximize’” and citing sources contributing to it). With respect to this question, I will adopt the pragmatic assumption that both civil and criminal enforcement agencies seek to maximize some combination of the number and importance of the convictions and favorable judgments they obtain. Whether agencies are motivated by public policy goals (for example, retribution and deterrence), prestige, or budget maximization, their incentives will steer them toward this particular set of enforcement outcomes. I further assume a rough alignment between these organizational goals and the incentives of individual enforcers. For literature supporting defending these assumptions concerning prosecutors and their institutions, see, for example, *id.* at 32 (“To the extent [the prosecutor] wishes to improve her reputation and chances at promotion, she must maximize her overall conviction rate and her average length of criminal sentence.”); Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 403 (2013) (“[P]rosecutors have their own incentives and ambitions. They tend to use their leverage to move cases through the system quickly and to maximize convictions, thus promoting deterrence and incapacitation.”); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 967 (1997) (“Whatever prosecutors’ private motivations are, however, the need to maximize convictions will

PLICITLY prioritized the use of parallel proceedings and adopted policy statements to formalize the coordination of criminal and civil regulators. If one were to describe the structure of parallel proceedings using only agency policy statements, however, the picture would be a distorted one.³⁹ Accordingly, an accurate account of parallel proceedings requires an examination of both the formal and informal policies that facilitate both intra- and inter-agency coordination between prosecutors and civil regulators.

First, it is clear from formal agency policies that parallel proceedings are central to the enforcement aims of the civil and criminal regulators. The SEC, for example, includes a performance metric in its annual report to Congress on the criminal activities related to conduct under investigation by the agency.⁴⁰ The CFTC likewise advertises the extent to which it cooperates with criminal authorities on its enforcement matters.⁴¹ Perhaps the most revealing institutional commitment to parallel enforcement, however, is the DOJ's 2012 policy statement—which took the form of a memo from Attorney General Eric Holder (the “Holder Memo”)—governing parallel proceedings.⁴² The goal of this policy statement was to “update and further

be an inescapable environmental constraint.”). For literature supporting the assumptions as they apply to regulatory agencies and their staff, see also Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 875–86 (2014) (describing civil enforcers' reputational incentives to seek out and publicize large monetary judgments); David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 549 (2013) (suggesting “the incentives of reputation, effectiveness, and mission fulfillment” may explain his findings that, for 152 former Southern District of New York prosecutors, there is no evidence that those who entered the private sector had less lucrative employment opportunities if they aggressively pursued convictions than if they did not do so).

39. For other examples of formalized criminal referral policies, see U.S. FOOD & DRUG ADMIN., REGULATORY PROCEDURES MANUAL § 6-5-2, <http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176738.htm#SUB6-5-2> (providing that the FDA's Office of Criminal Investigations “is responsible for reviewing all matters in FDA for which a criminal investigation is recommended,” and “FDA personnel must refer all criminal matters, regardless of their complexity or breadth, to OCI,” and “[d]istrict management must communicate with the local OCI office before pursuing any criminal matter”); Memorandum from Granta Y. Nakayama, Assistant Adm'r, EPA Office of Env't & Compliance Assurance, to EPA Regional Admins. et al. 7 (Sept. 24, 2007), <https://www.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf> [hereinafter EPA Parallel Proceedings Memo]; see also Garrett, *supra* note 20, at 161–63 (discussing the policies of the EPA and the IRS).

40. See SEC, CONGRESSIONAL BUDGET JUSTIFICATION, FISCAL YEAR 2017 ANNUAL PERFORMANCE PLAN & FISCAL YEAR 2015 ANNUAL PERFORMANCE REPORT 41 (2016), <https://www.sec.gov/about/reports/secfy17congbudgjust.pdf>.

41. See, e.g., Press Release, CFTC, CFTC Releases Annual Enforcement Results for Fiscal Year 2016 (Nov. 21, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7488-16> (“[T]he [Enforcement] Division continued and intensified its already close cooperation with the criminal authorities in pursuing criminal sanctions, including prison time for culpable individuals, for willful violations of the Commodity Exchange Act.”).

42. See U.S. DEP'T OF JUSTICE, OFFICE OF THE UNITED STATES ATTORNEYS, TAX RESOURCE MANUAL § 22, <https://www.justice.gov/usam/tax-resource-manual-22-parallel->

strengthen” the degree to which the “Department[’s] prosecutors and civil attorneys coordinate together and with agency attorneys.”⁴³ Accordingly, the Holder Memo encourages aggressive collaboration between prosecutors and civil regulators both within and outside the DOJ.⁴⁴

The Holder Memo encourages DOJ attorneys to coordinate at every stage of a matter that has the potential to generate both civil and criminal liability.⁴⁵ To this end the Holder Memo directs every U.S. Attorney’s Office and litigating component of Main Justice to “have policies and procedures for early and appropriate coordination of the government’s criminal, civil, regulatory and administrative remedies.”⁴⁶ This imperative has operational implications for both criminal and civil DOJ lawyers.⁴⁷ Specifically, the Holder Memo instructs the U.S. Attorney’s Office and the litigating unit within Main Justice to adopt policies concerning how parallel enforcement goals shape the selection (“intake”), investigation, and resolution of cases.⁴⁸ With respect to case selection, civil and criminal authorities within the DOJ must coordinate at early stages to determine whether both civil and criminal

proceedings; Memorandum from the Attorney General Eric M. Holder on Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings to all U.S. Attorneys et al., in U.S. Attorneys’ Organization & Functions Manual § 27 (Jan. 30, 2012), <https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings/> [hereinafter Holder Memo]. The Holder Memo is the sole policy statement governing the DOJ’s parallel enforcement practices except with respect to tax matters. The United States Attorney Manual includes relatively detailed guidance for parallel proceedings involving the IRS, which is constrained by rules governing the confidentiality of tax information. Cf. Garrett, *supra* note 20, at 163 (discussing IRS parallel proceedings rules that exist “in part because it must follow certain rules regarding confidentiality of tax return information”).

43. Holder Memo, *supra* note 42.

44. With respect to coordination between civil and criminal DOJ attorneys, the Holder Memo formalizes protocols for a type of intra-agency coordination of the sort that Professor Jennifer Nou has recently analyzed. See generally Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015).

45. See Holder Memo, *supra* note 42 (instructing DOJ attorneys, both criminal and civil, to “timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and by permissible law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings”).

46. *Id.* The U.S. Attorneys’ Manual offers little guidance about the criminal referral process other than requiring that “[w]henver an attorney for the government declines to commence or recommend federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are also reflected in the office files.” U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.270(A), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.270>.

47. The U.S. Attorney’s Office policies are not publicly available. To the extent these policies include rigid guidance about initiating parallel proceedings, however, they would contrast sharply with the informal process that was described by some of the former federal prosecutors whom I interviewed. Interview with anonymous source 1, DOJ [hereinafter I-1]; Interview with anonymous source 4, DOJ [hereinafter I-4].

48. Holder Memo, *supra* note 42.

prosecution is appropriate.⁴⁹ As to investigation, the memo urges prosecutors to “us[e] investigative means other than grand jury subpoenas for documents or witness testimony.”⁵⁰ This type of criminal investigation “outside the grand jury”—as practitioners call it—enables prosecutors to share information with regulators that they would otherwise be unable to disclose without judicial oversight.⁵¹ Civil attorneys, for their part, are instructed to “apprise prosecutors of discovery obtained in civil, regulatory, and administrative actions that could be material to criminal investigations.”⁵² Finally, the Holder Memo advises DOJ attorneys to “assess the potential impact” of any case resolution (including declination, indictment, guilty plea, sentencing, and civil settlement) “on criminal, civil, regulatory, and administrative proceedings to the extent appropriate.”⁵³

The DOJ’s policy statement might lead one to conclude that prosecutors and regulators communicate through formal channels and at arm’s length. In reality, however, there is a large set of informal norms that govern the relationships between prosecutors and civil regulators. To be clear, the relationships between regulators and prosecutors vary even among agencies that prioritize parallel enforcement.⁵⁴ The Internal Revenue Service (“IRS”), for example, has formal procedures for referring matters to criminal authorities outside the agency.⁵⁵ Within these parameters, however, the agency has a policy designed to encourage parallel civil and criminal investigations *within* the agency.⁵⁶ This policy requires the “civil and criminal functions of the IRS” to coordinate at early stages of a case to determine whether parallel proceedings are appropriate.⁵⁷ Although an Inspector General Report found institutional deficiencies with respect to how this

49. *Id.* (providing “[a] case referral from any source . . . is a referral for all purposes”).

50. *Id.*

51. *See infra* notes 286–288 and accompanying text.

52. Holder Memo, *supra* note 42.

53. *Id.*

54. *See* Garrett, *supra* note 20, at 162 (observing “the degree of collaboration [between agencies and prosecutors] does not lend itself to generalization but depends very much on which federal agency is involved, in which type of matter, and with which prosecutors”).

55. *Id.* at 163 (“[T]he IRS has the most formalized procedures for investigation and referral of criminal matters, in part because it must follow certain rules regarding confidentiality of tax return information.”). For example, the IRS lacks the statutory authority to settle a civil case after it has referred the matter to the Department of Justice. *See* 26 U.S.C. § 7122(a) (2012); *see also* United States v. LaSalle Nat’l Bank, 437 U.S. 298, 312 (1978).

56. I.R.S., IRM § 1.2.13.1.11, POLICY STATEMENT 4-26 (Oct. 5, 2005); *see* INSPECTOR GEN. FOR TAX ADMIN., DEP’T OF TREASURY, THE PARALLEL INVESTIGATIONS PROCESS NEEDS IMPROVEMENT (2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201330114fr.html> (reporting that I.R.S. Policy Statement 4-26 “encourages civil enforcement actions in collaboration with criminal investigations when abusive tax promotions are ongoing and harm to the Government is significant”).

57. *See* I.R.S., *supra* note 56, at § 1.2.13.1.11(11).

parallel investigation policy was implemented, it nonetheless reported that there was “[f]requent informal communication between civil examiners and special agents” during the course of their investigations.⁵⁸

There is also some variation in the formality of institutional arrangements between agencies with respect to parallel proceedings. Some agencies have entered into memoranda of understanding (“MoUs”) agreeing to coordinate enforcement efforts,⁵⁹ but many have not. Other agencies have policy guidelines that encourage the use of parallel proceedings and recommend certain discovery practices in connection with them.⁶⁰ But such policies are non-binding and sometimes blithely disregarded.⁶¹ As a practical matter, much of the coordination between individual civil and criminal enforcers is largely informal.⁶²

In these agencies, the formal policies governing parallel proceedings sometimes obscure the actual breadth and depth of day-to-day collaboration between prosecutors and regulators. In the SEC’s case, for example, there is a particularly pronounced gap between the formality of its regulations and the informality of its practices. The agency makes use of an “informal referral process” that is—withstanding what its name might suggest—highly rule-governed.⁶³ Under the informal process, senior officers at the SEC may authorize staff to discuss nonpublic investigations with prosecutors, staff of self-regulatory organizations, and state and local officials.⁶⁴ The SEC Enforcement Manual enumerates some considerations that should

58. See INSPECTOR GEN. FOR TAX ADMIN., *supra* note 56, at 8.

59. For example, the IRS and the Departments of Labor and Treasury have “entered into a memorandum of understanding that that, among other things, established a mechanism for coordinating enforcement and avoiding duplication of effort for shared jurisdiction.” 2011-42 I.R.B. 548.

60. See, e.g., Holder Memo, *supra* note 42; SEC, Enforcement Manual § 5.2.1 (Nov. 28, 2017), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

61. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486–87 (1996) (“Although nominally subordinate to the Attorney General, U.S. Attorneys enjoy a strong history and culture of independence; for many, disregard of the *United States Attorneys’ Manual* . . . is a source of pride.”). But see Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1440–43 (2008) (describing Main Justice’s efforts to control the independence of U. S. Attorneys’ Offices).

62. Interview with anonymous source 2 [hereinafter I-2].

63. The term “informal” is used to distinguish the process from a formal referral, where staff prepares a report to the Commission, which then decides whether to refer the matter to the Department of Justice for prosecution. See 17 C.F.R. § 202.5(b) (2017); see THE SECURITIES ENFORCEMENT MANUAL: TACTICS AND STRATEGIES 394 (Michael J. Missal & Richard M. Phillips eds., 2007). However, this cumbersome process appears to have fallen into disuse. See *id.*; Garrett, *supra* note 20, at 163; see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-385, MUTUAL FUND TRADING ABUSES I, 6 (2005) (reporting that the formal referral process had not been used for over twenty years).

64. 17 C.F.R. § 203.2 (2017) (permitting officers “at the level of Assistant Director or higher, and officials in Regional Offices at the level of Assistant Regional Director or higher” to make such authorizations).

inform a staff attorney's decision whether to seek such authorization, including "the egregiousness of the conduct, whether recidivism is a factor, and whether the involvement of criminal authorities will provide additional meaningful protection to investors."⁶⁵ Section 24(c) of the Exchange Act, however, permits the SEC to disclose information to prosecutors and others outside the agency only pursuant to a written "access request."⁶⁶ The SEC Enforcement Manual accordingly directs enforcement staff to "consult with their direct supervisors" and obtain approval from a senior officer if they are handling a matter "that appears to warrant an informal referral."⁶⁷ Once such approval is given, staff "may notify the appropriate criminal authorities" and "invite [them] to make an access request."⁶⁸ The Manual further instructs that, once a referral has been made, "staff is encouraged and expected to maintain periodic communication with the criminal authorities concerning the status of any criminal investigation."⁶⁹

To the uninitiated, these polices might suggest that SEC attorneys and prosecutors operate at arm's length in the typical parallel enforcement case. In reality, one former senior officer at the SEC indicated that he was surprised by the informality of the referral process when he joined the agency.⁷⁰ This officer described two informal processes for transmitting information to criminal authorities during his tenure. First, in an effort to obtain high-value cases, some U.S. Attorneys would have regular meetings with senior officials in SEC Regional Offices and SEC Headquarters to learn about potentially interesting cases. Based on these conversations, a U.S. Attorney might make a formal access request for information that they found promising.⁷¹ Second, the former senior official at the SEC described a relatively decentralized process by which SEC staff attorneys could solicit the interest of Assistant U.S. Attorneys in a particular case.⁷² If a SEC staff attorney decided that a target possessed the requisite level of criminal intent, the staff attorney was effectively empowered to reach out to an Assis-

65. SEC, Enforcement Manual § 5.6.1. The Manual also instructs staff to "consider jurisdictional factors, such as where the conduct occurred or the domicile of the possible violators or victims." *Id.*

66. *See* SEC, *supra* note 60, § 5.1.2 (describing the access request program); 15 U.S.C. § 78x (2012); 17 C.F.R. § 240.24c-1 (2017).

67. SEC, Enforcement Manual, § 5.6.1.

68. *Id.*

69. *Id.*

70. I-2; Interview with anonymous source 5 [hereinafter I-5]; Interview with anonymous source 9 [hereinafter I-9].

71. I-2.

72. I-2.

tant U.S. Attorney and say, “I’ve got something interesting.”⁷³ In either of these cases, a federal prosecutor’s access request was routinely granted.⁷⁴

Attorneys with experience at the CFTC describe a similar process by which the agency would transmit information to federal prosecutors. Moreover, CFTC attorneys coordinate closely with criminal authorities in advance of making a referral in order to gauge their potential interest in a case. Like the SEC, the CFTC requires a written access request prior to sharing investigative files with prosecutors.⁷⁵ Within the agency, an Office of Cooperative Enforcement housed within the Enforcement Division is tasked with “ensuring that enforcement of the commodity futures laws is addressed through civil, criminal, or administrative actions by state and Federal agencies or branches of government whenever possible.”⁷⁶ The Director of Enforcement, however, holds final authority over the CFTC Enforcement Division’s referral decisions.⁷⁷ As an attorney familiar with the CFTC’s enforcement practices explained, however, there is often informal communication between the CFTC and a criminal authority in advance of deciding whether to refer a case.⁷⁸ This suggests that, in both the CFTC and the SEC, prosecutors and regulators collaborate closely and informally at every stage of a parallel proceeding.

B. Doctrinal Non-Constraint

The informality of parallel proceedings enables prosecutors to coordinate in ways that enable them to circumvent the procedural regimes designed to constrain them.⁷⁹ Courts have been reluctant, however, to regu-

73. I-2.

74. I-2.

75. 17 C.F.R. § 140.73(a) (2017). The CFTC’s implementing regulations, however, give the Commission broad authority to share investigative files and other information with prosecutors outside the agency. See 17 C.F.R. § 11.3 (2017) (authorizing staff to share investigative material outside the agency if “the Commission directs or authorizes the public disclosure of the investigation”).

76. *Oversight of the Swaps and Futures Markets: Recent Events and Impending Regulatory Reforms: Hearing Before the H. Comm. on Agriculture*, 112th Cong. 111 (2012) (statement of Hon. Gary Gensler, Chairman, Commodity Futures Trading Comm’n); see also Press Release, CFTC, CFTC’s Division of Enforcement Creates Office of Cooperative Enforcement (Oct. 23, 2002), <http://www.cftc.gov/opa/enf02/opa4715-02.htm> (stating the Office of Cooperative Enforcement is charged with the “task of reaching out to financial regulators on the federal and state level, to ensure that they are coordinating investigations and prosecutions of commodities violators, and to ensure that the government addresses misconduct whenever appropriate”).

77. Interview with anonymous source 8 [hereinafter I-8].

78. *Id.*; Interview with anonymous source 7 [hereinafter I-7].

79. Scholars have previously identified these due process problems without necessarily attributing them to the informality of inter-agency coordination in parallel proceedings. See, e.g., Renan, *supra* note 38, at 254–55 (analyzing how parallel proceedings “can enable criminal prosecutors . . . to collect information that the criminal investigators would not have been able to obtain” and “enable regulatory agencies to operate without the legal constraints that attach to their

late this coordination. The Supreme Court has recognized that, if conducted inappropriately or for the wrong reasons, parallel proceedings threaten due process.⁸⁰ In two respects, however, the case law that has developed around this recognition has created something of a Potemkin doctrine. First, the doctrine leaves unregulated many problematic practices. Second, the problem that the doctrine does regulate rarely occurs. Notwithstanding these concerns, there are both constitutional and prudential hurdles to using doctrine to address the due process harms that can arise from parallel proceedings.

1. *Unregulated Coordination*

Essentially, parallel proceedings are permissible unless the government is using the civil action solely to build its criminal case or otherwise acts in bad faith. Most federal regulatory agencies enjoy broad grants of statutory authority to share information with federal prosecutors, and are only limited in doing so by three relatively weak due process constraints. First, a federal agency cannot initiate a civil investigation for the sole purpose of assisting a federal prosecutor's criminal case.⁸¹ Second, civil regulators may not affirmatively lie to defendants about the involvement of criminal authorities.⁸² Third, civil regulators cannot make discovery requests that lack any plausible, independent basis other than to build a criminal case.⁸³

The foundations of this doctrine were established in *United States v. Kordel*,⁸⁴ in which the defendants argued that prosecutors and regulators violated their due process rights by using the civil discovery process to build a criminal case.⁸⁵ The Supreme Court rejected this argument, but suggested that parallel proceedings may violate due process when the Government (1) "has brought an action solely to obtain evidence for [a] criminal prosecution," (2) "has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution," or (3) "other special circumstances that might suggest the unconstitutionality or even the impropriety of this

ordinary policymaking tools"); see also Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1389–94 (1991); Shiv Narayan Persaud, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 U. DAYTON L. REV. 77, 80 (2013).

80. *United States v. Kordel*, 397 U.S. 1, 11 (1970).

81. *United States v. Stringer*, 535 F.3d 929, 938 (9th Cir. 2008).

82. *Id.* at 940.

83. *Id.* at 939.

84. 397 U.S. 1 (1970).

85. Specifically, the Food and Drug Administration requested that the DOJ initiate criminal proceedings against certain defendants and provided the DOJ with the targets' responses to a set of civil interrogatories. *Id.* at 4–5.

criminal prosecution.”⁸⁶ This language—particularly its invitation for courts to evaluate whether “special circumstances” led to a parallel proceeding violating due process—suggests that federal courts could monitor and aggressively regulate the coordination of prosecutors and civil regulators. In practice, however, appellate courts have been reluctant to dive into the bureaucratic intricacies of how agencies conduct parallel investigations.⁸⁷

For a short period, courts stood willing to discipline prosecutors who “hid[] behind” civil investigations to obtain evidence, avoid criminal discovery rules, or evade criminal procedure constraints.⁸⁸ In *United States v. Scrushy*,⁸⁹ for example, a federal district court suppressed an SEC deposition and dismissed the charges against a defendant because the government’s civil and criminal investigations had “improperly merged.”⁹⁰ In *Scrushy*, federal prosecutors requested that the SEC move the location of a civil deposition so that they could secure venue for a criminal prosecution based on any false statements that the defendant might make during his testimony.⁹¹ At the prosecutors’ request, the SEC attempted to bolster the criminal case by asking certain questions and refraining from asking others.⁹² The district court concluded that the prosecutors had “manipulated the simultaneous investigations for [their] own purposes,” and that the use of the deposition testimony would consequently “depart[] from the proper administration of justice.”⁹³ Similarly, in *United States v. Stringer*,⁹⁴ a district court dismissed the defendants’ indictments on due process grounds because the SEC had affirmatively concealed the U.S. Attorney’s involvement in a parallel investigation.⁹⁵ The *Stringer* investigation involved col-

86. *Id.* at 11–12. The Court also suggested that a due process violation might occur in “a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury.” *Id.* at 12.

87. *See, e.g.*, *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc). In *Dresser*, the Court of Appeals for the District of Columbia declined to regulate the sharing of information between the SEC and the Department of Justice. *Id.* at 1309. Endeavoring to quash an SEC subpoena, one of the defendants argued that the agency had “abuse[d] the civil discovery process . . . for the purpose of criminal discovery and infringe[d] the role of the grand jury in independently investigating allegations of criminal wrongdoing.” *Id.* at 1370. The court rejected the argument, and in doing so emphasized the SEC’s and DOJ’s broad statutory mandates to coordinate in order to effectively enforce federal securities laws. *Id.* at 1377.

88. *United States v. Stringer*, 408 F. Supp. 2d 1083, 1087 (D. Or. 2006), *rev’d in part, vacated in part*, *United States v. Stringer*, 535 F.3d 929 (9th Cir. 2008).

89. 366 F. Supp. 2d 1134 (N.D. Ala. 2005).

90. *Id.* at 1137.

91. *Id.* at 1138.

92. *Id.*

93. *Id.* at 1140. DOJ officials have criticized *Scrushy* for its reliance on case law that pre-dates *Kordel*, but the government’s appeal was dismissed after *Scrushy* was acquitted of all remaining counts of the indictment. *See* Gray, *supra* note 5, at 45.

94. 408 F. Supp. 2d 1083 (D. Or. 2006).

95. *Id.* at 1092–93.

laboration between the SEC and the U.S. Attorney's Office so close that prosecutors decided to forego any FBI investigation and instead relied exclusively on the SEC's work product.⁹⁶ The U.S. Attorney's Office chose not to "surface" at an early stage of the investigation so that they would not deter the defendants' cooperation with the SEC.⁹⁷ Rather than actively misleading the defendant, however, the SEC provided him with a form which advised that the SEC "often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors."⁹⁸ Notwithstanding this notice, the SEC instructed court reporters not to tell the defendants' attorneys about the U.S. Attorney's involvement and was evasive when asked whether one of the defendants was the target of a criminal investigation.⁹⁹ The district court concluded that this "strategy to conceal the criminal investigation from defendants was an abuse of the [discovery] process."¹⁰⁰

Ultimately, however, the Ninth Circuit reversed the decision in *Stringer*, and in doing so entrenched a regulatory structure that grants prosecutors and civil regulators substantial discretion to coordinate their investigations to best fit their needs.¹⁰¹ The court held that the government honored its obligations under *Kordel* notwithstanding the U.S. Attorney's Office's decision not to disclose its involvement in the case.¹⁰² In the court's view, the fact that the SEC began its civil investigation before reaching out to prosecutors tended to "negate any likelihood that the government began the civil investigation in bad faith."¹⁰³ Because the SEC interviewed defendants to support a "bona fide civil investigation," the court held that there was no due process violation.¹⁰⁴ Additionally, the court held that the SEC's routine provision of a form provided defendants with adequate notice that they might be exposed to criminal liability, and that the defendants therefore

96. *Id.* at 1085–86.

97. *Id.* at 1086.

98. SEC, FORM 1662, SUPPLEMENTAL INFORMATION FOR PERSONS REQUESTED TO SUPPLY INFORMATION VOLUNTARILY OR DIRECTED TO SUPPLY INFORMATION PURSUANT TO A COMMISSION SUBPOENA 3 (Aug. 2016), <https://www.sec.gov/about/forms/sec1662.pdf>; see *Stringer* 408 F. Supp. 2d at 1086–87. Other agencies provide similar warnings that the information they collect may be used in criminal or civil proceedings. See, e.g., EPA Parallel Proceedings Memo, *supra* note 39

("[A]lthough not a legal requirement, it is a common EPA practice to include a warning in EPA information requests that all information sought may be used in an administrative, civil judicial or criminal action.").

99. *Stringer*, 408 F. Supp. 2d at 1086–87.

100. *Id.* at 1088.

101. *United States v. Stringer*, 535 F.3d 929 (9th Cir. 2008).

102. *Id.* at 942.

103. *Id.* at 939.

104. *Id.*

waived their Fifth Amendment right against self-incrimination by testifying during the SEC investigation.¹⁰⁵

The court thus embraced a reading of *Kordel* according to which parallel proceedings are permissible as long as (1) the civil investigation is not a pretext for the criminal one and (2) the government does not affirmatively lie about a prosecutor's involvement. Specifically, *Stringer* ensures that civil regulators can guard against judicial intervention by providing defendants with a *pro forma* notification that the regulator may share the fruits of their discovery with criminal authorities. If the investigation was initiated by civil enforcers—thus ensuring that investigation was not brought “solely to obtain evidence” for a criminal case—the government is virtually ensured against reversal of a parallel investigation.¹⁰⁶ Thus, the Ninth Circuit's *Stringer* decision virtually eliminates the “special circumstances” inquiry that permitted courts to scrutinize the coordination practices of regulators and prosecutors.

2. Doctrinal Misfires

While leaving most aspects of the prosecutor-regulator relationship untouched, the doctrine governing parallel proceedings addresses due process problems that rarely arise. Specifically, the doctrine prevents regulators from either (1) making strategic choices solely to build a criminal case or (2) actively misleading a defendant about a prosecutor's involvement in an investigation. (As a helpful shorthand, one might call these “*Scrushy* violations.”).

The prosecutors and regulators I interviewed were familiar with their obligations under *Scrushy* and *Stringer* and took them seriously.¹⁰⁷ They also reported, however, that *Scrushy* violations are now virtually nonexistent and, at their worst, tended to occur in “outlying” U.S. Attorneys Offices that lacked substantial experience with parallel proceedings.¹⁰⁸

105. *Id.* at 937–39. The court also rejected the defendants' Fourth Amendment argument that their consent to participate in the civil investigation was obtained by trickery or deceit. *See id.* at 940–41.

106. *United States v. Kordel*, 397 U.S. 1, 11 (1970).

107. For example, parallel investigations are attractive to prosecutors seeking foreign records because civil regulators are able to gain access to such materials with far greater ease than their criminal counterparts. Specifically, civil regulators are able to obtain records from foreign regulatory authorities through the multilateral IOSCO Memorandum of Understanding. Thus, by cooperating with civil regulators, prosecutors can gain access to foreign records more efficiently than if they were required to obtain the records under the terms of a Mutual Legal Assistance Treaty (“MLAT”). Civil regulators are mindful, however, that they may only seek out records that they have an independent basis for acquiring. This constraint places regulators in the position of occasionally denying a prosecutor's request for documents that the agency has no independent basis for obtaining. Interview with anonymous source 14 [hereinafter I-14].

108. I-2; Interview with anonymous source 6 [hereinafter I-6]; I-7.

More experienced U.S. Attorneys Offices, by contrast, tend to rely on their own investigative resources rather than hide behind civil investigations.¹⁰⁹ These accounts seem credible given that none of the white-collar defense attorneys I interviewed were able to recall any case in which federal prosecutors or regulators behaved as they did in *Scrushy*.¹¹⁰

One might argue that the extreme rarity of *Scrushy* violations attests to the success of the doctrine.¹¹¹ Certainly, one should not discount the indirect ways in which *Scrushy* and *Stringer* may have influenced prosecutors and regulators. For example, the decisions led the DOJ to train both its own attorneys and outside regulators concerning their due process obligations in parallel proceedings.¹¹² The doctrine may have also reinforced the transparency norms that are a hallmark of the SEC's enforcement practice.¹¹³ For example, an experienced defense attorney reported that he was on the verge of settling a case with admissions with the SEC.¹¹⁴ Before the settle-

109. I-1; I-2; I-6.

110. I-2; I-6; Interview with anonymous source 11 [hereinafter I-11]. *Scrushy* problems also rarely appear in state courts. Attorneys certainly may encounter unprofessional behavior in state parallel proceedings, such as a prosecutor "showing up" unannounced at a civil settlement meeting. For example, one experienced New York litigator has encountered what he deems to be unprofessional behavior wherein a county prosecutor became involved in a state legislative ethics investigation involving a defendant who did not reside in the prosecutor's district and was not a member of the prosecutor's political party. Interview with anonymous source 10 [hereinafter I-10]. At the state and local level, however, authorities often lack the ability to benefit from hiding behind a civil investigation to the degree that federal prosecutors are able. In New York, for example, the evidentiary rules governing the grand jury prevent the use of hearsay evidence and thus tend to give defendants greater insight into the government's case. Moreover, the state lacks a false statements charge equivalent to 18 U.S.C. § 1001, which eliminates the incentive for civil regulators to ask questions in depositions that are designed to elicit such a charge. Thus, as an attorney with policymaking experience in the Manhattan District Attorney's Office observed, a county prosecutor in New York "doesn't have the toolkit" to use civil investigations to circumvent criminal procedure protections. Interview with anonymous source 3 [hereinafter I-3].

111. Cf. *Shelby City, v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

112. See Holder Memo, *supra* note 42, n.1 ("When conducting parallel investigations, Department attorneys should be mindful of arguments like those raised in *Stringer* and . . . *Scrushy* The Department has provided and will continue to provide training opportunities to assist civil and criminal attorneys, and joint training with agency attorneys, in evaluating these issues.").

113. I-2; see also Interview by William Thomas with Richard Walker, Former Dir., SEC, at 45 (Mar. 14, 2015), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cfl.rackcdn.com/collection/oral-histories/20150514_Walker_Richard_T.pdf (contrasting the institutional norms of the FBI and the SEC and observing: "The Commission was very restricted . . . in terms of the notifications it would have to give to people that it was seeking information from. Basically, 'I work for the Securities and Exchange Commission, the information you give me could be used for thousands of purposes.'").

114. That is, the attorney's client was willing to admit wrongdoing as part of the settlement agreement.

ment was finalized, however, the agency learned that a U.S. Attorney's Office was interested in picking up the case. The SEC called the attorney to advise him of the development and offered to end the settlement negotiations (and thereby put the case on hold). The attorney speculates that the SEC's candor was motivated by a cautious interpretation of the agency's obligations under *Stringer* and *Scrushy* (and perhaps also by a desire to preserve the agency's credibility in future settlement negotiations).¹¹⁵

The rarity of such violations, however, seems to be the result of institutional design choices that have little to do with any judicial pronouncements. For a *Scrushy* violation to occur, an inexperienced (or overzealous) prosecutor must be paired with a naïve and poorly supervised regulator. One former senior officer at the SEC indicated that, even prior to *Scrushy* and *Stringer*, senior leadership in the Enforcement Division disapproved of the practice of federal prosecutors hiding behind SEC investigations.¹¹⁶ A *Scrushy* violation thus involves a deviation from the norms and values that the agency uses to assess the performance of its staff attorneys. Such deviations are likely to be rare given the relatively hierarchical nature of the regulatory enforcement agencies that frequently pursue parallel proceedings.¹¹⁷ As one experienced defense attorney explained, "there is a stark difference in negotiating with the SEC as compared to criminal prosecutors. It seems that when you have a case with the SEC, the entire staff is involved. You don't often get that sense when you're working with a prosecutor's office. Certainly, most investigations are not on the desk of the U.S. Attorney himself or herself."¹¹⁸

Moreover, reforms in the SEC and the CFTC have made *Scrushy* problems even more improbable. The effective coordination of parallel proceedings requires civil regulators to defer to the judgment and expertise of prosecutors with respect to criminal investigatory questions.¹¹⁹ In outlier cases such as *Scrushy*, such deference is misplaced.¹²⁰ However, with some exposure to the appropriate norms of criminal prosecutions—or by working under the oversight of attorneys familiar with those norms—a civil regulator will recognize the circumstances in which a prosecutor is trying to exploit civil discovery for purposes that do not serve the regulator's interests.¹²¹ In recent years, both the SEC and the CFTC have hired former

115. I-9.

116. I-2.

117. See Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 658–60 (2002); see also *infra* Part I.B (describing the SEC's and CFTC's formal oversight mechanisms over criminal referral decisions).

118. I-10.

119. I-5.

120. *Id.*

121. *Id.*

prosecutors to run their Enforcement Divisions and recruited former prosecutors to staff those divisions.¹²² Thus, both agencies have increased the number of regulators on staff who are adept at recognizing outlier cases where deference to prosecutors is inappropriate.¹²³

C. *Judicial Reluctance to Monitor*

An obvious response to doctrine that fails to address serious due process concerns is to call for new and better doctrine.¹²⁴ Leaving aside the merits of this approach, it would be difficult to persuade courts to adopt rules that would adequately address the due process concerns raised by academics and lawyers.¹²⁵ There are at least two reasons why courts have been reluctant to strengthen the relatively lax framework governing parallel proceedings.

First, to regulate coordination between prosecutors and regulators, courts would have to constrain executive discretion in ways that raise both separation-of-powers and judicial manageability concerns. A court would be hard pressed, for example, to regulate the timing of cases in order to prevent prosecutors and regulators from bringing them in tandem. This is because the Supreme Court has held that prosecutors may delay an indictment for a considerable length of time to build an investigation.¹²⁶ This hold-

122. For example, the CFTC's current Enforcement Director and one of the SEC's Co-Directors of Enforcement were Assistant U.S. Attorneys in the Southern District of New York. *See* Press Release, SEC, SEC Names Stephanie Avakian and Steven Peikin as Co-Directors of Enforcement (June 8, 2017), <https://www.sec.gov/news/press-release/2017-113> ("From 1996 to 2004, Mr. Peikin served as an Assistant U.S. Attorney in the Southern District of New York."); Press Release, CFTC, CFTC Acting Chairman Giancarlo Appoints James McDonald as Enforcement Director (Mar. 30, 2017), <https://www.cftc.gov/PressRoom/PressReleases/pr7541-17> ("Mr. McDonald joins the CFTC from the U.S. Attorney's Office for the Southern District of New York, where he served as an Assistant U.S. Attorney and most recently in the Public Corruption Unit.").

123. Consistent with this assessment, an attorney familiar with the CFTC's enforcement practices confirmed that the agency is able to, and on occasion does, reject prosecutors' requests for the regulators to seek out information that the agency had no independent civil basis for requesting. 1-8.

124. A court could hold, for example, that prosecutors infringe on the traditional investigatory role of the grand jury by coordinating with regulators to gather evidence through the civil discovery process. *But see* SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir. 1980) (en banc) (rejecting this argument). Alternatively, a court could rule that civil regulators cannot review material obtained by prosecutors without threatening the "fundamental maxim of discovery that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.'" *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 540 n.25 (1987) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1949)) (alteration in original).

125. *See supra* note 79.

126. *United States v. Lovasco*, 431 U.S. 783, 795 (1977) (holding that prosecutors may not delay an indictment "solely 'to gain tactical advantage over the accused,'" but may do so for the purpose of building an investigation (quoting *United States v. Marion*, 404 U.S. 307, 324 (1971))).

ing—which is rooted in separation-of-powers concerns¹²⁷—effectively gives prosecutors the power to delay a criminal case in order to benefit from the civil discovery they could obtain from a parallel proceeding. A court would also encounter doctrinal obstacles if it sought to regulate the type of cases that prosecutors and regulators brought as parallel proceedings. On the criminal side, charging decisions are effectively unreviewable unless they are obviously motivated by invidious discrimination.¹²⁸ It would therefore be a doctrinal aberration to inquire whether, in a parallel proceeding context, a prosecutor had improperly filed criminal charges in order to pressure a defendant to accept a civil settlement.¹²⁹ On the civil side, the Supreme Court has refused to engage in programmatic oversight of agency enforcement policies due to separation-of-powers concerns about judicial oversight of the inter-workings of executive agencies.¹³⁰ For the same reason, courts have declined to monitor agency decisions *not* to bring particular enforcement actions.¹³¹ These decisions leave courts without the doctrinal resources to easily monitor the relationships between prosecutors and regulators in the parallel proceedings context.

Second, even when acknowledging potential due process concerns, courts have treated parallel proceedings as essential to a well-functioning regulatory state. In *Kordel*, for example, the Supreme Court stressed that effective civil enforcement requires the government to be able to proceed expeditiously with regulatory investigations while reserving the ability to pursue criminal charges.¹³² It would therefore “stultify enforcement of fed-

127. *See id.* at 790 (“[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor’s judgment as to when to seek an indictment. Judges are not free, in defining ‘due process,’ to impose on law enforcement officials our ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.’” (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952))).

128. *See United States v. Armstrong*, 517 U.S. 456, 464–68 (1996); *Wayte v. United States*, 470 U.S. 598, 607–10 (1985).

129. *Cf. Newton v. Rumery*, 480 U.S. 386 (1987) (upholding a plea agreement that required a criminal defendant to forfeit his right to file a civil suit in exchange for a prosecutor’s dismissal of criminal charges).

130. *See Gillian E. Metzger, Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1453 (2003).

131. *See Heckler*, 470 U.S. at 832 (interpreting the Administrative Procedure Act to bar judicial review of non-enforcement decisions).

132. *See United States v. Kordel*, 397 U.S. 1, 11 (1970). The Court noted,

The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products.

Id.

eral law to require a governmental agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.”¹³³ This stultification could work in at least two ways. First, overzealous monitoring might require civil regulators to forego the possibility of criminal prosecution in order to obtain a civil judgment.¹³⁴ Second, it might “endanger[]” a criminal prosecution by forcing prosecutors to await the resolution of a civil proceeding before pursuing their case.¹³⁵

In light of these concerns, courts give prosecutors and regulators considerable discretion to decide which combination of civil and criminal investigatory techniques and remedies will best insure that they reach their desired outcome in the matter before them. In *SEC v. Dresser Industries, Inc.*,¹³⁶ for example, the D.C. Circuit emphasized that federal securities laws broadly authorized the SEC and the DOJ to coordinate as they deemed necessary.¹³⁷ It would contravene this statutory mandate, the court reasoned, if the SEC were limited in its ability to transmit information to the DOJ that it obtained through civil discovery.¹³⁸ This doctrine thus incentivizes modes of cooperation that are designed to maximize the government’s freedom to choose the combination of civil and criminal investigatory techniques that best fits their needs in a particular case.

II. SYSTEMIC RISKS OF PARALLEL ENFORCEMENT

The doctrinal framework governing parallel proceedings enables regulators to accomplish their enforcement goals with great efficiency but also creates opportunities for abuse.¹³⁹ Beyond facilitating individual instances of misconduct, however, parallel enforcement may create systemic problems both for regulators and those they target. A full account of such risks

133. *Id.*

134. *See id.*

135. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980) (quoting *Kordel*, 628 U.S. at 12); *see id.* (“The SEC cannot always wait for Justice to complete the criminal proceedings if it is to obtain the necessary prompt civil remedy; neither can Justice always await the conclusion of the civil proceeding without endangering its criminal case. Thus we should not block parallel investigations by these agencies in the absence of ‘special circumstances’ in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government.” (citing *Kordel* 628 U.S. at 11–13)).

136. 628 F.2d 1368 (1980) (en banc).

137. *Id.* at 1385.

138. More precisely, the en banc court reversed the decision of a three-judge panel ordering that “once the Justice Department initiates criminal proceedings by means of a grand jury, the SEC may not provide the Justice Department with the fruits of the Commission’s civil discovery gathered after the decision to prosecute.” *Id.* (quoting slip op. at 22).

139. *See, e.g.*, *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005); *supra* notes 89–99 and accompanying text.

is beyond the scope of this fundamentally descriptive Article. To demonstrate why a descriptive theory of parallel enforcement is necessary, however, it is worth highlighting two systemic risks that overlapping civil and criminal enforcement may create. For agencies, parallel enforcement may distort enforcement priorities in ways that, over time, serve to reduce the agencies' regulatory effectiveness. For defendants, parallel enforcement creates information asymmetries that threaten core due process rights.

A. *Regulatory Distortion*

Courts sometimes treat parallel enforcement as necessary to ensure that civil regulators are free to pursue their independent enforcement goals.¹⁴⁰ Left unconsidered, however, is the degree to which parallel enforcement may shape those enforcement goals. In other words, the availability of parallel proceedings and an agency's selection of enforcement goals may be endogenous variables. As such, parallel enforcement has the potential to distort the enforcement decisions of civil regulators. Specifically, as this Article shows, criminal charges can dramatically reduce the costs and effort required to pursue a civil regulatory action.¹⁴¹ An effective system of civil regulation, however, may require agencies to sanction conduct that is not criminal. The prospect of parallel proceedings may lead civil regulators to ignore such conduct in order to concentrate their resources on cases that are likely to support criminal charges, and are thus easier to litigate.

This argument turns on the distinction between the appropriate goals of civil and criminal enforcement. Several scholars recognized that there is a troubling under-theorization of the respective and distinct goals of civil and criminal enforcement in American law.¹⁴² Nevertheless, administrative law scholars have identified at least two significant justifications—an “economic” model and a “responsive regulation” model—for civil regulation.¹⁴³

140. See, e.g., *United States v. Kordel*, 397 U.S. 1, 11 (1970). The Court noted,

The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. . . . It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

Id.

141. See *infra* Part III.

142. Daniel C. Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 64 (Michael Klarman et al. eds., (2012)); see also DOUGLAS HUSAK, *OVERCRIMINALIZATION* 58 (2008).

143. Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 859–62 (2012). Professor Minzner—who is currently general counsel to the chairman of the Federal Energy Regu-

Both of these justifications suggest that civil regulators should pursue cases that do not overlap perfectly with those being pursued by their criminal counterparts.

Under an economic model, civil regulators will make enforcement decisions that will deter socially undesirable activities.¹⁴⁴ If there is an overlapping system of civil and criminal regulations, this goal should lead regulators to investigate and punish socially harmful conduct that will fall below the threshold for criminal action. According to one deterrence framework, civil regulators should make enforcement decisions that require wrongdoers to internalize the costs of any harm their conduct imposes on others.¹⁴⁵ This framework assumes that wrongdoers will commit social harms if the gain from doing so outweighs the probability of being detected multiplied by the fine that would be imposed if the harm were detected. Accordingly, when it detects wrongdoing, an agency should pursue a fine f that is equal to h/p , where h is the harm that a defendant caused and p is the probability that regulators will detect such harms.¹⁴⁶ If civil regulators routinely disregard harms that are not capable of sustaining criminal charges, then the probability of detection for those harms would fall dramatically. Thus, if a civil regulator were to make enforcement decisions that perfectly reflected the priorities of criminal prosecutors, the regulator would incentivize widespread wrongdoing.¹⁴⁷

An alternative model of “responsive regulation,” advanced by Ian Ayres and John Braithwaite, assumes that a potential wrongdoer is not motivated solely by economic motives.¹⁴⁸ Rather, a regulated actor is likely to be influenced by reputational considerations, a sense of social responsibility, and a range of other contextually specific incentives.¹⁴⁹ Accordingly, a regulator should carefully tailor its sanctions based on the motivations of actors and the norms under which they operate.¹⁵⁰ Significantly, this model

latory Commission—contends that, in practice, civil regulators make their enforcement decisions based on retributive considerations that lie outside their core expertise. *See id.* at 904–13.

144. *Id.* at 859–60.

145. *See id.*

146. *See* Minzer, *supra* note 143, at 860; *see also* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 190–93 (1968). Law and economics scholars take this to be the purpose of criminal law as well. *See id.*; Keith N. Hylton, *The Theory of Penalties and the Economics of Criminal Law*, 1 REV. L. & ECON. 175, 177–78 (2005); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195–96, 1205 (1985).

147. Moreover, with respect to the criminal-level harms that the regulator chooses to pursue, a cost-internalization framework suggests that the regulator may over-deter socially beneficial conduct if they fail to coordinate with prosecutors to ensure that they collectively impose a penalty that does not exceed h/p . This framework is described in Minzer, *supra* note 143, at 860.

148. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1995).

149. *Id.* at 4–5 (1995); Minzner, *supra* note 143, at 861–62.

150. AYRES & BRAITHWAITE, *supra* note 148, at 4–5.

acknowledges the possibility that “[r]egulations themselves can affect structure . . . and can affect motivations of the regulated.”¹⁵¹ In order to respond to the motivations of a diverse set of actors, regulators should have a range of sanctions available to them. A regulator might be well served to begin with efforts to “coax compliance by persuasion” and then to gradually escalate its enforcement based on the degree to which the targeted actor is cooperative.¹⁵² Significantly, however, an actor is less likely to cooperate with a regulator who has one, severe penalty available to them.¹⁵³

This model suggests that a civil regulator will not be effective if it gains a reputation for referring every case for criminal charges. Such a reputation will be ineffective for at least two reasons. First, if the agency focuses only on egregious actors—those actors who are truly deserving of criminal sanction—then it will miss the opportunity to undertake low-cost enforcement actions that will improve the behavior of well-meaning actors who are mistaken about their regulatory obligations. Second, if the agency expands the scope of its enforcement and refers well-meaning actors to criminal authorities, it could shape the incentives of those actors in ways that lead it to cause more social harms. A well-motivated actor who is mistaken about its regulatory obligations may “dig in his heels and fight” if treated as a criminal.¹⁵⁴ The same actor, by contrast, might show remorse and a desire to self-correct if exposed to relatively light sanctions.¹⁵⁵

Thus, parallel proceedings have the potential to shape an agency’s enforcement priorities in ways that cannot be justified under traditional theories of regulation. The availability of parallel proceedings will not be problematic if a civil regulator sets its enforcement priorities without regard to whether it can avail itself of the benefits of coordinating with prosecutors. However, if an agency begins to prioritize cases *because* they can be referred to criminal authorities, then it will make enforcement decisions that are likely to exacerbate the social harms they are seeking to correct.

It is difficult to assess whether a civil regulatory agency has allowed the prospect of parallel enforcement to improperly shape its enforcement decisions. There is circumstantial evidence, however, suggesting that policymakers should be sensitive to this concern. Understandably, some regulatory agencies find it beneficial from a deterrence perspective to signal that there is a high probability that a criminal case is likely to stem from its civil investigation. These signals, however, are not necessarily costless. For example, since 2003, it has been a top priority to cooperate with criminal au-

151. *Id.* at 4.

152. *Id.* at 35–36.

153. *Id.* at 36.

154. *Id.* at 48.

155. *Id.*

thorities in order to facilitate prosecutions.¹⁵⁶ From a regulatory perspective, there are sensible reasons for this approach. First, given its resource constraints, the CFTC appears to prioritize the most serious fraud cases—which by their nature involve some type of criminal activity. For example, one insider estimates that, in recent years, a substantial portion of the CFTC’s enforcement docket has involved some type of Ponzi scheme that would naturally give rise to criminal charges.¹⁵⁷ Of the remaining cases on the docket, some were the sort of high-impact and high-profile cases that criminal prosecutors would be eager to pursue. For example, the CFTC has enhanced its stature in recent years by successfully pursuing cases in the wake of the LIBOR scandal,¹⁵⁸ the FX (or forex) scandal,¹⁵⁹ and the collapse of Jon Corzine’s MF Global.¹⁶⁰ This case prioritization undoubtedly has significant deterrent benefits, and may reflect the best option for an under-funded regulatory agency.

At the same time, the aggressive use of criminal referrals may suggest that an agency’s enforcement priorities require further consideration. Several attorneys familiar with the CFTC’s enforcement practices confirm that, prior to about 2011, the CFTC referred virtually every single case (other than those involving routine reporting violations) to criminal authorities.¹⁶¹ As one attorney with considerable CFTC experience framed it, prior to about six years ago, the CFTC would refer virtually every case and hoped that a U.S. Attorney’s office would work it.¹⁶² Sources familiar with the CFTC maintain that, since then, the agency has taken a more discerning approach to referrals with the goal of ensuring that federal prosecutors have the capacity and will to pursue a case.¹⁶³ Even as recently as Fiscal Year 2015, however, approximately ninety percent of the CFTC Enforcement Division’s major fraud and manipulation cases—that is, fraud and manipulation cases in which the customer losses or market impact exceeded \$1

156. I-8.

157. *Id.*

158. *See* Press Release, CFTC, CFTC Orders The Royal Bank of Scotland to Pay \$85 Million Penalty for Attempted Manipulation of U.S. Dollar ISDAFIX Benchmark Swap Rates (Feb. 3, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7527-17> (describing the CFTC’s LIBOR benchmark abuse cases).

159. *See id.* (describing the CFTC’s foreign exchange benchmark abuse cases).

160. *See* Press Release, CFTC, Federal Court in New York Orders Jon S. Corzine to Pay \$5 Million Penalty for his Role in MF Global’s Unlawful Use of Nearly \$1 Billion of Customer Funds and Prohibits Corzine from Registering with the CFTC in any Capacity or Associating with an FCM (Jan. 5, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7508-17>.

161. I-7; I-8.

162. I-7.

163. *Id.*; I-8.

million in value (a relatively low threshold)—involved parallel proceedings.¹⁶⁴

Whether or not it is true, however, a ninety percent referral rate may signal to potential wrongdoers that an agency is selecting cases *because* they can be referred for criminal prosecution, while disregarding important cases that do not reach the criminal threshold.¹⁶⁵ For example, the Dodd-Frank Act recently lowered the scienter requirement of the Commodity Exchange Act (“CEA”) so that the statute now prohibits reckless fraud and manipulation in the commodities markets.¹⁶⁶ A criminal violation of the CEA, however, requires the government to prove a specific intent to defraud or manipulate the market.¹⁶⁷ It is difficult to ascertain whether, since the passage of Dodd-Frank, the CFTC has regularly used its newfound authority to select cases that involve reckless market manipulation but which, prior to further investigation, did *not* appear to involve criminal conduct. However, the occasional pursuit of such a case would send a signal that only the most egregious wrongdoers are at risk of regulatory enforcement.

B. Information Asymmetries

Parallel enforcement creates the opportunity for both civil and criminal agencies to circumvent the procedural rules and protections that have respectively been designed for each regime. The practice thus enables both civil and criminal regulators to avoid many of the institutional and doctrinal constraints that traditionally shape their decisionmaking. For defendants, this framework generates information asymmetries that raise significant due process concerns.¹⁶⁸ Specifically, parallel proceedings exacerbate infor-

164. See Press Release, CFTC, CFTC Releases Annual Enforcement Results for Fiscal Year 2016 (Nov. 6, 2015), <http://www.cftc.gov/PressRoom/PressReleases/pr7274-15>; I-8.

165. At least one attorney familiar with the CFTC’s enforcement practices disagrees strenuously with this claim and observes that in the last five years the agency has filed market-impacting cases that do not have a criminal component. I-8. This attorney cited the CFTC’s market manipulation pending case against Donald Wilson and DRW Investments as a significant case that did not have a criminal component. See Complaint, CFTC v. Wilson, No. 13-cv-7884 (S.D.N.Y. Nov. 6, 2013), ECF No. 1.

166. 17 C.F.R. § 180.1 (2012).

167. 7 U.S.C. § 13(a)(5) (2012).

168. Parallel proceedings impose other costs on defendants that do not necessarily raise questions of fairness or due process. For example, multiple defense attorneys reported that civil liability considerations significantly influence the information that they choose to produce in order to cooperate with a criminal investigation. I-4; I-6; I-11. As one defense attorney explained, “If there’s no threat of private civil action, then you can collect your worst documents in a binder and show that there’s no criminal case. But then you’ve possibly made the civil case for someone.” I-4. This problem is exacerbated by the fact that an effective response to a civil regulatory investigation may require the defendant to create documents that could prove damaging in a criminal case. As one experienced securities fraud litigator observed, when responding to SEC requests in a parallel investigation context, he is “often less concerned with the testimony that a client may

mation asymmetries between defendants and prosecutors that result from our criminal discovery rules, and create new information asymmetries that are antithetical to our civil discovery system.¹⁶⁹

While the federal rules of civil procedure are famously expansive, the rules of criminal procedure impose very few reciprocal discovery obligations.¹⁷⁰ Both prosecutors and civil regulators can exploit this differential to deepen their informational advantages in parallel proceedings.¹⁷¹ On the criminal side, prosecutors can use parallel proceedings to obtain evidence that civil regulators have gathered through the civil discovery process. Practitioners have regularly and publicly accused prosecutors of engaging in the “frequent practice” of using “regulatory investigations, especially by the Securities and Exchange Commission (SEC), as stalking horses to gather evidence for the criminal investigation.”¹⁷² Regardless of whether this is the core purpose of parallel proceedings, it is possible in light of the DOJ’s policy to proceed with such investigations “in a manner that allows information to be shared to the fullest extent appropriate to the case and permissible by law.”¹⁷³

In parallel proceedings, this information-gathering process often is asymmetrical. As David Sklansky and Stephen Yeazell have observed, criminal discovery typically “relies on each party’s own investigations and subsequent disclosures by that party, rather than on the mutual adversarial probing characteristic of civil process.”¹⁷⁴ Through parallel enforcement, however, criminal authorities benefit from the probing of civil discovery without necessarily having to assume the burdens of mutual disclosure.

provide than by the proliferation of statements and documents” that result from cooperation with the agency. I-11.

169. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 540 n.25 (1987) (discussing “the fundamental maxim of discovery that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation” (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947))); Ion Meyn, *Discovery and Darkness the Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091 (2014) (identifying and criticizing information disparities in criminal discovery); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 713–18 (2006) (comparing how these procedural asymmetries shape criminal discovery practice).

170. Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633, 645 n.45 (2014) (comparing the scope of FED. R. CRIM. P. 16 and FED. R. CIV. P. 26); Andrew E. Taslitz, *Prosecutorial Preconditions to Negotiations “Voluntary” Waivers of Constitutional Rights*, 23 CRIM. JUST. 14, 20 (2008).

171. Two articles that touch on this possibility without systemically analyzing the problem as being one of asymmetry are Cheh, *supra* note 79, and Persaud, *supra* note 79.

172. David Gourevitch & Richard M. Gelb, *Government Manipulation of Regulatory and Criminal Investigations: A New Judicial Willingness to Scrutinize*, 16 SEC. LITIG. J. 1, 1 (2016).

173. Holder Memo, *supra* note 42.

174. Sklansky & Yeazell, *supra* note 169, at 713.

Prosecutorial access to information does not necessarily create due process concerns when it is reciprocal. One commonly invoked justification for defendants' circumscribed discovery in criminal cases is the mutuality of obligation: the defendant's constitutional prerogative not to speak justifies reciprocal limitations on the evidence that the government makes available.¹⁷⁵ Theoretically, one could expand the discovery obligations in criminal cases while maintaining this mutuality of obligation. In some cases, parallel proceedings may work in this fashion by subjecting the government to civil discovery obligations that are relevant to their criminal prosecution. This shift can—and sometimes does—work in the defendant's favor. For example, a defense attorney may be able to use the civil discovery process to subpoena the cooperating witness in the government's criminal case, and thus obtain information that would not otherwise be available to her.¹⁷⁶ Indeed, in light of this access to discovery, one experienced defense attorney reported that he sometimes welcomes the presence of a civil regulator if his client is facing criminal charges.¹⁷⁷

The discovery obligations in parallel proceedings, however, often are far from mutual. An asymmetry stems, in part, from uncertainty on the defendant's part as to whether civil and criminal regulators are cooperating on a particular case. In order to effectively use civil discovery to develop a criminal defense, an attorney will have to know that a criminal investigation is underway and have some sense of the nature of that investigation. (For example, to use civil discovery to subpoena the cooperating witness in a criminal case, one must have some sense of what sort of criminal investigation might be underway and which witnesses are likely to feature in that case). A party's civil discovery rights, however, are limited to information that is relevant to the case at issue.¹⁷⁸ Thus, a defendant cannot use civil discovery solely to ferret out information about possible criminal charges.

Beyond this limitation, it often will be unclear whether a civil regulator is coordinating with a prosecutor in contemplation of an indictment, and hence unclear whether the defendant should seek discovery relevant to a defense against possible criminal charges. Virtually every attorney I have interviewed emphasized that experienced prosecutors do not actively "hide" behind civil regulatory investigations to gain the advantage of surprise.¹⁷⁹ Even when prosecutors do not actively conceal their interest in a case, how-

175. For a discussion of how this asymmetry of obligation shaped drafting debates over the degree of discovery that should be permitted under the Federal Rules of Criminal Procedure, with those advocating for limited discovery prevailing, see Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 *FORDHAM L. REV.* 697, 720–24 (2017).

176. I-6.

177. I-11.

178. FED. R. CIV. P. 26(b)(1).

179. See *supra* Part I.B.2.

ever, the ordinary protocols governing parallel proceedings may leave defendants unaware of their involvement. The SEC Enforcement Manual advises staff attorneys that, if asked about whether a criminal investigation is pending, they should do no more than “invite [the] person . . . to contact criminal authorities if they wish to pursue the question of whether there is a parallel criminal investigation.”¹⁸⁰ Reaching out to the relevant criminal authority—if you can accurately guess who it is¹⁸¹—will not necessarily prove beneficial. A call to prosecutors could theoretically yield information if a client were the “target” of a criminal investigation.¹⁸² (The U.S. Attorneys’ Manual “encourage[s]” federal prosecutors to notify individuals if they are the “target” of an investigation and requires them to do so if the target is a grand jury witness).¹⁸³ However, among different U.S. Attorneys’ Offices, “practices vary about the details they disclose” as to whether a case is pending.¹⁸⁴ Notably, some U.S. Attorneys’ Offices with sophisticated parallel enforcement experience will decline to designate someone as a “target” pri-

180. SEC, *supra* note 60, § 5.2.1. This directive states:

If asked by counsel or any individual whether there is a parallel criminal investigation, staff should direct counsel or the individual to the section of Form 1662 dealing with “Routine Uses of Information,” and state that it is the general policy of the Commission not to comment on investigations conducted by law enforcement authorities responsible for enforcing criminal laws. Staff should also invite any person who raises such issues to contact criminal authorities if they wish to pursue the question of whether there is a parallel criminal investigation. Should counsel or the individual ask which criminal authorities they should contact, staff should decline to answer unless authorized by the relevant criminal authorities.

Id. Form 1662, which is provided to defendants who are given a Wells notice, states that:

The Commission often makes its files available to other government agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other government agencies is, in general, a confidential matter between the Commission and such governmental agencies.

SEC, *supra* note 98, at 3.

181. The SEC Enforcement Manual further instructs: “Should counsel or the individual ask which criminal authorities they should contact, staff should decline to answer unless authorized by the relevant criminal authorities.” SEC, *supra* note 60, § 5.2.1.

182. The U.S. Attorneys’ Manual defines a “target” of an investigation as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” U.S. DEP’T OF JUSTICE, *supra* note 46, § 9-11.151.

183. *See id.* §§ 9-11.151, 9-11.153.

184. I-4.

or to filing an indictment.¹⁸⁵ The Southern District of New York, for example, reportedly “never gives target letters when people ask for them.”¹⁸⁶

Thus, in some cases civil regulators will freely transmit information to prosecutors whose interest in the case remains unknown to the defendant. This information gap is particularly acute for defendants who are unable to afford the relatively small number of white-collar defense attorneys with significant experience as a regulator or as a federal prosecutor working on complex fraud cases.¹⁸⁷ Even among these elite defense attorneys, however, there is no consensus as to whether it is appropriate or useful to inquire into whether a regulator is cooperating with a federal prosecutor. According to one experienced defense attorney and former prosecutor, “a good attorney always asks whether a [criminal] referral has been made” and sometimes even the SEC will confirm that it has (notwithstanding the guidance in the SEC Enforcement Manual).¹⁸⁸ By contrast, a comparably experienced defense attorney, who is also a former prosecutor, seems to avoid any direct inquiry as to whether regulators have made a criminal referral.¹⁸⁹

Even when a defendant is fully aware of a prosecutor’s interest in a civil regulatory matter, agencies can coordinate in ways that thwart the mutuality obligations of the civil discovery process. For example, both the SEC and the CFTC frequently file civil actions concurrently with criminal indictments, and the prosecutor will then request a complete or partial stay of discovery in the civil proceedings pending resolution of the criminal case.¹⁹⁰ Defense attorneys will often consent to these stays because they relieve clients of the burden of deciding between responding to a subpoena

185. In the words of one former federal prosecutor, in the Southern District of New York “[u]sually someone is not a target until the prosecutor is walking to the grand jury with the indictment. Until then they may be a ‘super subject,’ but they’re not a target yet.” I-6.

186. I-4; *see also* I-6 (“SDNY attorneys rarely give target letters, because they rarely designate people as targets until the charges are brought.”).

187. *See, e.g., United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006), *rev’d in part, vacated in part*, 535 F.3d 929 (9th Cir. 2008).

188. I-4.

189. I-6. This attorney reports that in his experience, and consistent with agency’s formal policy, SEC staff attorneys “won’t tell the outside world who has got the lead” in a case where criminal authorities may be working behind the scenes. I-6.

190. *See White, supra* note 1 (“When we work together and bring parallel actions, we will typically file our actions on the same day, unless there is some investigative reason for one of us to act first, such as a need for an emergency asset freeze or to stop a flight risk.”). Several district court judges, most notably Judge Rakoff, have criticized and attempted to push back against this practice. *See, e.g., SEC v. Saad*, No. 05 Civ. 3308, 229 F.R.D. 90, 91 (S.D.N.Y. 2005) (Rakoff, J.) (describing it as “strange[] . . . that the U.S. Attorney’s Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously”). *Cf. SEC v. Rajaratnam*, 622 F.3d 159, 171 (2d Cir. 2010) (issuing mandamus order reversing a stay of discovery where neither party objected to the stay request).

and exercising their Fifth Amendment self-incrimination rights.¹⁹¹ In practice, however, these stays can create a startling asymmetry between the information-gathering capacities of the government and the defendant. The stay of a civil judicial proceeding halts the mutual discovery process that is governed by the Federal Rules of Civil Procedure.¹⁹² However, the stay does not prevent an executive agency from using its broad authority to issue administrative proceedings in connection with a separate regulatory investigation.¹⁹³ The SEC, for example, has broad authority to demand evidence and compel testimony in connection with a regulatory investigation.¹⁹⁴ In practice, this permits the agency to serve administrative subpoenas on matters related to a case that has already been stayed if it purports to have an independent regulatory purpose for doing so.¹⁹⁵

It is therefore within the power of many regulatory agencies to thwart a defendant's ability to gather information in a parallel proceeding (by requesting a stay of the civil case) while compelling the defendant to continue producing information. The agency can then disclose this information to the prosecutor, thereby deepening the information asymmetry that already exists between the government and criminal defendants. According to some reports, the SEC has recently begun to exploit this authority to continue building investigations in cases that have been stayed.¹⁹⁶ In these cases, the SEC claimed that it was issuing subpoenas in connection with an un-

191. *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97 (2d Cir. 2012) (“A stay can protect a civil defendant from facing the difficult choice between being prejudiced in the civil litigation, if the defendant asserts his or her Fifth Amendment privilege, or from being prejudiced in the criminal litigation if he or she waives that privilege in the civil litigation.”).

192. See FED. R. CIV. P. 16.

193. See *Bowles v. Bay of N.Y. Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945).

194. See 15 U.S.C. §78u(b) (2012); U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES (2002), http://www.justice.gov/archive/olp/rpt_to_congress.htm [hereinafter DOJ, ADMINISTRATIVE SUBPOENA REPORT] (describing the full scope of the SEC's statutory and regulatory authority to issue administrative subpoenas); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741–42 (1984) (describing the broad nature of the SEC's subpoena power).

195. The SEC Enforcement Manual instructs staff not to “use investigative subpoenas *solely* to conduct discovery with respect to claims alleged in the pending complaint.” SEC, *supra* note 60, § 3.1.3 (emphasis added). But as the SEC has argued, this policy does not bar staff from conducting such discovery when they have an independent reason for using such subpoenas. See Plaintiff's Motion for Reconsideration of Order Granting Sanctions, Request for Oral Hearing, and Brief in Support at 2–3, *SEC v. Life Partners Holdings, Inc.*, No. 1:12-cv-00033, 2012 WL 4854813 (W.D. Tex. Aug. 28 2012) (arguing for reconsideration of a sanctions motion for issuing investigative subpoenas in advance of a discovery conference under Fed. R. Civ. P. 26(f)).

196. See Maranda E. Fritz & Eli B. Richlin, *A One-Way State: Cautionary Tales from Parallel Proceedings*, N.Y.L.J. 9, 12 (Apr. 25, 2016), http://nylawyer.nylj.com/adgifs/specials/2016_0425_ss_wcc.pdf (discussing the SEC's conduct in *United States v. Discala*, No. 14-CR-399 (ENV) (E.D.N.Y.), *SEC v. Discala*, No. 14-CV-4346 (ENV) (E.D.N.Y.), and in *SEC v. Blumberg*, No. 2:14-cv-04962 (FSH) (MAH) (D.N.J.)).

related matter, but then shared the evidence it obtained with prosecutors working on the criminal side of the case that was under a stay order.¹⁹⁷ The fact that a civil regulatory investigation serves multiple, legitimate purposes thus empowers regulators to obtain a significant information advantage in parallel proceedings.¹⁹⁸

These systemic risks of parallel enforcement—namely, the potential for regulatory distortion and the creation of information asymmetries—are not the only considerations that might motivate reforms. One might be concerned, for example, that parallel proceedings unduly pressure defendants to waive their Fifth Amendment self-incrimination rights.¹⁹⁹ The doctrinal hurdles to reforming parallel proceedings, however, should induce policymakers to consider how institutional design strategies might achieve aims that litigation is unlikely to accomplish.²⁰⁰ In order to develop these strategies, one must understand the dynamics that shape the ways in which prosecutors and regulators collaborate.

III. THE MAKE-OR-BUY DECISION IN PARALLEL ENFORCEMENT

To even the most experienced defense attorneys, regulatory agencies and prosecutors' offices can seem like a monolithic enforcement apparatus.²⁰¹ In reality, prosecutors and regulators have distinct goals and different sets of incentives. When these goals and incentives align (and their subject matter jurisdictions overlap), prosecutors and regulators may choose to coordinate. Just as importantly, they may choose not to coordinate.²⁰²

This option for choice characteristic distinguishes parallel proceedings from traditional, standalone criminal cases. In ordinary federal criminal

197. *See id.*

198. An attorney familiar with the CFTC's enforcement practices took pains to stress that the agency does not engage in such practices, and expressed skepticism that the SEC would do so. I-8.

199. *See infra* notes 274–278 and accompanying text.

200. *Cf.* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 907 (2009) (arguing for institutional reforms to address prosecutorial abuses in light of judicial reluctance to interfere with the internal operations of prosecutors' offices).

201. For example, as stated by one elite white-collar defense attorney—one of the few of his caliber without prosecutorial experience—"the Southern District of New York and the SEC are in lockstep." I-10.

202. *See* Robert K. Huffman et al., *The Perils of Parallel Civil and Criminal Proceedings: A Primer*, 10 HEALTH L. 1, 4 (1998). Huffman et al. write,

Many U.S. Attorney's offices have coordination policies, and if the criminal and civil attorneys are from the same U.S. Attorney's office, their coordination will be governed by whatever local policy on parallel proceedings is in place. If, however, the attorneys are from different parts of the DOJ, the degree of cooperation lies largely within the individual attorneys' discretion.

Id.

cases, prosecutors and investigators are mutually dependent on each other to secure convictions.²⁰³ As Daniel Richman influentially observed, the relationship between these actors is a “bilateral monopoly” wherein prosecutors control access to federal court and agents control most of the investigative resources.²⁰⁴ Often, a U.S. Attorney’s Office will have complete control over whether to prosecute a case that law enforcement agents have invested in building. Conversely, agents often have considerable control over the cases that they wish to build and the tactics they use to build them.²⁰⁵ Thus, for standalone criminal cases, federal prosecutors and investigative agents are bilaterally dependent.²⁰⁶

In parallel proceedings—or, rather, in matters that could potentially become parallel proceedings—this bilateral dependence does not exist. This simple, constitutive feature of parallel proceedings has significant structural implications with respect to the inter-agency dynamics that shape criminal and civil enforcement. Specifically, the choices facing criminal and civil regulators in the parallel enforcement context can be helpfully characterized as a set of “make-or-buy” decisions analogous to those that shape the contractual relationships between private firms.²⁰⁷ Both civil and criminal regulators can choose to use their in-house resources to achieve their desired enforcement outcomes, or they can “buy” these resources from their civil or criminal counterpart at the cost of lending their resources and expertise to that agency. Over time, civil and criminal agencies can choose

203. Richman, *supra* note 28, at 758.

204. *Id.*

205. *See id.* at 767–69. As Richman acknowledges, this characterization of the prosecutor-agent relationship is somewhat broad. In some instances, FBI agents have the ability to choose between different U.S. Attorney’s Offices that each have venue over a case. *See id.* at 759–60. In others, the agents can pitch their case to state or local prosecutors rather than to the U.S. Attorney’s Office (or bring the case to state or local prosecutors after a federal prosecutor has declined to prosecute). *See id.* at 760–61.

206. *See* OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 16 (1999) (summarizing the transaction cost economic theory of bilateral dependence).

207. *See* Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 388, 393–94 (1937). Economists have elaborated upon the “make-or-buy” model to analyze governments’ choices of whether to provide a service or contract with private firms to do so. *See, e.g.*, Oliver Hart et al., *The Proper Scope of Government: Theory and an Application to Prisons*, 112 *Q. J. ECON.* 1127 (1997); Jonathan Levin & Steven Tadelis, *Contracting for Government Services: Theory and Evidence from U.S. Cities*, 58 *J. INDUS. ECON.* 507 (2010); Oliver E. Williamson, *Public & Private Bureaucracies: A Transaction Cost Perspective*, 15 *J. L., ECON. & ORG.* 306, 319 (1999).

Recently, economists Jonathan Levin and Steven Tadelis have examined the conditions under which American cities will contract with non-municipal public agencies to provide a government service. *See* Levin & Tadelis, *supra* note 207, at 526–35. Levin and Tadelis found that, in this context, public sector contracting is a substitute for the in-house provision of a government service (“making”) rather than for private contracting (“buying”). *Id.* at 535. The research data underlying my article suggests that the “make-or-buy” literature nevertheless provides a useful framework for understanding the incentives of prosecutors and regulators in the parallel enforcement context.

the institutional arrangements for achieving their enforcement goals that result in the lowest transaction costs. The make-or-buy decisions in parallel proceedings thus inform both the case-by-case decisionmaking and the broader policy choices of both prosecutors and civil enforcers. This Part presents and develops this make-or-buy framework based on current and former prosecutors' and regulators' accounts of their decisionmaking strategies in parallel proceedings.

A. *The Make-or-Buy Decision Structure*

In pursuit of their respective goals of high-profile convictions and high-profile civil judgments and settlements, prosecutors and regulators will be responsive to transaction (or maladaptation) costs.²⁰⁸ Parallel proceedings give both prosecutors and regulators a greater range of options for reducing transaction costs than those available in ordinary criminal cases. In ordinary criminal cases, prosecutors and investigators are bilaterally dependent to the degree that requires them to defer to each other's goals. In parallel proceedings, however, prosecutors and regulators face a set of "make-or-buy" decisions that are not present in traditional criminal cases.²⁰⁹ This feature of parallel proceedings is essential to understand their operation.

"Transaction costs" are notoriously difficult to define.²¹⁰ It suffices for the purposes of this Article, however, to treat them as the bargaining costs that arise when parties are bilaterally dependent. In the private sector, bilateral dependence often occurs because one actor makes asset-specific investments related to the product that it is exchanging with the other.²¹¹ In

208. There is a substantial body of literature applying transaction cost economics to the decisions of agencies to contract with private firms. See, e.g., Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 390 (2003). Other scholars have applied this approach to Congress's decision whether to delegate authority to agencies. See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1049 (2007); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1049-57 (2006). Scholars have further analogized government decisions of whether to privatize a service to the "make" or "buy" decisions of private firms. See, e.g., Levin & Tadelis, *supra* note 207. This Article appears to be among the first, however, to apply the analogy to inter-agency decisionmaking.

209. See Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388, 393-94 (1937).

210. See Lee Anne Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1483-90 (2013).

211. See Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q. 269, 281-82 (1991). Williamson defines asset specific investments as "durable investments that are undertaken in support of particular transactions, the opportunity cost of which investments is much lower in best alternative uses or by alternative users should the original transaction be prematurely terminated." OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 55 (1985).

the short term, these investments create transaction costs that deepen the actors' bilateral dependence. If these actors are unable to reach mutually satisfactory contractual arrangements when operating under such conditions, then their continuing relationship will generate even greater transaction costs.²¹² But in the long run, if these costs continue to rise, it will be efficient for the firms to undertake the expense of vertically integrating.²¹³

In ordinary criminal cases—those not involving parallel proceedings—the bilateral dependence of prosecutors and their investigating agents exists to an even greater degree than is common in a private market. As a matter of statutory design, however, federal prosecutors and federal agents are unable to respond to maladaptive costs by vertically integrating. In a traditional (non-parallel) case, a federal prosecutor cannot simply decline the services of an FBI agent and independently build her own investigations.²¹⁴ Likewise, an FBI agent cannot ignore a federal prosecutor's declination decision and file a criminal case on her own.

In cases involving parallel proceedings, however, agencies can redeploy their resources in response to the quality of their relationships with other regulators. This enables each agency to decide whether to “make” or “buy” the resources required to achieve their respective enforcement goals. To reduce litigation costs, civil regulators may cooperate with prosecutors so that they can use a criminal conviction to invoke collateral estoppel and thus bar a defendant from challenging her civil liability. To reduce investigation costs, a regulator may reach out to a prosecutor or an FBI agent to determine whether they have access to witness interviews, wiretaps,²¹⁵ or other information that prosecutors gathered by investigating “outside” the grand jury.²¹⁶ At the same time, this cooperation with prosecutors may increase the payoff to regulators by increasing the settlement value of a case. If the costs of cooperating with prosecutors are too high, however, then regulators can invest in the expertise and resources necessary to investigate and litigate their cases in-house. They can, in other words, “make” the litigation and investigation goods that they would otherwise have “bought” from prosecutors.

212. *See id.* at 106–08. Please note that Williamson post-1991 favors the term “maladaptation costs.” *See, e.g.,* WILLIAMSON, *supra* note 206, at 107.

213. *See* WILLIAMSON, *supra* note 206, at 16 (“[A]lthough the unified ownership of both stages incurs bureaucratic costs of its own, hierarchy (vertical integration) becomes the cost-effective governance structure as asset specificity progressively deepens.”).

214. *See* Richman, *supra* note 28, at 767.

215. Although the regulator may not be able to obtain the wiretap evidence directly from prosecutors, they may be able to gather the information from defendants through civil discovery. *See* SEC. v. Rajaratnam, 622 F.3d 159, 180–82 (2d Cir. 2010).

216. *See infra* notes 281–288 and accompanying text.

Criminal prosecutors, likewise, may decide between “buying” information and litigation goods from regulators or “making” them in-house. To reduce investigation costs, prosecutors may reach out to an agency with an impressive informational network and try to build a criminal case based on some of the promising tips, complaints, and referrals (“TCRs”) that come into the agency’s office. Beyond the information that an agency passively receives from TCRs, it might have its own civil investigators seeking out cases that a U.S. Attorney might find promising.²¹⁷ To reduce litigation costs, prosecutors may rely on the substantive expertise of an agency’s staff in order to establish a defendant’s liability, and may even use agency staff as expert witnesses in appropriate cases.²¹⁸ Alternatively, the prosecutor could purchase these resources from a competing regulator, or “make” them internally.

Over time, agencies can choose the institutional structures for achieving their enforcement goals that result in the lowest transaction costs.²¹⁹ For example, if a civil regulator repeatedly compromises a criminal investigation by failing to disclose (or, as I will explain below, “creating”) *Brady* material, a prosecutor will weigh this cost against those of developing relationships with new investigatory agents. Conversely, civil regulators will consider the costs of cooperating with a federal prosecutor who repeatedly manipulates a civil investigation for their own purposes, or files indictments in a manner that deprives the civil regulator of credit for their work. When one agency redeploys its assets away from cooperating with another, the other agency will respond by redeploying its assets as necessary.

This set of dynamics can shape institutional norms in profound ways. For example, inter-agency trust plays a substantial and systemic role in the decisions governing parallel proceedings.²²⁰ For the purposes of analyzing organizational relationships, “trust” can be usefully defined as:

[A] particular level of the subjective probability with which an agent assesses that another agent or group of agents will perform a particular action, both *before* he can monitor such action (or in-

217. The SEC’s Office of Market Intelligence, for example, actively engages in market surveillance using a “market watch room,” replete with Bloomberg terminals and real-time stock pricing monitors that keep an eye on the markets.” Ben Protess & Azam Ahmed, *With New Firepower, S.E.C. Tracks Bigger Game*, N.Y. TIMES (May 21, 2012), https://dealbook.nytimes.com/2012/05/21/with-new-firepower-s-e-c-tracks-bigger-game/?_r=1 (quoting Thomas A. Sparkin).

218. I-8.

219. See WILLIAMSON, *supra* note 206, at 5.

220. For a summary of academic literature on interpersonal trust that is potentially relevant to legal scholarship, see Claire A. Hill & Erin Ann O’Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1718 & nn.1–7 (2006).

dependently of his capacity ever to be able to monitor it) *and* in a context in which it affects *his own* action.²²¹

So defined, questions of interpersonal trust are relevant to every set of human interactions,²²² including the administration of criminal law.²²³ In every criminal case, prosecutors and agents must trust one another to collaborate productively.²²⁴ In the parallel enforcement context, trust can have significant operational consequences. This is because the organizational significance of trust correlates with the power to exit. The greater an actor's freedom to terminate a working relationship, the greater role trust plays in governing their decisions within the relationship.²²⁵ In the traditional prosecutor-agent dynamic, civil enforcers and criminal prosecutors often lack the option to exit their working relationships with one another. When these relationships break down, the actors will go to great cost to improve them. For example, they may compromise their institutional priorities and invest resources to improve the competence of their collaborators.²²⁶

But parallel proceedings are different. When the working relationships between civil and criminal regulators erode, they can stop collaborating without shutting down for business. This dynamic is exacerbated by the informal nature of inter-agency cooperation in parallel proceedings. In order for such informality to work, the institutions must invest in maintaining high degrees of trust.²²⁷ These investments can serve as constraints on

221. See Diego Gambetta, *Can We Trust?*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* 213, 217 (Diego Gambetta ed., 1988).

222. See *id.* at 219.

223. For a fascinating examination of the relevance of trust to the administration of criminal enterprises, see DIEGO GAMBETTA, *CODES OF THE UNDERWORLD: HOW CRIMINALS COMMUNICATE* (2011).

224. Cf. Richman, *supra* note 28, at 830 (proposing oversight over the length of time prosecutors and agents work together in order to better “develop the specialized knowledge and agent trust that would facilitate productive exchanges”).

225. See Gambetta, *supra* note 221, at 218–29.

226. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

227. See Walter W. Powell, *Trust-Based Forms of Governance*, in *TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH* 59–60 (Roderick M. Kramer & Tom R. Tyler eds., 1996) (arguing that in strategic alliances where trust is not easily established, actors must “rely on contractual agreements to curb potential opportunism” and “formally structured” monitoring); cf. Ronald J. Gilson, et al., *Text and Context: Contract Interpretation as Contract Design*, 100 *CORNELL L. REV.* 23, 67 (2014) (“[A]s uncertainty becomes fully Knightian, and state-contingent contracting becomes close to impossible rather than merely gap-ridden, . . . the parties’ formal contractual arrangement then focuses on specifying a collaborative process, the goal of which is to create the context that will support the informal mechanisms of trust that will regulate the actual provision of goods and services.”). For a thorough survey of the “social norms” literature to which these observations contribute, see Alex Raskolnikov, *The Cost of Norms: Tax Effects of Tacit Understandings*, 74 *U. CHI. L. REV.* 601, 604–07 (2007).

agencies' behavior by ensuring that one agency does not deviate too far from the policy goals of the other.

Under some conditions, however, one agency may be so dependent on the other that trust becomes less relevant. When this situation occurs—a situation in which an agency is trapped in a cooperative relationship with high holdup costs—exploitation and capture of the dependent agency's agenda becomes possible. For example, if a regional office of the SEC lacks the ability to effectively litigate cases at trial, it may have to rely on a local U.S. Attorney's Office to secure the convictions it needs to obtain quick settlements.²²⁸ Under such circumstances, the U.S. Attorney's Office has the power to use the SEC's investigation as a tool for generating charges against a defendant (by eliciting false statements in the course of a deposition) and establishing venue (by scheduling depositions within the U.S. Attorney's Office's jurisdiction). In other words, when the SEC's litigation skills are weak, the U.S. Attorney can behave as it did in *United States v. Scrushy*.²²⁹ In the short run, while the civil regulator remains dependent, the prosecutor need not worry about the erosion of trust that this behavior creates. In the long run, however, the civil regulator can respond to these conditions by investing in the litigation skills necessary to sever its relationship with the prosecutor.

Of course, there are significant limits to a transaction-cost analysis of the decisionmaking in parallel proceedings. Political considerations and cultural norms may keep regulators coordinating with each other long after doing so has ceased to be productive.²³⁰ When change does occur, it will often result from exogenous pressures rather than from shifts in the relationship with a regulator.²³¹ Or the motivations of regulators may be so varied and inscrutable that the governance of parallel proceedings is driven by ambitious bureaucrats seeking out problems on which to impose their idiosyncratically preferred solutions.²³² The realities of parallel proceedings, however, suggest that a transaction cost analysis has considerable explanatory value.

228. See David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 TEX. L. REV. 1849, 1858 n.75 (2012) (citing news reports following the 2008 financial crash where "the public perceived an SEC afraid to litigate, that settled cases for relief far milder than what could be obtained at trial").

229. See *supra* notes 88–100 and accompanying text; see also 1–5.

230. Cf. Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 240–41 (1979) ("Other things being equal, idiosyncratic exchange relations which feature personal trust will survive greater stress and display greater adaptability.").

231. See, e.g., *infra* notes 394–405 and accompanying text (describing reforms to the SEC's Enforcement Division in response to the Madoff scandal).

232. See generally Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1 (1972).

B. Collaborative Options in Parallel Proceedings

Unlike simple make-or-buy decisions, the more complex ones that prosecutors and civil enforcers face do not involve simply a binary choice for each party to either build its in-house litigation and investigation resources or “buy” them from another party. When it is desirable to cooperate with an outside agency in the service of these goals, both criminal and civil regulators have a range of options available to them. Both federal and civil enforcers take advantage of their exit power to adjust their agency alliances in parallel proceedings to advance their enforcement priorities. In terms of their options for “buying” goods through parallel proceedings, however, agencies differ in their bargaining power.

In choosing whether to collaborate with a criminal prosecutor, flexible venue rules help to ensure that regulators have options when selecting their prosecutor.²³³ For example, the venue rules for white-collar offenses—especially for securities offenses—are notoriously expansive.²³⁴ These rules enable regulators to cooperate with the U.S. Attorney’s Office of their choice and to reject the overtures of a disfavored office. In addition, the regulator can bring their case to the relevant specialty unit in Main Justice.²³⁵ As one former SEC officer explained, for matters that prosecutors discover independently, the case is usually brought in the jurisdiction where venue most naturally lies.²³⁶ If the SEC learns about an issue before prosecutors do, however, the agency will make an independent decision whether to refer the case and to which criminal authority.²³⁷ On these matters, there are some subject areas that naturally fall within the province of a specific

233. See, e.g., Yin Wilczek, *Interaction of SEC’s Bounty Program, Cooperation Initiative Remains to Be Seen*, White Collar Crime Report (BNA) (June 17, 2011) (reporting that the Deputy Director of the SEC’s Enforcement Division, “in response to a question as to where the SEC refers its matters, said the commission constantly is reminded by [the] U.S. Attorney for the Eastern District of Virginia . . . and [the] U.S. Attorney for the Southern District of New York . . . that their districts have broad jurisdiction over SEC cases. The SEC makes the decision based on its ‘best judgment,’ he said.”).

234. See 18 U.S.C. § 3237(a) (2012) (general venue provision providing that an offense may be “prosecuted in any district in which” it was “begun, continued, or completed”); Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa(a) (2012) (providing that securities offenses may be prosecuted in any district “wherein the defendant is found or is an inhabitant or transacts business” or where “any act or transaction constituting the violation occurred”); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 782 (1999) (noting that “the flexibility of federal venue requirements often expose potential targets (particularly in the white-collar area) to prosecution in several different districts”).

235. See, e.g., Thad A. Davis, *A New Model of Securities Law Enforcement*, 32 CUMB. L. REV. 69, 81–82 (2002) (“Currently, when the SEC perceives a possible criminal violation of the securities laws it may, in its discretion, refer such action to the main Justice Department, or alternatively, directly to a United States Attorney’s Office.”).

236. Interview with anonymous source 12 [hereinafter I-12].

237. *Id.*

U.S. Attorney's Office or Main Justice.²³⁸ For example, Foreign Corrupt Practices Act ("FCPA") claims naturally fall within the purview of the Fraud Section of Main Justice.²³⁹ Even these cases, however, permit the SEC some discretion to choose among different prosecutors.²⁴⁰

Civil regulatory agencies will often differ in their bargaining power with respect to selecting prosecutors. The CFTC, for example, has a range of options for cooperating with prosecutors. The agency must be careful, however, to choose its prosecutors wisely to ensure that they will actually be able to reap the benefits of a criminal referral.²⁴¹ In choosing a prosecutor, the dominant factor that shapes the CFTC's referral decisions is which prosecutor's office is likely to "run with a case."²⁴² One potential source of frustration with parallel proceedings, according to an attorney familiar with the CFTC, is the possibility that criminal authorities will accept a referral but not follow through on the investigation.²⁴³ CFTC officials therefore do their best to coordinate with criminal authorities in advance of a referral to make sure that the office has the time and commitment to pursue the case.²⁴⁴

When making criminal referrals, CFTC attorneys evaluate a number of "commonsense" considerations that include whether an office has the capacity and will to prioritize the case.²⁴⁵ In terms of competition between these offices for high-profile cases, a U.S. Attorney will often make clear that she is interested in pursuing the case.²⁴⁶ As one former CFTC attorney conceded, however, U.S. Attorneys are not always as "gung ho" about pursuing the agency's cases as they are about cases on the SEC's docket.²⁴⁷ The Fraud Section of Main Justice, by contrast, has a large staff devoted to prosecuting the sort of cases that the CFTC generates.²⁴⁸ A relatively easy "retail fraud" case may go to a U.S. Attorney's Office that has an interest in taking it even if its value is too small for an office such as the SDNY to pri-

238. *Id.*

239. *Id.*

240. For example, one former SEC officer reported that for certain matters there is a preference for the Southern District of New York, but not monolithically so. *Id.*

241. As to their options, the CFTC may refer a criminal case to a U.S. Attorney's Office, the Fraud Section of Main Justice, an FBI field office, or a state or county prosecutor. I-8; I-7.

242. *Id.*

243. *Id.*

244. *Id.*

245. For example, the complexity of a case will often determine the office to which it is referred. If a case involves a complex matter that requires considerable financial expertise, it will typically go to the SDNY, the Eastern District of New York ("EDNY"), the DOJ Fraud Section, or the Northern District of Illinois (Chicago). I-8; I-7.

246. I-8.

247. I-7.

248. *Id.*

oritize. Smaller cases may also go to state or local criminal enforcement authorities, including the Manhattan District Attorney.²⁴⁹ In addition, the CFTC frequently works with U.S. Attorneys' Offices in Florida (which often prosecute fraud cases involving defendants who take advantage of retirees), the Western District of North Carolina, and the Central District of California.²⁵⁰ This range of options, according to one attorney familiar with the CFTC's enforcement practices, ensures that there will rarely be a case involving potential criminal conduct that does not get referred to some criminal office.²⁵¹

By contrast, the SEC appears to have more buying power when it comes to choosing a prosecutor. The SEC's Enforcement Division devotes more time to selecting among prosecutors who want their cases than selling their cases to prosecutors. As with the CFTC, the broad venue provisions of federal securities laws permit the SEC to choose among a range of U.S. Attorneys as well as the Fraud Section of Main Justice. The SEC will also coordinate with the Manhattan District Attorney on certain cases—as it has recently done concerning a small value but high-profile investigation concerning former New Jersey Governor Chris Christie and the Port Authority²⁵²—but appears rarely to do so.

For high-profile SEC cases, there appears to be strong competition among different federal prosecutors. Several former SEC attorneys reported that U.S. Attorneys and Main Justice Leadership would regularly visit the agency's headquarters to maintain relationships with senior officers and “prospect” for high-profile cases.²⁵³ As one former officer explained, prosecutors from the U.S. Attorney's Office for the Southern District of New York would occasionally come to SEC Headquarters to maintain relationships with the Enforcement Division. Prosecutors from other U.S. Attorneys' offices—including the Eastern District of Virginia—have also done this to varying degrees.²⁵⁴

In terms of the pecking order for these high-profile cases, the Southern District of New York appears to be first among equals. The office is renowned for its expertise in securities fraud (although sometimes criticized for its failure to aggressively prosecute those involved in the financial cri-

249. I-8.

250. I-7.

251. I-8.

252. See Press Release, SEC, Port Authority Omitted Risks to Investors in Roadway Projects (Jan. 10, 2017), <https://www.sec.gov/news/pressrelease/2017-4.html>; Matt Flegenheimer et al., *2nd Bridge Inquiry Said to Be Linked to Christie*, N.Y. TIMES (June 23, 2014), <https://www.nytimes.com/2014/06/24/nyregion/2nd-bridge-inquiry-said-to-be-linked-to-christie.html>.

253. I-2; I-5; I-9.

254. I-12.

sis).²⁵⁵ There is substantial overlap between the dockets of SDNY prosecutors and SEC trial attorneys, particularly those in the SEC's New York Regional Office.²⁵⁶ According to one former SDNY prosecutor, during his time in the office “[m]ore than half of the securities fraud cases” that were handled by the Securities and Commodities Fraud Task Force “also ha[d] an SEC component.”²⁵⁷ This degree of collaboration both reinforces and reflects what another former SDNY prosecutor described as a “special relationship” between this office and the SEC.²⁵⁸ For example, according to both former SDNY prosecutors and SEC regulators, it was common for SDNY prosecutors below the U.S. Attorney level—including the Chief of the Criminal Division and the head of the Securities & Commodities Fraud Task Force—to regularly visit the SEC Headquarters in Washington, D.C. to maintain relationships with senior officers at the SEC and to prospect for cases.²⁵⁹

For SEC cases that were not of the highest profile, a former senior officer at the SEC described the referral process as being more decentralized.²⁶⁰ The regional offices of the SEC tended to develop strong collaborative relationships with U.S. Attorneys' Offices that were adept at pursuing securities fraud cases. With respect to cases that are referred at this level, a former senior officer at the SEC indicated that he was surprised by the informality of the referral process. For example, SEC staff attorneys might decide to initiate the criminal referral process if they decided that a target met the requisite level of criminal intent. In such cases, a staff attorney at the SEC might call an Assistant U.S. Attorney with whom she has a relationship to let her know of an interesting case, and a formal access request from the U.S. Attorney's Office would follow. This former senior officer at the SEC also described an informal monthly meeting where the local U.S. Attorney would ask, “[W]hat are you working on?” This attorney recalled that, at times, federal prosecutors might be so eager to pursue a case that SEC staff attorneys had to exercise some discretion to prevent a hasty referral.²⁶¹

255. See, e.g., Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2115 n.6 (2015) (noting that “the United States Attorney's Office for the Southern District of New York has a particular expertise in securities cases”).

256. There is little public data on this overlap, but one former prosecutor estimated that, during his time at the SDNY, more than half of the securities fraud cases “had an SEC component.” I-6.

257. *Id.*

258. I-1.

259. I-1; I-5; I-9.

260. I-2.

261. *Id.*

These reports suggest that the make-or-buy dynamic differs between agencies. Some prosecutors—such as those in the Southern District of New York—have considerable buying power, while others might have to settle for collaborating on lower profile cases. Likewise, some agencies—such as the SEC—have impressive selling power. Others agencies will have less selling power, and might therefore have to be strategic in choosing prosecutors who will agree to work a case.

Of course, if the costs of collaborating on a parallel proceeding become too high, both civil and criminal regulators can both decide to forego cooperation and “make” their cases using the resources available to them in-house. If the civil enforcer with independent litigating authority does not wish to cooperate with a prosecutor, it retains the option of pursuing its own civil case. Therefore, civil regulators may simply decline to refer a case to criminal prosecutors and use the non-criminal remedies and investigative resources available to them in order to sanction a defendant. This choice allows for a range of enforcement options. First, the regulator could pursue its case in federal court and can take advantage of broad venue rules to file the case in the jurisdiction it deems appropriate.²⁶² Second, the agency could choose to avoid federal court and pursue its case through administrative proceedings.²⁶³ Thus, an agency’s enforcement priorities are not only protected from the threat of prosecutorial declination, but also from the threat of unfavorable treatment in federal court.

Similarly, a U.S. Attorney’s Office may simply decline to coordinate with a regulatory agency and build its investigation using resources within the Justice Department. This option may be attractive in cases that require relatively few investigative resources, either due to their simplicity or because they involve a sophisticated corporate defendant that is eagerly presenting the government with evidence it has obtained through its own internal investigation. Even if a case requires extensive investigation, however, the U.S. Attorney’s Office can choose between competing federal investigative agencies with overlapping degrees of expertise in the relevant matter. In a financial crimes case, for example, the prosecutor might be able to leverage the expertise of the FBI or the Secret Service.²⁶⁴ Accordingly, as one

262. Given the institutional design of many regulatory agencies, however, this will not necessarily result in the level of forum shopping that would otherwise be possible. For example, the New York Regional Office of the SEC has jurisdiction in New York and New Jersey. *See New York Regional Office*, SEC, <https://www.sec.gov/page/sec-new-york-regional-office> (last visited Apr. 30, 2018).

263. David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1157 (2016).

264. Although the Secret Service is part of the Department of Homeland Security, it does not have independent litigating authority and must therefore rely on the DOJ’s prosecutorial gatekeeping power. *See* 28 U.S.C. § 516 (2006) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction

U.S. Attorney has observed, prosecutors do not have to “put all their investigative eggs in one basket” and can choose between investigators based on their level of resources and their degree of commitment to the case.²⁶⁵

1. Benefits and Costs to Civil Regulators

For civil regulators, the potential benefits from collaborating with prosecutors include both an expansion in the remedies available to them and, to a lesser extent, an informational advantage.²⁶⁶ First, parallel proceedings permit civil and criminal regulators to essentially merge the set of civil and criminal remedies that are available to each regulator respectively. By expanding the range of remedies that they can collectively obtain against a defendant, both civil and criminal regulators can increase the payoff of their enforcement actions while reducing their costs.

This expansion of available remedies is particularly attractive to civil regulators. To state the obvious, criminal convictions can result in stigma, collateral consequences, and—significantly—prison time.²⁶⁷ As current

of the Attorney General.”); *see also, e.g.*, *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 210 (D.C. Cir. 2013) (listing DOJ attorneys as counsel for appellants).

265. *See* Richman, *supra* note 28, at 770 (reporting on the statements of the U.S. Attorney for the Western District of North Carolina concerning the jurisdictional overlaps between the FBI and the Secret Service on white-collar cases).

266. This analysis assumes that there is alignment of the incentives and goals that motivate civil investigators and litigating enforcement attorneys. In the criminal context, federal investigative agents (including those within the DOJ) do not report to federal prosecutors. *See* U. S. DEP’T OF JUSTICE, ORGANIZATION, MISSION, AND FUNCTIONS MANUAL: DOJ ORGANIZATIONAL CHART, <https://www.justice.gov/agencies/chart> (last visited Apr. 30, 2018). This creates the potential for agenda conflicts that must be carefully negotiated between prosecutors and investigators. *See generally* Richman, *supra* note 28. In most regulatory agencies, by contrast, civil investigators and prosecutors are one and the same. In the SEC, for example, the power to issue subpoenas is delegated to the Enforcement Director, who in turn delegates the authority to mid-level enforcement officers. *See* James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115, 146 n.127 (2012); MARC I. STEINBERG & RALPH C. FERRARA, *SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT*, 25A, § 9:1 nn.3–5 (updated Sept. 2015). Within this structure, the SEC has traditionally separated the Enforcement Division’s trial attorneys and investigating attorneys. *See* Terence J. Lynam, *Going to Trial Against the SEC*, BANKING & FIN. SERVS. POL’Y REP., Sept. 2007, at 6. In recent years, however, the Enforcement Division has reportedly reorganized this structure “by pairing groups of trial attorneys with groups of investigative lawyers so that trial staff are involved earlier in the investigations, and vice versa.” Ed Beeson, *SEC Silences Critics with Resounding Victory in Wyly Trial*, LAW360 (May 14, 2014), <https://www.law360.com/articles/537677/sec-silences-critics-with-resounding-victory-in-wyly-trial>. This organizational structure would seem to reduce the incentive misalignments and power struggles that create tension between criminal prosecutors and agents.

267. For the type of white-collar cases that are frequently pursued in parallel, the criminal penalties are particularly serious. *See, e.g.*, Peter J. Henning, *Punishments for Insider Trading Are Growing Stiffer*, N.Y. TIMES: WHITE COLLAR WATCH (Sept. 9, 2014, 10:44 AM), https://dealbook.nytimes.com/2014/09/09/punishments-for-insider-trading-are-growing-stiffer/?_r=0.

SEC Chair (and former U.S. Attorney for the Southern District of New York) has said, “There are, of course, no more powerful tools than a criminal conviction and the prospect—and reality—of imprisonment.”²⁶⁸ In addition, criminal prosecution can increase the monetary sums that the government would otherwise be unable to recover.²⁶⁹ The criminal forfeiture statute can sometimes enable the government to recover assets that would otherwise be beyond the reach of the civil regulator.²⁷⁰ Moreover, a conviction can result in criminal penalties beyond those imposed by a civil settlement.²⁷¹

Convictions also increase the settlement value of a case.²⁷² As William Stuntz observed, “[T]he stakes in criminal litigation have two critically important characteristics: They are both extremely large and nonmonetary. . . . If a given defendant has a million dollars in the bank, he might well find it worthwhile to spend it all to achieve a successful outcome”²⁷³ In the parallel enforcement context, one such outcome would be a coordinated non-prosecution agreement that involves the payment of heavy civil penalties. By revealing that prosecutors are interested in a civil enforcement case, a civil regulatory agency will motivate a defendant to pay a steep price for such an agreement.

In addition to raising settlement value, however, there are two ways in which a criminal conviction will substantially reduce the costs of litigating the settlement. First, if the government is able to obtain a conviction, the regulator can invoke collateral estoppel to bar the defendant from litigating

268. White, *supra* note 1.

269. For example, the SEC’s Fair Fund provision gives it the authority to compensate investors for their losses using civil penalties and the disgorgement of ill-gotten gains. See Verity Winship, *Fair Funds and the SEC’s Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1110 (2008). The agency cannot, however, predicate a civil penalty on the full amount of shareholders’ losses. See *SEC Directors Testify at Senate Hearings on Structural Reforms*, SEC Today 12891582 (summarizing testimony of SEC Enforcement Director Robert Khuzami); see also Securities Exchange Act of 1934 §§ 21(d), 21A, 15 U.S.C. §§ 78u(d), 78u-1 (2012) (setting forth the remedies available to the SEC).

270. See 18 U.S.C. § 982(a) (2012).

271. See, e.g., Press Release, SEC, Petrochemical Manufacturer Braskem S.A. to Pay \$957 Million to Settle FCPA Charges (Dec. 21, 2016), <https://www.sec.gov/news/pressrelease/2016-271.html> (reporting that a petrochemical manufacturer charged with FCPA violations “agreed to pay \$325 million in disgorgement, including \$65 million to the SEC” and “more than \$632 million in criminal penalties and fines”).

272. Cf. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 886 (2007) (“The DOJ’s added value may be that in unusually serious [parallel enforcement] cases, it can secure cooperation using the deterrent threat of indictment.”).

273. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 31 (1997) (analyzing criminal defendants’ willingness to pay for legal representation).

her liability with respect to those issues.²⁷⁴ Thus, the mere credible threat of a conviction will incentivize a defendant to spare regulators the costs of challenging important aspects of their case. By cooperating in this manner, the defendant may hope to avoid a criminal charge while avoiding the costs of litigating an issue that she would have to forfeit anyway.

Second, the threat of a conviction might incentivize a defendant to accept adverse inferences against her—and thus reduce the government’s litigation costs—in order to avoid incriminating herself. Because the Fifth Amendment’s self-incrimination right²⁷⁵ extends only to criminal cases, triers of fact may draw adverse inferences in a civil proceeding if a defendant chooses to remain silent.²⁷⁶ Thus, by helping prosecutors build a criminal conviction, civil regulators can substantially increase the settlement value of a case against a defendant who is willing to take an adverse inference in the civil proceeding to reduce the risk of prison time.²⁷⁷ One white-collar defense attorney (and former SDNY prosecutor) explained that sometimes people overstate the degree to which this is a problem because “you can cure adverse inferences anytime before trial.”²⁷⁸ Other defense attorneys, however, suggest that the doctrine governing when an adverse inference can be cured is so underdeveloped that lawyers cannot factor it in to the advice they offer clients.²⁷⁹

Accordingly, the selection of remedies—in the form of criminal convictions, civil settlements, criminal and civil forfeiture orders, non-prosecution agreements, and other resolutions of parallel proceedings—is central to the collaborative process between civil and criminal regulators. Many deferred prosecution agreements and non-prosecution agreements in white-collar cases bear the hallmarks of close collaboration between federal

274. See *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 41 (2d Cir. 1986) (noting that “federal law . . . accept[s] the general principle that a criminal conviction has collateral estoppel effect in a civil action”).

275. U.S. CONST. amend. V.

276. See *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97 (2d Cir. 2012) (“[T]he greatest risk posed by parallel [civil and criminal proceedings] . . . is that parallel proceedings may place significant burdens upon the Fifth Amendment privilege against self-incrimination.” (second and third alterations in original) (quoting Alvin Hellerstein & Gary Naftalis, *Private Civil Actions and Concurrent or Subsequent Regulatory or Criminal Proceedings*, SG046 ALI-ABA 903, 905 (2001))).

277. See MARVIN G. PICKHOLZ, PETER J. HENNING & JASON R. PICKHOLZ, 21 *SEC. CRIMES Protective Orders* § 4:5, Westlaw (database updated Nov. 2017) (“To allow civil discovery to proceed, or to proceed without any Rule 26(c) protective order, sets the stage for the defendant trapped in parallel proceedings to be victimized by creating an in terrorem increment in the settlement values of a case because, even if later allowed to testify, a defendant who invokes the Fifth Amendment during discovery faces the use of his earlier invocation as an impeachment device.” (footnote omitted)).

278. I-4.

279. I-11.

prosecutors and civil regulators.²⁸⁰ Indeed, the DOJ's policy statement governing parallel proceedings—the Holder Memo—instructs agency attorneys to assess the impact of a guilty plea on the resolution of a civil case.²⁸¹ In making these assessments, DOJ attorneys are advised to engage in “[e]ffective and timely communication[s]” with the staff of other agencies “so that agencies can pursue available remedies at an appropriate time.”²⁸² It is therefore standard practice for experienced defense attorneys to seek “coordinated settlements” with criminal and civil regulators in parallel proceedings.²⁸³

The informational benefits to regulators from coordination are subtler. The Federal Rules of Criminal Procedure bar prosecutors from disclosing matters before a grand jury except in certain enumerated circumstances.²⁸⁴ However, to facilitate collaboration with civil regulators, prosecutors can work “outside” the grand jury.²⁸⁵ As one former prosecutor explained, “[I]t is not that difficult to investigate with means other than the grand jury in parallel proceeding contexts. Eventually you may want to use the grand jury to memorialize a witness's testimony, but you can also lock down a witness's statements by taking precise notes of an interview.”²⁸⁶ For example, the FBI may conduct a “knock and talk” interview of any person who may be relevant to a criminal investigation.²⁸⁷ Several experienced defense at-

280. *See, e.g.*, Garrett, *supra* note 20, at 159.

281. Holder Memo, *supra* note 42.

282. *Id.*

283. *See, e.g.*, HARLAN GOTTLIEB & KEVIN L. PHELPS, SEYFARTH SHAW LLP, THE GOVERNMENT CONTRACT COMPLIANCE HANDBOOK § 3:8 (5th ed. Supp. 2016) (“[I]n practice today, global settlements are more likely to be ‘parallel settlements’ or ‘coordinated settlements.’ If the Government commences an investigation of your company, you should actively pursue a settlement to resolve all criminal, civil, and administrative disputes with each interested party, including the Civil and Criminal Divisions of the DOJ, the relevant administrative agencies, prime and subcontractors, and any ‘qui tam’ private plaintiffs.”).

284. *See* FED. R. CRIM. P. 6(e)(2)–(3). These exceptions permit courts to authorize disclosure of grand jury evidence “preliminarily to or in connection with a judicial proceeding.” FED. R. CRIM. P. 6(e)(3)(E)(i). In order to obtain such a judicial order, however, regulators must satisfy the relatively high burden of showing a “particularized need” for the grand jury materials to be disclosed. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 442–45 (1983). Moreover, this exception does not apply to civil regulatory investigations that will result in administrative proceedings or which otherwise are unrelated to an actual or prospective judicial proceeding. *See United States v. Baggot*, 463 U.S. 476, 480–83 (1983).

285. I-1; I-8; *see also* Holder Memo, *supra* note 42 (advising that, in cases that are likely to involve parallel proceeding, “prosecutors should, at least as an initial matter, consider using investigative means other than grand jury subpoenas for documents or witness testimony”).

286. I-4.

287. Fern L. Kletter, Annotation, *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions*, 15 A.L.R. 6th 515 (2006) (defining “[k]nock and talk [as] a procedure used by law enforcement officers, under which they approach the door of a residence seeking to speak to the inhabitants, typically to obtain more information regarding a criminal investigation or to obtain consent to search where probable cause is lack-

torneys and former prosecutors have suggested that this technique is particularly effective in the type of white-collar cases for which parallel proceedings are common.²⁸⁸ Once the case has proceeded further, the prosecutor and civil regulators can conduct witness interviews jointly, or the prosecutor can unilaterally conduct an interview that it summarizes for the regulator.²⁸⁹ Thus, with adequate planning, a federal prosecutor can build a criminal investigation so as to facilitate coordination with civil authorities.

Potential wiretap evidence may also incentivize coordination.²⁹⁰ Civil regulators lack a statutory basis to conduct wiretaps, and federal prosecutors are likely prohibited from directly disclosing wiretapped conversations to civil regulators under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.²⁹¹ If a federal criminal case is already underway, then regulators can obtain wiretap evidence from the defendants themselves through civil discovery.²⁹² Therefore, a civil regulator could potentially reap the benefits of a federal criminal investigation without incurring the costs of coordination. Nevertheless, a collaborative relationship with federal prosecutors could motivate criminal authorities to provide agencies with the information necessary to know that they should make discovery requests to defendants that will yield wiretap evidence.

If the costs of coordinating become too great, however, civil regulators have most of the procedural tools they need to obtain this information independently—to “make” rather than “buy” the investigation—if they have the resources to do so.²⁹³ Unlike the remedies that are uniquely available to criminal prosecutors, the investigative resources of civil regulators are comparable to those of U.S. Attorneys in parallel enforcement cases. When investigating “outside” the grand jury in order to share information with a civil regulator, the investigative tools that are available to prosecutors—including administrative subpoenas and search warrants—are not notably

ing”); *id.* (“Given that the presence of law enforcement officers at one’s doorstep has an inherent natural element of coercion, a knock and talk encounter does not implicate constitutional prohibitions against unlawful seizures, so long as the encounter remains consensual and does not rise to the level of a seizure.”).

288. I-1; I-4.

289. *See, e.g.*, *United States v. Martoma*, 990 F. Supp. 2d 458, 461–62 (S.D.N.Y. 2014) (describing prosecutors and regulators employing both of these techniques in a parallel insider trading investigation).

290. *See White*, *supra* note 1.

291. 18 U.S.C. §§ 2510–2522 (2012). In *SEC v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010), the U.S. Attorney’s Office filed an amicus brief conceding that such direct disclosures of wiretaps to the SEC are prohibited “without any law enforcement purpose and solely to assist the SEC in a civil case.” *Id.* at 174. For an argument that such direct disclosures are in fact permitted, see Alexandra N. Mogul, Note, *Behind Enemy Phone Lines: Insider Trading, Parallel Enforcement, and Sharing the Fruits of Wiretaps*, 84 FORDHAM L. REV. 1247 (2015).

292. *See United States v. Gupta*, 848 F. Supp. 2d 491, 496 (S.D.N.Y. 2012).

293. *See supra* Part III.A.

stronger than those at the civil regulator's disposal.²⁹⁴ Moreover, a civil regulator does not necessarily need to rely on the prosecutor's goodwill in order to benefit from their investigation. Rather than collaborating with a prosecutor, a civil enforcer could theoretically piggyback on the prosecutor's investigation and use the civil discovery process to obtain wiretap evidence and other valuable information.²⁹⁵

For civil regulators, there are a number of potential costs of parallel enforcement that might lead them to select one prosecutor's office over another, or to decline to collaborate with any prosecutor at all. Three costs, in particular, were a recurrent theme in my interviews with current and former regulators. First, civil enforcers are sensitive to the possibility that prosecutors will "unreasonably" try to slow down an investigation.²⁹⁶ As one former CFTC attorney observed, regulators recognize that prosecutors must sometimes make reasonable requests to delay the civil investigation.²⁹⁷ Moreover, prosecutorial declinations appear not to generate significant tensions between prosecutors and the referring agency because regulators are aware that prosecutors have legitimate reasons for declining a case.²⁹⁸ It becomes a serious problem for the CFTC, however, if prosecutors attempt to slow things down, and thus, interfere with regulatory objectives, simply because they have other things on their plate.²⁹⁹

Second, and relatedly, parallel enforcement creates the risk that civil regulators will not receive the credit that they believe they deserve for their work. Both prosecutors and civil attorneys are sensitive to this risk. For example, the Holder Memo instructs DOJ attorneys that "[i]t is vital that investigators obtain appropriate credit for all of their work in support of the government's remedies, including civil and administrative remedies."³⁰⁰ Civil regulators can seek to minimize the risk by advertising their contributions to a parallel proceeding. For example, both the SEC and the CFTC frequently file civil actions the same day an indictment is issued, and the DOJ will then request a stay of the civil proceedings.³⁰¹ A former senior official at the SEC indicated that, in his view, the only purpose of these simultaneous filings is to ensure that the agencies share the credit and publicity that results from filing a high-profile criminal indictment.³⁰² Even

294. *See supra* notes 284–285 and accompanying text.

295. *See supra* note 292 and accompanying text.

296. I-7.

297. *Id.*

298. *Id.*

299. *Id.*

300. Holder Memo, *supra* note 42.

301. *See supra* note 190 and accompanying text.

302. I-2; *see also* THOMAS C. NEWKIRK & CHRISTOPHER DEAL, JUDGES LOOK BEHIND THE SCREEN QUESTIONING SEC STAYS IN PARALLEL PROCEEDING 3 (Nov. 25, 2009),

when these stays occur, however, the relatively large megaphone that attends criminal charges may lead the public (and, importantly, Congress) to discount the contributions of civil enforcers.³⁰³ Indeed, one former, high-ranking SDNY prosecutor observed, “[T]he SEC will sometimes bridle at a request to stay the civil proceeding.”³⁰⁴ As this former prosecutor explained, “[I]t is difficult to stand down when you have developed a case and may rightfully want citizens to know that you’ve been doing your job, so tensions may arise from being perceived to take a back seat. Especially if they’ve been building the investigation and have a solid case.”³⁰⁵

Finally, former regulators noted that their agencies were sensitive to the threat of prosecutorial “steamrolling”—the possibility that a prosecutor will attempt to unreasonably control a parallel investigation.³⁰⁶ For example, a prosecutor may try to insist that only one lawyer from a cooperating agency attend joint witness interviews and attempt to deny the agency’s enforcement lawyer any opportunity to ask questions during the interviews.³⁰⁷ According to one former CFTC regulator, prosecutorial efforts to control a parallel investigation cross a line in two situations.³⁰⁸ First, a prosecutor may be so risk-averse about creating discovery that he insists on controlling the investigation as a knee-jerk instinct rather than evaluating the proper scope of cooperation on a case-by-case basis.³⁰⁹ Second, a prosecutor may overestimate the criminal investigators’ relative competence conducting witness interviews in situations where the regulators have greater substantive expertise than prosecutors.³¹⁰

Concern about “steamrolling” varies both between, and within, regulatory agencies. For example, one former SEC senior official indicated that the agency’s level of enthusiasm for cooperating with criminal authorities varied by office.³¹¹ Attorneys at the SEC Headquarters in Washington, D.C., for example, would bridle at the degree to which the DOJ Securities Fraud Section would take over a case in which they were involved.³¹² These attorneys were accordingly more reluctant to involve criminal author-

https://jenner.com/system/assets/publications/1780/original/judges_look_behind_the_screen.pdf?1314805431 (remarking on the “not-so-secret pact” between the SEC and the DOJ).

303. Cf. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 875–86 (2014) (describing civil enforcers’ reputational incentives to seek out and publicize large monetary judgments).

304. I-4.

305. *Id.*

306. I-7.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. I-2.

312. *Id.*

ities in an SEC investigation.³¹³ Some of these attitudes changed when former prosecutors began to occupy key positions in SEC leadership, but the variation in enthusiasm nevertheless existed.³¹⁴ Additionally, an attorney familiar with the CFTC's enforcement practices suggested that the risk of steamrolling has not been a significant concern in recent years.³¹⁵ Perhaps due to increased education on both the civil and criminal sides, prosecutors may have realized that the risks of cooperative enforcement are not what they might have initially perceived them to be, and that the benefits of cooperation far outweigh the potential risks.³¹⁶

This perspective suggests that experienced regulators have internalized—without necessarily articulating—that whether to engage in parallel enforcement is a cost-benefit decision. Regulators try to manage the associated risks of coordination, and thus reduce the hold-up costs of parallel enforcement. For example, an attorney with recent CFTC experience explained that, when prosecutors cross a line in attempting to control a parallel investigation, regulators can usually push back by stressing the benefits of cooperation.³¹⁷ A regulator may point out, for example, that her agency may have more expertise in the relevant market, and that the criminal investigators on a given case are not significantly more skilled at witness interviews than the enforcement lawyers.³¹⁸

In the short run, regulators could choose to pursue a case unilaterally while continuing to reap the benefits that attend cooperative enforcement. Specifically, a regulator could “free ride” off a prosecutor's efforts without cooperating in a parallel proceeding. For example, a regulator could choose to wait until a prosecutor obtains a conviction and simply piggyback off the criminal investigation. Over time, however, this strategy will come at a cost. If civil regulators consistently free ride off of prosecutions that they decline to assist, prosecutors may be less willing to provide them the information and support, or may even decline referrals from a recalcitrant agency. Hence, the repeat-game structure of parallel enforcement ensures that, over time, a civil regulator will face a choice between “buying” prosecutorial resources through collaboration and “making” those resources through in-house investments.

313. *Id.*

314. *Id.*

315. I-8.

316. *Id.*

317. I-7.

318. *Id.*

2. *Benefits and Costs to Prosecutors*

For prosecutors, the benefits and costs of parallel proceedings differ in some respects from those of regulators. As to benefits, parallel enforcement enables prosecutors to leverage the substantive expertise, remedial options, and investigative resources of civil enforcement agencies. First, parallel proceedings enable prosecutors to leverage the substantive expertise of civil regulatory agencies.³¹⁹ This expertise can benefit prosecutors at both the investigative and litigation stages of a proceeding. For example, as an attorney familiar with the CFTC's enforcement practices explained, prosecutors can expedite a plea agreement by having an agency investigator with substantive expertise attend a proffer and ask perceptive questions about the trades in question.³²⁰ Additionally, this attorney explained that CFTC investigators can serve as experts on the financial products or trades at issue in a criminal trial, and the agency has connections with outside experts that prosecutors can leverage in a parallel investigation.³²¹

Second, as with regulators, parallel proceedings offer prosecutors a modest expansion of the remedies available to achieve their desired regulatory aims.³²² A civil enforcement decision has no collateral estoppel value for a criminal prosecution.³²³ However, it can provide monetary remedies otherwise beyond a prosecutor's reach. For example, Section 304 of the Sarbanes Oxley Act—sometimes known as the Act's "clawback provi-

319. See, e.g., Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1867 (1992) ("Administrative agencies have special expertise in identifying and assessing violations. They have firsthand experience with potential offenders and with the substantive law over which they have regulatory authority."); Miheer Mhatre, Note, *Parallel or Paralyzed? Sklena, Rule 804(b)(1), and the Costly Implications for Interagency Law Enforcement Efforts*, 2013 COLUM. BUS. L. REV. 546, 566–67 (2013) ("In addition to facilitating broader impact for government resources, parallel proceedings uniquely generate opportunities for expertise pooling." (footnote omitted)).

320. I-8.

321. *Id.* Similarly, SEC staff attorneys will sometimes appear as lay and expert witnesses in criminal cases that are a part of a parallel proceeding. See, e.g., *United States v. Georgiou*, 777 F.3d 125, 142–44 (3d Cir. 2015) (upholding the district court's admission of lay witness testimony by an SEC employee concerning observations he made in connection with the SEC investigation); *United States v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988) (holding that an SEC expert's testimony was impermissibly conclusory but acknowledging that "no sustainable objection could have been made" if the testimony had been more limited).

322. For a discussion and critique of the prosecutor as a regulatory entity in the white-collar context, see Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 177 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

323. See E. H. Schopler, Annotation, *Conviction or Acquittal in Criminal Prosecution as Bar to Action for Statutory Damages or Penalty*, 42 A.L.R.2d 634 (1955) ("Since an acquittal on criminal charges may represent only an adjudication of insufficient proof to overcome all reasonable doubt of accused's guilt, and does not constitute an adjudication on preponderance of evidence burden applicable in civil proceedings, a criminal acquittal does not operate as collateral estoppel on issues in subsequent civil proceeding . . .").

sion”—enables the SEC to seek the forfeiture of bonuses and other forms of equity-based compensation.³²⁴ This provision is particularly attractive to regulators because it can be imposed without jury findings to support disgorgement and can apply against individual defendants.³²⁵ According to one former federal prosecutor, the availability of this clawback provision is an attractive feature of parallel proceedings against individual defendants.³²⁶

The most significant advantages that prosecutors can obtain from parallel enforcement, however, are investigative in nature. For example, some have argued that parallel proceedings ratchet up the costs of using criminal procedure rights to resist a government investigation.³²⁷ In practice, the costs of a criminal conviction are usually so dire that experienced lawyers will counsel defendants to accept an adverse inference in a civil proceeding in order to reduce their risk of conviction.³²⁸ In some cases, however, the costs of remaining silent in a civil proceeding will indeed persuade defendants to testify in that proceeding, ultimately to the benefit of prosecutors.³²⁹

My interviews revealed several other benefits to using parallel investigations to build a criminal investigation that scholars had previously overlooked. For example, one former prosecutor observed that having a civil regulator initiate an investigation could help determine whether a criminal investigation is warranted.³³⁰ Moreover, both prosecutors and regulators observed a number of small ways in which parallel proceedings benefit from having civil regulators take the lead in an investigation, including the fact that “witnesses are less wary of talking” during a civil proceeding.³³¹ In addition, beginning a parallel proceeding with civil investigation can reduce the press attention that a case attracts, which is desirable under many circumstances.³³²

324. See 15 U.S.C. § 7243 (2012).

325. See *SEC v. Jasper*, 678 F.3d 1116, 1130 (9th Cir. 2012) (holding that because “the reimbursement provision of [15 U.S.C. § 7243] is considered an equitable disgorgement remedy and not a legal penalty,” a defendant “is not entitled to have a jury find all of the facts necessary to support the reimbursement”).

326. I-1.

327. See *supra* note 79.

328. See *supra* notes 276–279 and accompanying text.

329. As one experienced defense attorney explained, this decision can be motivated by a (typically misguided) desire to avoid attracting prosecutorial interest in a matter: “[I]f the SEC starts an investigation, and you’re concerned about your client’s exposure criminally, and you assert the Fifth to deposition questions—then you’re pretty much inviting the United States Attorney to get interested in the case. So some lawyers take a shot and are cooperative with the SEC in the hope that they never bring in the US Attorney.” I-10. Such a strategy, in the view of this attorney, is “very dangerous.” *Id.*

330. I-4.

331. *Id.*

332. *Id.*

Additionally, civil regulators are often better positioned than prosecutors to learn about and inquire into wrongdoing. Because financial misconduct is often difficult and costly to detect,³³³ both civil and criminal regulators lack the resources to seek out wrongdoing without the assistance of the media or outside actors.³³⁴ Prosecutors have powerful resources for generating cases (including the promise of leniency for those who reach out to them about criminal conduct they have committed). Both civil and criminal enforcers frequently must rely upon whistleblowers to learn about potential misconduct.³³⁵ In the securities context, the SEC is currently authorized to pay substantial awards to individuals who provide the agency with information leading to a successful enforcement action yielding over \$1 million.³³⁶ This provision makes whistleblowing sufficiently lucrative for individuals to take substantial risks in order to bring compelling information to the SEC.³³⁷

Even leaving whistleblower payouts aside, staffing and institutional considerations may make civil regulators better positioned to discover certain types of new cases through whistleblowers. For instance, the staffs of many civil agencies often belong to the same professional networks as those whom they are regulating.³³⁸ The SEC, for example, attempts to recruit

333. Cf. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 706 (1997) (observing that intentional corporate misconduct “is often uniquely difficult to detect because it is deliberately hidden”).

334. See Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL’Y 639, 646–47 (2010); Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 273 (2014). For a recent example of the SEC’s and DOJ’s coordinated effort to incentivize disclosures of wrongdoing, see Carmen Germaine, *SEC, DOJ Not Fooling Many With Easy FCPA Deals*, LAW360 (June 8, 2016, 10:29 PM), <http://www.law360.com/articles/804906/sec-doj-not-fooling-many-with-easy-fcpa-deals> (describing the effects of the new Foreign Corrupt Practices Act Pilot Program that offers substantial civil and criminal penalty discounts to companies that cooperate with investigators and disgorge unlawful gains).

335. See generally Miriam H. Baer, *Reconceptualizing the Whistleblower’s Dilemma*, 50 U.C. DAVIS L. REV. 2215 (2017).

336. Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act § 922, 15 U.S.C. § 78u-6 (2012).

337. See, e.g., Press Release, SEC, SEC Issues \$17 Million Whistleblower Award (June 9, 2016), <https://www.sec.gov/news/pressrelease/2016-114.html> (reporting that the SEC has “awarded more than \$85 million to 32 whistleblowers since the program’s inception in 2011” and that the largest single whistleblower payout was \$30 million). The CFTC has a similar whistleblower program. See 7 U.S.C. § 26 (2012). That agency’s payouts, however, have thus far been smaller and fewer in number. See Press Release, CFTC, CFTC Announces Fourth Whistleblower Award (July 26, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7411-16> (announcing that the agency issued its fourth award of \$50,000 and that its largest payout had thus far been \$10 million).

338. See, e.g., Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015) (analyzing empirical work documenting the extent and effects of the revolving door between agencies and the industries they regulate).

employees with professional experience in regulated industries,³³⁹ and its staff returns to those industries in large numbers after leaving the agency.³⁴⁰ These contacts might lead industry insiders to feel more comfortable reaching out to SEC staff than FBI agents—who often have backgrounds and training different from those working in white-collar industries—about potential wrongdoing.³⁴¹ Additionally, the SEC has structured its bureaucracy so that staff with a diverse range of expertise will evaluate tips, complaints, and referrals that come into the agency. Specifically, as a former senior officer at the SEC explained,

the goal in establishing the agency’s Office of Market Intelligence was to create an information intake office that combined expertise in market surveillance, data analytics, and accounting alongside the substantive legal expertise of staff who liaise specifically with the SEC’s specialized units, including asset management, FCPA, structured and new products, market abuse, and municipal securities and public pensions.³⁴²

Thus, by collaborating with the SEC, prosecutors can buy into an institutional structure that prioritizes a careful substantive review of a wide range of information.

Such collaboration comes at the cost, however, of coordinating with civil agencies with different training and priorities.³⁴³ With respect to the SEC, for example, one former prosecutor explained, “[T]he SEC is not a criminal enforcement organization and the SDNY sometimes had concerns

339. SEC, REPORT ON THE IMPLEMENTATION OF SEC ORGANIZATIONAL REFORM RECOMMENDATIONS 21 (2012), <https://www.sec.gov/news/studies/2012/secorgreformreport-2012-df967.pdf> (reporting on structural reforms in the agency that include “[r]ecruitment of industry experts, and continued enhancement of expertise of existing SEC staff through targeted training in critical areas”); Mary L. Schapiro, Chair, SEC, Remarks at the Practising Law Institute’s SEC Speaks (Feb. 24, 2012), <https://www.sec.gov/news/speech/2012-spch022412mlshtm.html> (“We broadened our hiring approach, searching for recruits with financial industry backgrounds and specialized experience. We now have traders, asset managers, academics and quants on staff in addition to attorneys, economists and accountants, giving us a correspondingly greater insight into the technologies and practices that drive today’s financial markets.”).

340. See generally PROJECT ON GOV’T OVERSIGHT, REVOLVING REGULATORS: SEC FACES ETHICS CHALLENGES WITH REVOLVING DOOR (2011), <http://www.pogo.org/our-work/reports/2011/fo-fra-20110513.html> (summarizing and criticizing the number of SEC staff that go on to work in regulated industries).

341. See Richman, *supra* note 28, at 789–90.

342. I-12. This language tracks the SEC’s organization of specialized units when the OMI was formed in 2010. *Id.* The Structured and New Products Unit has been replaced with the Complex Financial Instruments Unit. *Id.*

343. *Cf.* Lynch, *supra* note 23, at 33 (“Administrative agencies may be insensitive to the special demands of the criminal process, and may be frustrated with prosecutors’ reluctance to pursue cases that seem to the administrators a significant part of their enforcement program but that fail to meet prosecutors’ criteria for imposing criminal punishment or for likely success before juries.”).

about coordinating with them because of the differences in their legal responsibilities and objectives.”³⁴⁴ Two potential costs significantly influence prosecutors’ decisions of when, whether, and how to collaborate with civil regulators.

First, in some cases, a prosecutor might be frustrated by the slow speed of the enforcement bureaucracy in civil regulatory agencies. As one former Southern District of New York prosecutor explained, “[T]he SDNY can be prepared to bring a complaint in as long as it takes to write up a complaint, and get an agent to swear to it, take it to a magistrate judge, and get the arrest warrant signed.”³⁴⁵ By contrast, “the SEC has all sorts of internal approval requirements, and processes they need to go through, and get approvals to bring cases that the DOJ just doesn’t have.”³⁴⁶ There are, accordingly, situations in which “the DOJ is ready to bring a case, and the SEC is not.”³⁴⁷

The more serious risk for prosecutors, however, is that a civil regulator might compromise a criminal investigation by forcing a U.S. Attorney’s Office to reveal its interest in a defendant too early. This risk arises from the transparency norms that govern many agencies’ civil investigations. The SEC Enforcement Manual, for example, typically provides individuals under investigation with a “Wells notice.” The notice informs the individual of the specific charges that the agency staff are contemplating and provides the individual with the opportunity to dissuade staff members from recommending charges to the Commission.³⁴⁸ Federal prosecutors, by contrast, are well practiced in maintaining the secrecy of an investigation. In principle, the United States Attorneys’ Manual “encourage[s]” prosecutors to notify the “target” of an investigation “a reasonable time before seeking an in-

344. I-4.

345. I-6.

346. *Id.*

347. *Id.*

348. *See* SEC, *supra* note 60, § 2.4 (describing the “Wells process” and defining a “Wells notice” as “a communication from the staff to a person involved in an investigation that: (1) informs the person the staff has made a preliminary determination to recommend that the Commission file an action or institute a proceeding against them; (2) identifies the securities law violations that the staff has preliminarily determined to include in the recommendation; and (3) provides notice that the person may make a submission to the Division and the Commission concerning the proposed recommendation”); *see also* 17 C.F.R. § 202.5(c) (2018). At times, the agency may diverge from these formal policies of transparency. With respect to the Wells process, for example, one former senior official at the SEC indicated that there is sometimes considerable resistance on the part of the agency’s staff to the disclosures that are required under the Enforcement Manual. I-2. The reason for this resistance, according to this former official (who was critical of the practice), is that the agency’s settlements will be reduced if the target of an investigation is able to write a better Wells submission. *Id.* Nevertheless, this official indicated that the SEC is traditionally an agency of full disclosure and that transparency norms still inform high-level decisionmaking. *Id.*

dictment.”³⁴⁹ In practice, some experienced U.S. Attorney’s Offices rarely provide such notification to individuals under investigation. Prosecutors in the SDNY, for example, “rarely give target letters, because they rarely designate people as targets until the charges are brought Usually someone is not a target until the prosecutor is walking to the grand jury with the indictment. Until then they might be a ‘super subject,’ but they’re not a target yet.”³⁵⁰

The divergent approaches of civil and criminal enforcers with respect to transparency can create tensions in the parallel proceedings context. According to the former SDNY prosecutor, the SEC and a U.S. Attorney’s Office “can sometimes have different interests on when to formally bring a case.”³⁵¹ As this attorney explained:

When an SEC case gets announced, they usually issue a press release and bring the case, and it’ll be very publicly known. And to the extent that there is an investigation going on the criminal side, any chance of doing covert investigation, or of the investigation not being known, is obviously blown once an SEC case comes out. So sometimes there is interest on the DOJ side to hold off on things before a case is actually brought.³⁵²

Another former SDNY prosecutor indicated, however, the SEC is sometimes reluctant to postpone their enforcement actions to the degree that a prosecutor might prefer.³⁵³ More specifically, this prosecutor observed that “the SEC became on certain occasions less willing to stay cases” after the appointment of veteran SDNY prosecutor Robert Khuzami as Enforcement Director in 2009.³⁵⁴

A second cost of collaborating is the threat that civil regulators will compromise a criminal prosecution by adding to the prosecutor’s discovery burdens. Under *Brady v. Maryland*³⁵⁵ and *Giglio v. United States*,³⁵⁶ prosecutors have an affirmative obligation to disclose material evidence that is “favorable to an accused.”³⁵⁷ In addition, the Jencks Act requires prosecutors to disclose any statement of a testifying witness that is “in the possession of the United States” if the statement “relates to the subject matter as to

349. DEP’T OF JUSTICE, *supra* note 46, § 9-11.153.

350. I-6.

351. *Id.*

352. *Id.*

353. I-4

354. *Id.*

355. 373 U.S. 83 (1963).

356. 405 U.S. 150 (1972).

357. *Brady*, 373 U.S. at 87. For a more detailed explanation of the doctrine established by *Brady* and its progeny, see Baer, *supra* note 38, at 11–15.

which the witness has testified.”³⁵⁸ Thus, *Brady* and its progeny impose an affirmative duty on prosecutors to review evidence that is in the possession of investigators from outside agencies who are part of the prosecution’s investigative team.³⁵⁹ In fact, in two recent, high-profile insider trading cases involving parallel proceedings, judges in the SDNY have held that the prosecutors had an affirmative duty to disclose *Brady* material that was in the possession of the SEC.³⁶⁰ In each of these cases, the court held that the “parallel” DOJ and SEC enforcement efforts were sufficiently well coordinated to count as a “joint investigation” for *Brady* purposes.³⁶¹ The current and former prosecutors and regulators interviewed were sensitive to the implications of these decisions and reasonably assumed that courts will stand ready to apply the same rule to Jencks material.³⁶²

358. 18 U.S.C. § 3500(b) (2012); *see also* FED. R. CRIM. P. 16. In practice, the government will disclose such statements in advance of a witness’s testimony in order to avoid unnecessary trial delays. *See* *United States v. Garcia*, 406 F. Supp. 2d 304, 305–06 (S.D.N.Y. 2005) (observing that “[i]n practice, the procedure described in the [Jencks Act] has proved unworkable” and that “[e]arly disclosure of 3500 material . . . facilitates trial efficiency by avoiding lengthy recesses during trial”). When speaking loosely, prosecutors will sometimes refer to these disclosure duties—including those under the Jencks Act—as their *Brady* obligations. I draw this inference from my professional and social interactions as well as from my interviews of current and former prosecutors. For concision’s sake, this Article will follow the same convention except where greater precision is warranted.

359. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that, under *Brady*, prosecutors have a “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case”); *see also* *United States v. Ramirez*, 174 F.3d 584, 588 (5th Cir. 1999) (holding that, under the Jencks Act, prosecutors have a duty to disclose statements in the custody of the Federal Bureau of Prisons); *United States v. Bufalino*, 576 F.2d 446, 449 (2d Cir. 1978) (holding that there is “no longer any excuse for official ignorance” concerning the government’s obligation under the Jencks Act and Rule 16 to disclose material in the FBI’s possession); *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971) (holding that “[t]he duty of disclosure” under the Jencks Act “affects not only the prosecutor, but the Government as a whole, including its investigative agencies”), *abrogated on other grounds* by *Arizona v. Youngblood*, 488 U.S. 51 (1988). As a formal policy matter, the Department of Justice acknowledges that in parallel proceedings a civil regulatory agency can be “part of the prosecution team for discovery purposes” and “encourage[s]” prosecutors “to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes.” Memorandum from Deputy Attorney General David W. Ogden on Guidance for Prosecutors Regarding Criminal Discovery to DOJ Prosecutors (Jan. 4, 2010), <https://www.justice.gov/dag/memorandum-department-prosecutors> [hereinafter Ogden Memo].

360. *United States v. Martoma*, 990 F. Supp. 2d 458, 460–62 (S.D.N.Y. 2014); *United States v. Gupta*, 848 F. Supp. 2d 491, 493–95 (S.D.N.Y. 2012).

361. *See Martoma*, 990 F. Supp. 2d at 461 (holding that a joint investigation occurred where the SEC and the U.S. Attorney’s Office began communications shortly after prosecutors commenced their investigation, the agencies “jointly conducted twenty interviews of twelve witnesses,” the SEC provided prosecutors with documents it obtained through civil discovery, and the agencies coordinated their depositions); *see also Gupta*, F. Supp. 2d at 493–95 (holding that a joint investigation occurred where the U.S. Attorney’s Office and the SEC had jointly conducted 44 witness interviews).

362. This assumption is consistent with several Second Circuit cases implying that a “joint investigation” generates a responsibility for prosecutors to seek out and review witnesses in the possession of outside agencies. *See, e.g., United States v. Paternina-Vergara*, 749 F.2d 993, 998

My interviews suggest that *Brady* obligations factor heavily in prosecutors' decisions concerning whether, and how, to coordinate with regulators. As one former SDNY prosecutor explained in the course of discussing coordination between that office and the SEC, "[T]he SEC is not a criminal enforcement organization and the SDNY sometimes had concerns about coordinating with them because of the differences in their legal responsibilities and objectives."³⁶³ Interestingly, however, my sources did not express any concern that civil regulators would withhold evidence that prosecutors had an affirmative duty to disclose. One former senior officer at the SEC indicated that this risk is largely illusory because once a prosecutor makes an access request, the SEC will hold nothing back that is requested.³⁶⁴ Thus, the close coordination that is the hallmark of modern parallel proceedings serves to obviate one common concern of prosecutors with respect to *Brady* obligations.

A more significant concern for prosecutors, however, is the risk that civil regulators will inadvertently "create" *Brady/Giglio* and Jencks problems.³⁶⁵ Specifically, prosecutors worry that civil investigators might memorialize jointly conducted witness interviews in ways that will compromise the criminal case. The former prosecutors who expressed this concern took their *Brady* obligations seriously, and understood that the government must disclose exculpatory information that a witness communicates verbally regardless of whether the statement was committed to paper.³⁶⁶ However, by failing to be sufficiently precise in how they memorialize interviews, civil enforcers might "create" *Brady* material based on witness statements that are not in fact exculpatory. The divergent objectives of civil regulators and prosecutors create the risk that regulators will be relatively "less sensitive to the need for precision" in relaying a witness's testimony.³⁶⁷ According to one former, high-ranking SDNY prosecutor, this *Brady* concern has two dimensions: "First, you worry that you as the prosecutor are now responsible for what is in their files and how they wrote it. Second, they may

(2d Cir. 1984) (holding that "even in the course of a joint investigation undertaken by United States and foreign law enforcement officials the most the Jencks Act requires of United States officials is a good-faith effort to obtain the statements of prosecution witnesses in the possession of the foreign government"); *see also* *United States v. Bin Laden*, 397 F. Supp. 2d 465, 480–84 (S.D.N.Y. 2005) (holding that the U.S. Marshals Service was part of a "prosecution team" for Jencks Act purposes based on their level of assistance to the criminal investigation).

363. I-4. In context, this statement clearly was not intended to single out the SEC as being less professional than other civil regulatory agencies. To the contrary, I got the sense that all of the former federal prosecutors with whom I spoke held the SEC in high regard.

364. I-2.

365. I-4; I-1.

366. I-4; I-11; *see also* Ogden Memo, *supra* note 359 ("[M]aterial exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email.").

367. I-4.

create *Brady* problems by taking post-interview notes that mischaracterize a witness's testimony so that it seems exculpatory when in fact it was not."³⁶⁸

The problem of civil enforcers "creating" *Brady* material is particularly acute when civil regulators take multiple sets of post-interview notes paraphrasing a witness's statements. The government's disclosure obligations under *Giglio* and the Jencks Act create opportunities for skilled defense attorneys to exploit even minor inconsistencies between how different notetakers characterized a witness's statements.³⁶⁹ Thus, several former prosecutors stressed the importance of designating a single, experienced investigator to take notes during witness interviews that are attended by civil and criminal regulators.³⁷⁰ "Otherwise," said one former prosecutor, "you could spend the trial fighting over seven different versions of something a witness said."³⁷¹

Several of these former prosecutors cited the facts underlying Judge Rakoff's decision in *United States v. Gupta*³⁷² as an example of the SEC inadvertently "creating" *Brady* material by memorializing their after-the-fact recollections of a jointly conducted witness interview. In *Gupta*, the SEC and the U.S. Attorney's Office for the SDNY ("USAO") conducted a parallel insider trading investigation that included 44 jointly conducted interviews.³⁷³ Consistent with the protocol that former prosecutors described in my interviews, the only person who took contemporaneous notes of the interviews was an FBI agent who was assigned to the USAO.³⁷⁴ Within a day or two after each interview, however, an SEC attorney prepared memoranda summarizing his recollections of what he deemed to be relevant parts of the interview.³⁷⁵ Judge Rakoff held that, because these interviews involved "joint fact-gathering," the prosecutor was required under *Brady* to review the SEC's documents arising from the interviews and disclose any exculpatory information.³⁷⁶ Judge Rakoff's opinion recognized that *Brady* material can include the precise type of material that was of particular concern to the prosecutors I interviewed: inconsistencies between two different accounts of a witness interview which a skilled defense attorney could use to undermine the strength of the government's criminal case. Specifically, the government argued that the defendant had already received any *Brady* material contained in the SEC memoranda because prosecutors had an independent

368. *Id.*

369. I-1.

370. *Id.*; I-4; I-6.

371. I-4.

372. 848 F. Supp. 2d 491 (S.D.N.Y. 2012).

373. *Id.* at 493.

374. *Id.*

375. *Id.* at 493-94.

376. *Id.* at 494-95.

duty to disclose exculpatory portions of their agents' notes detailing joint interviews.³⁷⁷ In rejecting this argument, Judge Rakoff observed, "The SEC attorney may have chosen to emphasize other parts of the witness interviews in his memoranda that did not make it into the FBI agent's notes, or that the Government attorneys present simply forgot, and those may qualify as *Brady* material."³⁷⁸

The decision in *Gupta* reveals that the holdup costs can challenge even the most stable and longstanding inter-agency enforcement relationships. More than one former prosecutor specifically expressed disappointment that SEC staff in *Gupta* deviated from standard practice to memorialize their after-the-fact recollections of witness interviews.³⁷⁹ Such actions, speculated one former prosecutor, might have temporarily lowered the degree of enthusiasm with which SDNY lawyers approached their cases involving the SEC's New York Regional Office.³⁸⁰ Another former prosecutor acknowledged that *Gupta* might have created tensions between the USAO and the SEC's New York Regional Office, but cautioned that it was quite accurate to say that the offices became less willing to work together.³⁸¹ Simply put, the two offices need each other.³⁸² This former prosecutor acknowledged, however, that there might be situations in which a U.S. Attorney's Office has had such bad experiences with a civil regulator that they may be reluctant to continue coordinating with it.³⁸³ This reluctance is counterbalanced, he added, by the institutional obligation to pursue criminal cases that agencies refer to the office.³⁸⁴

Notwithstanding this institutional constraint, the make-or-buy framework has considerable explanatory value with respect to how prosecutors approach parallel proceedings. Given the need for some influential U.S. Attorney's Offices to triage their cases, the costs and benefits of cooperation would lead them to prioritize some cases—and some agencies—over others. Prosecutors have a diverse set of goals and obligations, only one of which is to honor agency referrals. In some situations, a prosecutor's overall aims might be better served by endeavoring to discover and build a case internally rather than by reaching out to a regulatory agency for a promising referral. Alternatively, a prosecutor might recognize an obligation to seriously consider agency referrals, but may nevertheless be presented with a range of choices concerning which agency—and which office *within* an

377. *Id.* at 495.

378. *Id.*

379. I-1; I-4.

380. I-1.

381. I-4.

382. *Id.*

383. *Id.*

384. *Id.*

agency—to work with. The extent of overlapping jurisdiction on regulatory matters gives the prosecutor a range of agencies with which to cooperate.³⁸⁵ On many securities matters, for example, a prosecutor may choose between coordinating with the SEC or the CFTC.³⁸⁶ Even when jurisdictional overlap does not exist, a prosecutor could choose to work more closely with a regional office of an agency that it deems particularly competent, while rejecting referrals from regional offices that have developed a reputation for trouble. Thus, without lowering their overall declination rate, a prosecutor might assess the costs of parallel proceedings when deciding which referrals to accept.

IV. INTERDEPENDENCE AND AGENCY DESIGN

This Article has shown that, in the parallel proceeding context, an agency's expertise will fluctuate based on the behaviors of the agencies with which it is coordinating. Applying the make-or-buy framework, this Part examines specific instances of this type of inter-dependent fluctuation. Specifically, it will examine ways in which inter-agency relationships shaped the relative expertise of prosecutors and regulators with respect to the investigation skills, litigating prowess, and substantive knowledge necessary to pursue complex regulatory cases.

In doing so, this analysis yields two important insights about inter-agency coordination in parallel proceedings and beyond. First, even when an agency must reform for reasons unrelated to its parallel enforcement relationships—as the SEC did in response to the Bernie Madoff scandal—the make-or-buy decision will influence which reforms the agency chooses to adopt. Second, rather than building its own expertise, the make-or-buy decision will sometimes lead an agency to invest in building the expertise of another agency. For example, an improvement in a prosecutor's ability to pursue complex regulatory cases might not simply be the product of the prosecutor's own choices: it might also reflect a civil regulator's deliberate strategy to improve its own regulatory enforcement outcomes.

A. *Investigation and Litigation Expertise*

Prosecutors' offices are structured to cultivate investigation and litigation expertise. Prosecutors begin trying cases early in their careers and thus

385. See generally Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 214 (2006).

386. Although the CFTC has historically lacked jurisdiction over insider trading offenses, the Dodd-Frank Act granted such jurisdiction. See 7 U.S.C. § 9 (2012); 17 C.F.R. § 180 (2018); *In re Arya Motazed*, CFTC Docket No. 16-02, 2015 WL 7880066 (Dec. 2, 2015).

tend to accrue more trial experience than civil regulatory attorneys.³⁸⁷ Moreover, they can rely upon the relatively well-resourced FBI to investigate their cases, and can call upon other criminal investigative agencies such as the Secret Service (which has expertise in financial crimes).³⁸⁸ Theoretically, the DOJ could strategically build its investigation expertise in order to be less reliant on having the SEC and other regulatory agencies for case referrals. I have found no evidence, however, suggesting that the DOJ has adopted this strategy. To the contrary, one of the former high-ranking prosecutors with whom I spoke indicated that prosecutors felt a sense of institutional obligation to pursue cases referred to them by civil regulatory agencies.³⁸⁹ Moreover, the relatively decentralized structure of U.S. Attorneys' offices ensures that federal prosecutors accumulate considerable enforcement expertise, including trial experience, at early stages in their careers.³⁹⁰ Since they are in the business of prosecuting crimes, a U.S. Attorney's Office is unlikely to restructure itself to deprive its staff of litigation experience simply because it has the option of cooperating with competent litigators from another agency.³⁹¹

By contrast, civil regulatory agencies can make strategic institutional design choices that shape their relationships with prosecutors, and are perhaps influenced by those prosecutors. Consider, for example, a series of reforms that have strengthened the SEC's reputation as an aggressive regulator.³⁹² The SEC has traditionally had a hierarchical organizational structure and enforcement incentives which led it to prioritize easy-to-settle cases over those that required more extensive litigation.³⁹³ Until recently, this

387. See JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 177–78 (2015) (describing the relative trial expertise of Assistant U.S. Attorneys and SEC staff and citing it as a reason for the SEC's trial aversion).

388. See generally Richman, *supra* note 28.

389. I-4.

390. See COFFEE, *supra* note 387, at 177–78; see also Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 607 & n.78 (2005) (citing literature finding that prosecutors have the discretion and incentives to choose cases with the aim of gaining trial experience).

391. However, since more than ninety-seven percent of federal convictions are the result of guilty pleas, perhaps one should not take for granted that a prosecutor's office will necessarily continue to emphasize trial expertise. See DOJ, BUREAU OF JUSTICE STAT., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, Table 5.22.2010 (2010), www.albany.edu/sourcebook/pdf/t5222010.pdf (reporting that 87,418 of the 89,741 defendants convicted of federal crimes in 2010—or 97.4%—had entered a plea of guilty or nolo contendere).

392. See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 610 (2012) (“[S]ince the discovery of Bernard Madoff's fraud in December 2008 (precipitated solely by Madoff's startling admission), the SEC's Enforcement Division has recast itself as an all-purpose investigator and punisher.”).

393. See BOSTON CONSULTING GRP., U.S. SECURITIES AND EXCHANGE COMMISSION: ORGANIZATIONAL STUDY AND REFORM 180 (2011) [hereinafter BCG Report], <http://www.sec.gov/news/studies/2011/967study.pdf> (describing the SEC's hierarchical organiza-

contributed to the SEC staff's reputation for having inadequate investigation and litigation experience, and for being overeager to settle egregious cases.³⁹⁴ In a scathing 2009 report, the SEC cited this lack of experience as a reason for the agency's mishandling of Bernie Madoff's Ponzi scheme.³⁹⁵ In response to this report, the SEC enacted a number of reforms to improve its enforcement expertise and, in doing so, strengthened its leverage vis-à-vis criminal authorities in the parallel proceedings context. The change began in 2009 with the hiring of veteran SDNY prosecutor Robert Khuzami to lead the SEC's Enforcement Division. Khuzami made at least four significant changes to the agency's enforcement practices.

First, under Khuzami, former federal prosecutors occupied the Enforcement Division's top leadership positions.³⁹⁶ Significantly, the SEC recruited these former prosecutors from outside the agency rather than taking the traditional step of promoting career staff to top deputy positions.³⁹⁷

tion and an incentive structure whereby "enforcement success was informally measured by statistics (i.e. number of cases) and high profile cases, resulting in internal competition for 'hot' cases and limited information sharing across teams"); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-261, SECURITIES AND EXCHANGE COMMISSION: IMPROVING PERSONNEL MANAGEMENT IS CRITICAL FOR AGENCY'S EFFECTIVENESS 17 (2013), <http://www.gao.gov/assets/660/655989.pdf> (confirming the findings of the SEC Inspector General that the SEC's incentive structure has led to an "increased focus on easier, 'slam dunk' cases over those cases that looked to be complex and more time consuming"). The relationship between the CFTC's organizational structure and its enforcement outcomes has received far less attention than the SEC's. As one CFTC attorney explained, there are some significant organizational differences between the SEC's and the CFTC's respective enforcement divisions. 1-8. The SEC, for example, divides its enforcement resources into investigative teams and trial teams. *Id.* At the CFTC, by contrast, the trial attorneys and investigative attorneys are on the same working team "from day one." *Id.* This reflects a "different philosophy" from the SEC's, and enables trial attorneys to provide input and make calls on questions of admissibility and other litigation-related questions. *Id.* Nevertheless, the agency's overarching organizational structure is substantially similar, see *CFTC Organization*, CFTC, <http://www.cftc.gov/About/CFTCOrganization/index.htm> (last visited Apr. 30, 2018), and the agency has been subject to similar criticisms regarding its desire to pursue easily settled cases. See, e.g., Richman, *supra* note 334, at 274 (discussing the desirability of "institutional design measures that reduce pressure on the SEC, CFTC, and other agencies to focus on quantity, not quality").

394. COFFEE, *supra* note 387, at 177-78 (stating that a "favorite explanation of the defense bar and some judges" for the SEC's inadequate enforcement during the 2008 Financial Crisis was that "the SEC's attorneys generally lack trial experience, and it would prefer to settle than risk a loss"); John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 125 (2005) ("The SEC is currently trial averse. Indeed, the SEC litigation paradigm for a 'successful' case is 'file-and-settle.'" (footnote omitted)).

395. SEC, OFFICE OF INVESTIGATIONS, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME—PUBLIC VERSION 24 (2009), <http://sec.gov/news/studies/2009/oig-509.pdf>.

396. See Shannon Henson, *Ex-Prosecutors Bring DOJ Tactics with Them to SEC*, LAW360 (Sept. 28, 2010, 7:45 PM), <https://www.law360.com/articles/187165/ex-prosecutors-bring-doj-tactics-with-them-to-sec>.

397. See Baer, *supra* note 392, at 610 (noting that Khuzami "recruited two former prosecutors from the same United States Attorney's Office to work for him in high-level positions").

These veteran prosecutors brought with them a wealth of litigation experience that was previously available to the SEC only if it chose to collaborate in a parallel civil and criminal proceeding. These recruiting efforts can thus be viewed as measures for empowering the agency to “make” cases if the costs of “buying” them were unacceptable.

Second, the SEC restructured its Enforcement Division in ways that enabled its attorneys to pursue cases without relying on the litigation expertise of outside prosecutors.³⁹⁸ For example, the SEC flattened the Enforcement Division’s management structure and reassigned many supervisors to work as front-line investigators.³⁹⁹ The agency also established an Office of Market Intelligence (“OMI”) designed to strengthen the agency’s capacity to generate cases from the tips, complaints, and referrals it receives from outside sources.⁴⁰⁰ In addition, Khuzami streamlined the investigative process to eliminate several layers of the internal approval processes for negotiating settlements, issuing subpoenas, and opening informal investigations.⁴⁰¹

Third, Khuzami introduced the use of formal cooperation agreements. Similar to those used by federal prosecutors, these agreements incentivized culpable insiders to cooperate with the SEC at early stages of an investigation.⁴⁰² Finally, Khuzami aggressively publicized these reforms, and in doing so gained a level of media attention that is typically reserved for high-profile U.S. Attorneys.⁴⁰³ A deterrence strategy familiar to high-level prosecutors,⁴⁰⁴ this public relations effort communicated the SEC’s commitment to pursuing cases that had only recently been regarded as beyond their competence.

398. For a detailed discussion and analysis of this restructuring, see Jayne W. Barnard, *Evolutionary Enforcement at the Securities and Exchange Commission*, 71 U. PITT. L. REV. 403, 406–09 (2010).

399. See Robert Khuzami, Testimony Before the United States Senate Committee on the Judiciary, Testimony Concerning Investigating and Prosecuting Fraud after the Fraud Enforcement and Recovery Act (Sept. 22, 2010), <https://www.sec.gov/news/testimony/2010/ts092210rk.htm> (“We reallocated a number of staff who were first level managers—some of our most experienced and dedicated attorneys—to the mission-critical work of conducting front-line investigations.”).

400. See *id.*; see also *supra* note 342 and accompanying text (describing the design and purpose of the OMI).

401. See Khuzami, *supra* note 399.

402. See *id.* (“[O]ur ‘cooperation agreement[.]’ require[s] that cooperators provide truthful evidence and testimony concerning the organizers, leaders, and managers of wrongful activity in exchange for a potential reduction in sanctions.”).

403. Baer, *supra* note 392, at 611 (explaining that Khuzami “went on a public relations kick that included a positive depiction in the *New York Times* as the public’s new, star crusader”); see, e.g., Jenny Anderson & Zachery Kouwe, *The Enforcers*, N.Y. TIMES, Feb. 9, 2010, at B1.

404. See Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 1010–13 (2010) (proposing reforms to the prosecutorial use of press releases as a deterrence strategy).

These reforms enabled the SEC to litigate civil cases using techniques and methods that had previously been available only if the agency chose to cooperate with prosecutors. As Miriam Baer has observed, Khuzami's reforms served to "remake the enforcement division in the image of a local prosecutor's office."⁴⁰⁵ These reforms were evident to outsiders. As one reporter explained, "[t]he SEC's handling of civil proceedings increasingly resembles the DOJ's handling of criminal cases. . . . [F]rom their origins, through the investigative stage, to their completion, SEC civil proceedings now are involving tools and techniques more traditionally associated with the DOJ's criminal proceedings."⁴⁰⁶ Significantly, however, these reforms also strengthened the SEC's reputation among the prosecutors with which it traditionally worked. For example, one former high-ranking SDNY prosecutor observed that the SEC became on certain occasions less willing to stay cases after Khuzami's reforms of the Enforcement Division.⁴⁰⁷

Even when exogenous shocks require an agency to change its enforcement practices, the transaction costs of inter-agency coordination will influence the choice of which reforms to adopt. One might argue, for example, that because these reforms were the result of an exogenous shock—the Madoff scandal—they had little to do with the make-or-buy decision in parallel enforcement. This objection, however, neglects the broader institutional context that informed the SEC's restructuring. If parallel enforcement had zero transaction costs, the SEC could simply have relied on outside prosecutorial expertise to secure its desired enforcement outcomes in high-profile cases such as Madoff's. In this frictionless world, perhaps the SEC would have had to modestly reform its processes for reviewing tips, complaints, and referrals. Once it learned of potential misconduct, however, it could simply outsource the case to a U.S. Attorney's office and use their work to extract a civil settlement. In reality, however, such outsourcing carries costs that made it worthwhile for the SEC to develop its in-house enforcement expertise.

Significantly, however, an agency's desire to make such choices must be supported by the resources to do so. For example, shortly after the SEC hired a former prosecutor to lead its Enforcement Division, the CFTC followed suit by hiring David Meister, who is also a veteran SDNY prosecutor with experience prosecuting securities fraud.⁴⁰⁸ Under Meister's leadership,

405. Baer, *supra* note 392, at 610.

406. *Patterns in Parallel Proceedings: SEC Actions, DOJ Tools*, LAW360 (Jan. 17, 2012), <https://www.law360.com/articles/298489/patterns-in-parallel-proceedings-sec-actions-doj-tools>.

407. I-4.

408. See Press Release, CFTC, CFTC Announces Departure of Enforcement Director David Meister (Oct. 1, 2013), <http://www.cftc.gov/PressRoom/PressReleases/pr6735-13>. Mr. Meister's successor, Aitan Goelman, is a former SDNY prosecutor with a similar resume. See Press Re-

the CFTC adopted similar reforms to those undertaken by the SEC.⁴⁰⁹ As a result, the agency secured a number of high-profile victories—including in cases arising from the Libor and Fx scandals as well as the collapse of MF Global—and rose in the esteem of criminal authorities.⁴¹⁰ To some degree, however, the CFTC’s reform efforts were hampered by the fact that Mr. Meister’s arrival at the CFTC coincided with the Republican takeover of Congress. This political shift left the agency with a budget that was inadequate in light of its increased responsibilities under the Dodd-Frank Act of 2010.⁴¹¹ According to a former CFTC regulator, these budget constraints left the CFTC unable to use the hiring strategies that the SEC’s Enforcement Division used in 2009 to recruit experienced former prosecutors from the private sector.⁴¹² Although the CFTC was able to laterally recruit a small number of prosecutors from the DOJ, it ultimately could not build a degree of litigation expertise comparable to the SEC’s.⁴¹³ This experience suggests that funding constraints will sometimes leave agencies unable to adjust their enforcement strategies in response to the costs of cooperating with prosecutors.

B. Subject Matter Expertise

Civil enforcement agencies will inevitably invest in developing substantive expertise in the fields they are charged with regulating. The SEC’s staff, for example, includes members with substantial private sector and academic experience in accounting, asset management, trading, economics, and more.⁴¹⁴ Parallel proceedings enable prosecutors’ offices to harness this expertise while investing their resources in litigation and investigation.⁴¹⁵ An adequately resourced prosecutor’s office, however, can also invest in developing the substantive expertise necessary to prosecute complex

lease, CFTC, Enforcement Director Aitan Goelman to leave CFTC (Jan. 19, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7517-17>.

409. See Ben Protess, *Financial Watchdog with Bite to Depart His Agency*, N.Y. TIMES (Sept. 30, 2013), <https://dealbook.nytimes.com/2013/09/30/c-f-t-c-s-enforcement-chief-to-depart/>.

410. See *id.* (quoting the head of the criminal division of the U.S. Attorney for the Southern District of New York as saying that Meister “built the C.F.T.C.’s strongest enforcement program in memory”). One of my interviewees, a former federal prosecutor now in private practice, confirmed that “the CFTC is more aggressive than it used to be and appears to have borrowed the SEC’s enforcement model.” I-6.

411. See Corey Boles & Jamila Trindle, *CFTC Budget Request Is Cut*, WALL ST. J. (Nov. 15, 2011), <https://www.wsj.com/articles/SB10001424052970203503204577038653502512684>.

412. I-7.

413. *Id.*

414. See *supra* note 340 and accompanying text.

415. See *supra* Part III.B.2.

regulatory cases without cooperating with civil regulators.⁴¹⁶ If the costs of cooperating with a civil regulator become too high, a prosecutor's office can make these investments and thus decrease its reliance on parallel enforcement.

More interestingly, however, the make-or-buy decision can motivate a civil regulator to invest in building the substantive expertise of an outside prosecutor's office. No matter how much a regulator invests in its own enforcement expertise, it will still lack a number of tools available to prosecutors.⁴¹⁷ Therefore, when the transaction costs of working with a particular prosecutor become unacceptable, a civil regulator might wish to cooperate with another prosecutor's office rather than pursuing its enforcement goals unilaterally.⁴¹⁸ For complex cases, however, the civil enforcer will prefer to work with a prosecutor who has some degree of substantive knowledge of the relevant regulatory field.⁴¹⁹ If only one prosecutor's office possesses the requisite level of substantive expertise, then a civil regulator will find itself in a bilaterally dependent relationship that leaves it vulnerable to exploitation.⁴²⁰ Even if no such exploitation occurs, a civil regulator's enforcement priorities will be constrained by the number of cases that the prosecutor is willing and able to take.

One solution is to break a prosecutor's monopoly by investing in the substantive expertise of rival prosecutors. Although costly in the short term, these investments provide a regulatory agency with a greater number of competent prosecutors with whom to coordinate. This, in turn, makes the agency less reliant on any single U.S. Attorney's Office and thus less susceptible to capture.

A civil regulator wishing to pursue this strategy has at least three options available. First, it may establish formal training and technical assistance programs to educate prosecutors about the relevant aspects of their regulatory field. For example, the CFTC sometimes provides training to law enforcement groups "on conducting parallel criminal and civil prosecution of commodities market manipulation and fraud," and has conducted cross-agency training with the DOJ to educate both prosecutors and regulators of their powers under the Dodd-Frank Act.⁴²¹

416. The SDNY's U.S. Attorney's Office, for example, has considerable substantive expertise with respect to financial and regulatory crimes. *See supra* notes 255–259 and accompanying text.

417. *See White, supra* note 1 ("Criminal investigations unquestionably bring great value—search warrants, wiretaps, and undercover operations are not in the SEC's toolbox.").

418. *See supra* Part III.B.

419. *See supra* notes 246–259 and accompanying text.

420. *See supra* notes 227–229 and accompanying text.

421. CFTC, FY 2011 ANNUAL PERFORMANCE REPORT 47, <http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/2011apr.pdf>. Similarly, the SEC indirectly benefits from the National Association of Securities Dealer's Criminal Prosecution

Second, an agency can permit its staff to work as Special Assistant U.S. Attorneys. This program is arguably a boon to the civil enforcement attorneys who are appointed to serve as Special AUSAs, as it increases their employment opportunities as white-collar defense attorneys upon leaving government service. According to former regulators, however, the program is also an effective strategy for building the capacity of the prosecutors' offices that collaborate with civil enforcement agencies.⁴²² Speaking in praise of this program, a former senior officer at the SEC explained that it provided the agency's staff with experience trying criminal cases while building the capacity of U.S. Attorneys' Offices that might otherwise lack the sophistication and resources to prosecute securities fraud cases.⁴²³

Perhaps the most effective strategy for breaking a prosecutorial monopoly, however, is for an agency to refer challenging cases to other prosecutors' offices and invest the resources necessary—including extensive labor power—to ensure that those cases are successful. The SEC's Enforcement Division adopted this approach under Robert Khuzami's leadership, when the agency began to collaborate with a greater number of U.S. Attorney's Offices. As a former senior officer at the SEC explained, since 2009 the SEC has made a conscious effort to build relationships with, and refer cases to, U.S. Attorneys' Offices beyond the Southern District of New York.⁴²⁴ This effort, he explained, partially reflects a conscious decision to build the capacities of these offices.⁴²⁵ Corroborating this account, another former SEC attorney added that the Enforcement Division pursued this strategy in part because the involvement of more U.S. Attorneys' Offices meant “more capacity” to pursue parallel proceedings.⁴²⁶

Assistance Group (“CPAG”), which provides technical assistance to prosecutors concerning the investigation and prosecution of securities fraud. See Barry R. Goldsmith, NASD Executive Vice President, Testimony Before the Finance and Hazardous Materials Subcommittee of the Commerce Committee (Sept. 13, 2000), <http://www.finra.org/newsroom/speeches/091300-testimony-finance-and-hazardous-materials-subcommittee-commerce-committee>.

422. Cf. Zheng, *supra* note 338, at 1276–80 (surveying the empirical literature that supports a “human capital” theory of the revolving door, according to which prosecutors are incentivized to aggressively pursue cases in order to demonstrate expertise that is valuable in the private sector).

423. I-2.

424. I-9.

425. *Id.*

426. I-5. There are, of course, limits to the strategy of investing in the expertise of other agencies. For example, in complex regulatory fields, the expertise of judges may be relevant to an agency's enforcement outcomes. More research would be required, however, to determine whether such expertise favors or disfavors the agency. Cf. Stephen J. Choi et al., *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L. Q. 869, 900 (2005) (finding a correlation between lower PSLRA attorneys' fees and cases brought in district courts with a large number of securities fraud suits including the SDNY); Mark A. Lemley et al., *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 STAN. L. REV. 1121, 1124 (2014) (finding that judicial experience with patent infringement cases correlates with less favorable outcomes for patentees); Paul Weitzel, *The End of Sharehold-*

This aspect of parallel enforcement has significant implications for any serious thinking about how best to reform parallel proceedings. It is tempting to observe an agency that has dramatically improved its enforcement outcomes (or that has become laudably sensitive to due process considerations) and trace those improvements to its own policy decisions. The make-or-buy structure of parallel proceedings, however, suggests that one might have to look beyond the agency's own decisions to examine those of their collaborators.

V. APPLICATION: THE FBI EMBED PROGRAMS

This Article has demonstrated that prosecutors' and regulators' choices are inter-dependent and influenced by the transaction costs of cooperation. It has further shown that agencies will implicitly (and sometimes explicitly) pursue institutional reforms that are designed to reduce or eliminate the transaction costs of parallel enforcement. One recent institutional design innovation—which scholars had previously overlooked—powerfully illustrates these claims.

In recent years, the DOJ has coordinated with the CFTC and the SEC to embed FBI agents and analysts within those agencies.⁴²⁷ This Part will offer the first academic analysis of the FBI embed programs. In doing so, it will use the make-or-buy framework both to explain why the agencies chose to integrate their operations in ambitious and highly experimental ways, and to analyze the specific institutional design choices that the agencies made to guard their respective enforcement prerogatives.

er Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws, 2013 BYU L. REV. 65, 95 n.134 (2013) (noting that “[t]he Southern District of New York . . . has several judges with expertise in securities regulation, which plaintiffs’ counsel have the same motivation to avoid” that they do with respect to the Delaware Court of Chancery).

427. James B. Comey, Director, FBI, Statement Before the House Appropriations Committee, Subcommittee on Commerce, Justice, Science, and Related Agencies: FBI Budget Request for Fiscal Year 2015 (March 26, 2014), <https://www.fbi.gov/news/testimony/fbi-budget-request-for-fiscal-year-2015> (“Currently, we have embedded agents and analysts at the Securities and Exchange Commission and the Commodity Futures Trading Commission, which allows the FBI to work hand-in-hand with U.S. regulators to mitigate the corporate and securities fraud threat. Furthermore, these relationships enable the FBI to identify fraud trends more quickly and to work with our operational and intelligence counterparts in the field to begin criminal investigations when deemed appropriate.”); James B. Comey, Director, FBI, Remarks to New York City Bar Third Annual White-Collar Crime Institute: Confronting Corporate Crime (May 19, 2014), <https://www.fbi.gov/news/speeches/confronting-corporate-crime> (“We have agents and analysts embedded with the SEC and the [CFTC]. Together, we can identify trends quickly and open criminal investigations when necessary.”).

Memoranda of understanding between the FBI and the relevant civil agencies govern the scope of each program.⁴²⁸ According to a former SEC officer, the purposes of the embedded agents and analysts are to (1) avoid redundancies with criminal investigations (which ensures that an SEC investigation does not compromise a criminal investigation), (2) generate criminal interest, and (3) engage in secondary review of TCRs to determine whether they are appropriate for criminal referral.⁴²⁹ With respect to the SEC program, the FBI agents and analysts are embedded within the civil agency's OMI, which was created in 2010.⁴³⁰ The OMI, housed within the SEC's Enforcement Division, receives TCRs from governmental entities, citizens, SROs (including the Financial Industry Regulatory Authority), the exchanges, and the National Futures Association. The office also handles suspicious activity reports for SEC registrants. The OMI evaluates this information and makes some threshold determinations such as whether it is actionable, lies within the SEC's jurisdiction, and whether the statute of limitations bars enforcement.⁴³¹ If a matter is substantial but not within the SEC's jurisdiction, the OMI may refer the information to other authorities even if it does not go further within the SEC.⁴³² It thus has a central role to play in generating parallel enforcement cases.

The FBI embed programs increase the payoffs of parallel enforcement by circumventing the practical and doctrinal limits on how prosecutors and civil regulators share information.⁴³³ The SEC's embed program—which is the only one for which the relevant information is publicly available—provides the FBI with real-time information as it comes into the SEC.⁴³⁴ As

428. See INT'L ORG. OF SEC. COMMISSIONS, CREDIBLE DETERRENCE IN THE ENFORCEMENT OF SECURITIES REGULATION 25 (June 2015), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.pdf> (“[T]he US CFTC has entered into a Memorandum of Understanding (MoU) to second US Federal Bureau of Investigation (FBI) Special Agents and Intelligence Analysts from the FBI's Economic Crimes Unit into the US CFTC to facilitate cooperation and improve the process for referring information between the two agencies to combat securities fraud and market manipulation. The US SEC also entered into an MoU with the FBI to embed FBI agents within the US SEC's Office of Market Intelligence.”); see also Robert Khuzami, Testimony Before the United States Senate Committee on the Judiciary: Testimony Concerning Investigating and Prosecuting Fraud after the Fraud Enforcement and Recovery Act (September 22, 2010), <https://www.sec.gov/news/testimony/2010/ts092210rk.htm>.

429. I-12.

430. Proress & Ahmed, *supra* note 217.

431. I-12.

432. *Id.*

433. The programs thus exemplify what Daphna Renan has identified as “pooling,” a process by which agencies cooperate to create “joint structures” that enhance each agency's powers beyond what they would otherwise be. See Renan, *supra* note 38, at 211.

434. See Robert S. Mueller, III, Director, FBI, Statement Before the House Judiciary Committee, Washington, D.C. (May 9, 2012), <http://www.fbi.gov/news/testimony/oversight-of-the-federal-bureau-of-investigation-3> (“In 2010, the FBI began embedding special agents at the SEC, which allows us to see tips about securities fraud as they come into the SEC's complaint center.”);

reported by a former senior officer at the SEC, the initial goal of that agency's embed program was to bring FBI agents and analysts "over the wall" so that criminal authorities could make use of SEC information without having to go through the process of making formal access requests for specific files.⁴³⁵ Section 24 of the Exchange Act limits the SEC's availability to share information with other authorities without a formal access request.⁴³⁶ Therefore, as explained by a former SEC officer, FBI agents and analysts are deemed to be SEC employees who are answerable to the Chief of the OMI and, by extension, the Enforcement Director.⁴³⁷ According to one journalistic account of the OMI, this structure permits the embedded FBI agents and analysts to access all SEC databases, providing the FBI with "a wealth of information about potential violators" of federal securities laws.⁴³⁸ Additionally, the SEC and FBI have disclosed that "[o]n occasion, embedded agents will use the SEC database for their own classified investigations" without disclosing the identity of the person being examined to the Chief of the OMI.⁴³⁹

The embed programs also give civil regulators access to FBI information that they are formally unable to possess under rules governing sensitive criminal evidence. As a former senior officer at the SEC explained, one of the agency's goals in designing the embedded agent program was to ensure that, in certain circumstances and through the FBI embeds, the SEC can access information from the FBI databases.⁴⁴⁰ This access appears to be circumscribed by "law enforcement protocols prohibiting prosecutors and the FBI from sharing investigative materials, such as wiretapped conversations, with securities regulators."⁴⁴¹ However, both the SEC and the CFTC enforcement staff appear to be able to review materials that remain under the formal custodial control of the FBI embedded agents.

As an attorney knowledgeable about the CFTC's practices explained, one of the ways in which the embedded agents coordinate information shar-

see also Christopher L. Garcia & Boyd M. Johnson III, *Defending Clients in Insider Trading Investigations and Enforcement Actions*, in *DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS* § 14:18 (Daniel J. Fetterman & Mark P. Goodman eds., 2014).

435. I-9.

436. See 15 U.S.C. § 78x(c) (2012); 17 C.F.R. § 240.24c-1(b) (2018).

437. I-12.

438. Protess & Ahmed, *supra* note 217.

439. *Id.*; see also Sarah N. Lynch & Matthew Goldstein, *Exclusive: SEC Builds New Tips Machine to Catch the Next Madoff*, REUTERS (July 27, 2011), <http://www.reuters.com/article/us-sec-investigations-idUSTRE76Q2NY20110727> (reporting that the SEC's embedded FBI agent "uses the SEC's tips system to drill into areas of particular interest to the FBI. Right now, for instance, he is on the lookout for tips about high-yield investment scams as well as high-priority areas such as insider-trading and market manipulation").

440. I-9.

441. Lynch & Goldstein, *supra* note 439.

ing is by acting as the repositories of information relevant to the CFTC to which the FBI has access.⁴⁴² For example, agents from field offices can send “Section 302 reports”—notes of interviews with witnesses taken in the course of a criminal investigation—to the embedded agent. CFTC attorneys can then review these reports while truthfully asserting that the documents have not left the custody of criminal investigators.⁴⁴³

The embed programs not only amplify the benefits of parallel enforcement, but also minimize the costs. By permitting FBI agents to access TCRs, the embed programs reduce the risk to prosecutors that a civil regulatory agency will inadvertently compromise a criminal investigation. At the same time, the regulatory agencies benefit from the expertise that FBI agents possess regarding the range of criminal charges that specific information might be able to support.⁴⁴⁴ By granting criminal investigators unfettered access to agency information, however, the agency risks losing control of its enforcement priorities. Specifically, one might worry that the FBI agents would share the information with their favored prosecutors without regard for the civil agency’s distinct enforcement goals.⁴⁴⁵ The SEC’s embed program is designed to eliminate this risk. According to a former senior officer at the SEC, embedded agents are prohibited from reaching out directly to FBI field offices or U.S. Attorney’s Offices with information learned through OMI without the approval of the Chief of OMI or the Director of Enforcement. This safeguard, explained the former senior officer, ensures that FBI agents do not jump the gun on potential SEC investigations.⁴⁴⁶

By reducing the transaction costs of parallel enforcement, the FBI embed programs have had a significant impact on how the financial regulatory

442. I-8.

443. *Id.* As this attorney explained, however, the CFTC must still make an access request to the prosecutors conducting an investigation in order to be granted access to criminal discovery. *Id.* The embedded agent does not make this access request. Once the CFTC is granted access, its staff can look at Section 302 reports and other criminal discovery in the presence of the FBI agents. *Id.* The attorney described this process as an administrative solution to a geographical problem: the embed program spares CFTC staff in D.C. the expense of flying across the country to FBI field offices in order to review criminal discovery. *Id.* However, it remains the prerogative of the relevant FBI field office to decide whether to grant a CFTC access request. *Id.*

444. I-9.

445. *Cf. supra* Part II.B.1 (discussing the risk of prosecutorial steamrolling).

446. A senior officer at the CFTC described a similar process by which FBI agents review all TCRs that flow into that agency. As this officer describes it, an embedded FBI agent will go through the TCRs that come into the CFTC and evaluate which ones are appropriate for criminal referrals. I-9. This agent can then determine whether there is a criminal investigation pending against someone listed in one of the TCRs. *Id.* In light of the agent’s information resources and expertise as to the type of conduct that gives rise to a criminal violation, their referral recommendation will substantially increase the likelihood that a referral will ultimately be made. *Id.* However, the agent cannot make a referral on behalf of the agency; the Director of Enforcement holds the final authority over the referral decision. *Id.*

agencies pursue parallel proceedings. As reported by an attorney familiar with the CFTC's enforcement practices, one of the goals of the FBI embed program was to ensure that criminal referrals were not "merely sent out into the abyss," but were made in a way that would better ensure that criminal authorities would work the case.⁴⁴⁷ Consistent with this goal, the CFTC reported that in Fiscal Year 2010 (prior to the embed program's implementation) 25 cases were filed by outside criminal *and* civil law enforcement authorities that included CFTC cooperation.⁴⁴⁸ And in Fiscal Year 2015, the agency "handled nearly 300 matters involving 'joint cooperation with Federal and state criminal and civil authorities.'"⁴⁴⁹

In facilitating more efficient coordination between prosecutors and regulators, the FBI embed programs also raise concerns that bear further analysis. For example, the embedded agent program may increase the information asymmetries between defendants and prosecutors, and thus traduce the "civil discovery principle of equal knowledge."⁴⁵⁰ Given the limited discovery available in criminal cases, the presence of embedded agents within a civil regulatory agency could enable civil regulators to review information that targets of a parallel proceeding may never see. Consider, for example, a situation in which an embedded FBI agent has access to a Section 302 report that has not been disclosed to the defendant. It appears that a civil regulator could review that document, but subsequently claim during discovery that the document lies outside the agency's custodial control. This risk may be more than simply hypothetical. One defense attorney familiar with the embed program expressed frustration that, in one instance, the SEC claimed it did not have access to documents that in practice it was likely able to see.⁴⁵¹ The likely reason for the denial, according to this defense attorney, was that the documents in question were under the formal custodial control of an FBI agent down the hall from the SEC staff attorneys.⁴⁵² As the white-collar bar becomes more aware of the embedded agent program, such complaints could make their way into litigation.

VI. CONCLUSION

This Article has provided an explanatory theory of the structures and incentives that shape parallel enforcement. While this is fundamentally a

447. *Id.*

448. CFTC, FY 2010 PERFORMANCE & ACCOUNTABILITY REPORT 75, <http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/2010par.pdf>.

449. CFTC, FY 2015 ANNUAL PERFORMANCE REPORT & 2017 ANNUAL PERFORMANCE PLAN (FEB. 2016) 45, <http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/2015apr.pdf>.

450. *SEC v. Rajaratnam*, 622 F.3d 159, 182 (2d Cir. 2010).

451. I-9.

452. I-9.

descriptive project, it is also a prolegomenon for further, normative work. The doctrine governing parallel proceedings facilitates modes of coordination that expand the government's freedom to select the combination of civil and criminal investigatory techniques that best accomplish their goals in a given case. It also provides regulators with the flexibility to decide which remedies to pursue—civil, criminal, or both—and the ability to share the information relevant to making those enforcement decisions.

The make-or-buy framework can be used to better clarify the threats that discretion might pose to defendants, and how best to address those threats. One can apply the framework, for example, to identify the ways in which the promise of a criminal conviction might distort the goals of civil regulators. The framework can also be used to diagnose information disparities between defendants and regulators that parallel proceedings may exacerbate. As this Article has shown, however, it is unlikely that doctrinal reforms to parallel proceedings are feasible or, for that matter, desirable. Hence, careful attention to the structure of parallel proceedings—the sort of attention this Article has provided—is a prerequisite for any serious consideration of such normative questions.