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Political Economy of Criminal Procedure

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Abstract: This chapter presents a public choice theory of criminal procedure. The core idea is that criminal procedure is best understood as a set of rules designed to thwart attempts to use the state's law enforcement power in a predatory fashion or in order to transfer wealth generally. For the most part we focus on a set of core procedural protections that can be considered long-established norms.

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I. INTRODUCTION

This chapter presents a public choice theory of criminal procedure.[1] Alternatively, one could describe the argument of this chapter as a "rent-seeking" theory of criminal procedure. We are especially concerned with the panoply of rules that make it more difficult to convict criminal defendants and obstruct the work of prosecutors. The rules appear to be perverse at first glance, because any well-functioning society should aim to suppress crime as effectively as possible. What purpose is served by rules that reduce the likelihood that a guilty defendant will be punished?

The core idea of this chapter is that criminal procedure is best understood as a set of rules designed to thwart attempts to use the state's law enforcement power in a predatory fashion or in order to transfer wealth generally. Our argument is most easily grasped if one imagines a society consisting of predatory factions or predatory prosecutors who attempt to use the law enforcement process as a mechanism for wealth extraction or enhancement. A social planner, in such a society, might find it valuable to construct a set of rules that cabin the predator; and since predators are wily sorts, the rules may have to take a number of different forms and change over time to meet new challenges.

This chapter's core idea, expressed simply as a concern for abuse, is not new. Many courts have noted that procedural protections in criminal law constrain the potential for abuse by government agents. Among criminal law theorists, Herbert Packer argued in 1964 that the Due Process Model of criminal law envisions a set of rules designed to reduce the efficiency of criminal prosecution in order to constrain the potential for abuse.[2] However, surprisingly little attention has been invested by criminal law specialists into explaining the importance of the public choice theory relative to other theories, precisely how criminal procedural rules constrain abuse, and in using public choice theory to explain the case law on criminal procedure. We will address these issues in this chapter.

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[1] The arguments in this chapter are based on Keith N. Hylton & Vikramditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61-118 (2007). By "public choice", we mean the study of government from the rational actor or market perspective. See generally, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (University of Michigan Press, 1962); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Harvard University Press, 1965).

[2] Herbert Packer, *Two Models of Criminal Procedure*, 113 U. PA. L. REV. 1 (1964).

For the most part we focus on a set of core procedural protections that can be considered long-established norms. We are thus less focused on Warren Court innovations (e.g, *Gideon v. Wainwright*, *Miranda v. Arizona*), though the approach developed here would be useful in justifying some of those as well. Some key propositions of this chapter can be set out right away. With respect to the reasonable doubt rule, the double jeopardy clause, and the ex post facto clause, this chapter's theory implies the following. First, the primary function of the reasonable doubt rule is to make it difficult for the criminal law enforcement process to be used for predatory purposes. Second, the essential purpose of double jeopardy doctrine is to prevent prosecutors from substituting toward successive prosecutions in order to avoid fundamental single-trial procedural constraints such as the reasonable doubt rule. Third, the ex post facto clause is violated only by those changes in the punishment process that create a potential for abuse by increasing the risk of targeted enforcement. These propositions by no means exhaust the implications of public choice theory for criminal procedure. However, they do get across the types of specific-function theories motivated by our general approach.

Since the public choice approach has received relatively little attention in the theoretical literature on criminal law, we will devote most of this chapter to setting out the theory in detail. To the extent that the public choice approach has been explored earlier in the literature, it is largely in the margins and in passing remarks, with little effort to offer a taxonomy of predation and its implications for criminal procedure case law. This chasm is especially troubling in view of the important status of criminal procedure doctrine in modern constitutional law.

We begin in Part II by discussing some of the prior literature that hints at or suggests a public choice approach to criminal procedure. In Part III, we briefly describe a few core pro-defendant criminal procedural protections. Following that, we reexamine the traditional justification for these protections, set out in the Supreme Court's decision in *In Re Winship*.[3] In Parts IV and V we explore the costs of rent-seeking in the criminal law enforcement process and the means by which these costs are controlled through basic features of criminal procedure. In Part VI, we apply the theory to some case law, focusing on double jeopardy. Part VII concludes.

II. PREVIOUS LITERATURE SUGGESTING A PUBLIC CHOICE APPROACH TO CRIMINAL PROCEDURE

[3] 397 U.S. 358 (1970).

The public choice approach has been remarkably underdeveloped in the criminal procedure literature. Indeed, with the exception of David Friedman's "Why Not Hang Them All? The Virtues of Inefficient Punishment,"[4] there have been virtually no attempts to use public choice theory, either in the criminal law literature or the law and economics literature on law enforcement, as a comprehensive analytical approach to criminal procedure.[5]

In spite of the near absence of the public choice approach in the law books and journals on criminal procedure, pieces or hints of public choice theory can be found in some of the criminal law literature and related sources. In this part, we discuss three notable examples: works by John Langbein,[6] Henry Packer,[7] and John Hart Ely.[8] Langbein's approach is historical and implies a public choice explanation for some key procedural innovations of the eighteenth century. Packer's approach is policy-oriented and uses public choice reasoning to describe one model of the criminal justice system. Ely's approach focuses on constitutional rather than criminal law. However, since much of criminal procedure law is constitutional today, Ely's approach has clear implications for criminal procedure.

A. Langbein

Langbein's *The Origins of Adversary Criminal Trial* is focused, as the title suggests, on the events leading to the employment of lawyers by defendants in criminal trials. Criminal trials were largely private affairs well into the 1800s. Until the early 1700s, criminal defendants were prohibited from employing defense lawyers. A series of scandals, first in treason trials and later in ordinary felony trials, led to reforms that eventually permitted defense counsel.

Langbein's book is not primarily directed to providing a theory of the function of pro-defendant criminal procedures. However, his detailed history of adversary trial suggests a theory that is consistent with the public choice rationale provided in this chapter. The scandals leading to the allowance of defense counsel could

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[4] 107 J. POL. ECON., 259 (1999).

[5] One notable exception is Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEG. STUD. 1 (1974). More recently, Hugo Mialon has authored articles on the economics of constitutional law. See, e.g., Hugo M. Mialon and Paul Rubin, The Economics of the Bill of Rights, forthcoming American Law and Economics Review (2008); Hugo M. Mialon & Sue H. Mialon, The Effects of the Fourth Amendment: An Economic Analysis, 24 J. Law, Econ. & Organ. 22 (2008). However, we have limited our discussion in the text to literature that presents a public choice account of the criminal law.

[6] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (Oxford University Press, 2003).

[7] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (Stanford University Press, 1968).

[8] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard University Press, 1980).

all be described as examples of predatory abuse of the criminal process. The scandalous treason trials recounted by Langbein involved the crown's prosecution of political enemies.[9] The felony trial scandals involved efforts by opportunists to secure false convictions in order to collect rewards offered by the state.[10] These scandals led judges to permit criminal defendants to employ lawyers in order to improve their chances against opportunistic plaintiffs.

Although Langbein's historical account of the events leading to adversary trial could be cited as empirical support for our functional theories of core procedural protections, the focus of this chapter is different from that of Langbein. Instead of examining historical incidents of predation, we start with the procedural rules and examine the extent to which they could be used to obstruct predation in the criminal punishment process.

B. Packer

In his essay titled "Two Models of the Criminal Process," Herbert Packer sets out alternative models of the criminal law enforcement process, one labeled the "Crime Control Model" and the other labeled the "Due Process Model". The Crime Control Model presents a normative vision of efficient criminal law enforcement. Packer describes an assembly-line process that seeks to apprehend violators quickly and punish them without delay. Lengthy criminal trials and appeals would be discouraged. A presumption of guilt would apply to defendants that pass an initial administrative screening by enforcement agents.

Packer's Due Process Model is almost diametrically opposed to the Crime Control Model. It envisions a system in which procedural safeguards make the criminal enforcement process inefficient and time-consuming. The defendant is given a presumption of innocence in this model. The reason for procedural safeguards is that

> [p]ower is always subject to abuse – sometimes subtle, other times, in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, in this model, be subjected to controls that prevent it from operating with maximal efficiency.[11]

The Due Process Model is in some respects similar to the public choice theory provided here. Both theories point to the potential for abuse or predation as a reason for pro-defendant procedural constraints. However, Packer's discussion

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[9] LANGBEIN, *supra* note 6, at 67-79.
[10] *Id*., at 148-158.
[11] PACKER, *supra* note 7, at 166.

of the Due Process Model suggests that he is ultimately concerned with rights that the state should respect rather than the costs of violating those rights. In addition, although Packer uses his Crime Control and Due Process models to explain trends in criminal law, he never attempts to use either model to provide a detailed, positive theory of the core planks of criminal procedure doctrine. In both of these senses – the focus on utilitarian versus rights-based arguments and the priority given to justifying established institutions and law – our approach differs from Packer's.

C. Ely

In *Democracy and Distrust*, John Hart Ely offered a theory of constitutional interpretation that suggests a public choice account of some parts of constitutional law, including the law of criminal procedure.[12] According to Ely, courts have interpreted the constitution in order to prevent legislative majorities from extracting wealth from legislative minorities. An approach to interpretation that discourages such wealth extraction promotes democracy under Ely's theory because it forces elected representatives to take into account the interests of minority groups within their communities. It should be clear that this theory can result in implications for criminal procedure law that are consistent with the public choice model.

Still, the public choice model is a more direct and simpler rationale than Ely's democracy-forcing theory. Occam's razor should lead us to prefer the simpler and sparser theory. Moreover, there are several respects in which the public choice model may be preferable.

First, the democracy-forcing theory is a contradiction in its own terms. Democracy ordinarily has been understood as a system in which the majority gets its way. It is a contradiction to argue that a purer form of democracy would require judges to block the decisions of majorities when those decisions trample over the rights of minorities. The U.S. Constitution contains provisions that clearly thwart the will of legislative majorities. Those provisions are by no means designed to generate a purer form of democracy. They are designed to prevent some specific and predictable failures that are planted in the seedbed of majority vote regimes.

The democracy-forcing theory, consistent with much of modern constitutional law doctrine, alters the direction and shape of the shields that protect legislative minorities in the Constitution. The democracy-forcing theory suggests that it is important to identify and monitor the treatment of "discrete and insular"

[12] See, e.g, ELY, *supra* note 8, at 173-178.

minorities. The discrete and insular status of the protected minorities distinguishes them from minorities based on attributes such as age or income distribution. Age and income form status groups whose membership fluctuates. The legislative minorities that should be protected under the democracy-forcing theory, in contrast, are hard-cast in the form of race, ethnicity, religion, or some other feature which is unlikely to be passed off quickly. According to the democracy-forcing theory, judges should be especially quick to block the decisions of majorities when they extract wealth from identifiably-different ethnic, racial, or religious minority groups. By implication, a decision to transfer wealth from one particular economic class does not necessarily raise alarm bells under the model.

The public choice theory of this chapter focuses on rent-seeking conduct rather than the identification of legislative minorities that are deserving of constitutional protection. The public choice theory, which we argue is embodied in criminal procedure, identifies particularly troubling wealth extraction methods and attempts to block those methods, whether or not they aim to expropriate some identifiable legislative minority. The public choice theory implies all of the "distrust" based theories for protecting legislative minorities, but goes further by suggesting a broad suspicion or distrust of expropriation efforts in general.

Finally, the democracy-forcing model, with its emphasis on hard-cast legislative minorities, does not necessarily imply the specific-function theories articulated in this paper. Whether it would depends on the distribution of such minorities in the society. A largely homogeneous society should not need the pro-defendant protections under the democracy-forcing model. However, under the public choice approach, the pro-defendant procedural protections observed in the law would exist irrespective of the society's degree of homogeneity.

III. SOME CORE CRIMINAL PROCEDURAL PROTECTIONS AND THE TRADITIONAL JUSTIFICATION

We have argued to this point that the preexisting literature, though showing an awareness of the public choice model as a possible explanation for criminal procedure law, has largely sidestepped the task of using the model to provide a detailed justification for key procedural conventions and the case law. The courts, on the other hand, have been forced to provide a rationale for procedural protections because of the need to decide cases. The rationale emphasized in the courts was set out in full in the Supreme Court's *In Re Winship* decision. In *Winship*, the Court held that the reasonable doubt standard was required in criminal trials by the Due Process Clause of the Constitution. The Court argued,

as a justification, that the reasonable doubt standard was best because false convictions in the criminal process are more costly to society than false acquittals. Further, the reasonable doubt standard would generate fewer false convictions than the preponderance standard (and correlatively more false acquittals). We will refer to this traditional justification as the "error-cost" rationale.

Criminal procedure is a vast topic and space will not permit us to explore all of the procedural protections given to criminal defendants. In this part, we will focus on the reasonable doubt standard and a few other core protections, such as double jeopardy, and examine them against the traditional error-cost justification offered in the American case law. We will start with a brief survey of core procedural protections.

A. Core Procedural Protections

The reasonable doubt standard requires that the moving party (i.e., the prosecution) prove that the defendant is guilty, beyond a reasonable doubt, of the criminal offense(s) with which he is charged.[13] Although the reasonable-doubt formulation seems to have first appeared in 1798,[14] the notion that the standard of proof in criminal trials should favor defendants has ancient origins. Blackstone, in his description of the criminal process, noted that "all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than one innocent suffer."[15] Coke, considerably earlier, said that "the evidence against a prisoner should be so manifest, as it could not be contradicted."[16] In 1970, the Supreme Court constitutionalized this long-established norm by holding in *In Re Winship* that the due process clause protects the defendant against conviction except upon proof beyond a reasonable doubt.[17]

The reasonable doubt standard stands in contrast to the "preponderance of the evidence" standard, used most frequently in civil cases.[18] It requires that the moving party prove that the defendant is liable on the preponderance of the evidence or, put simply, is more likely liable than not.

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[13] In Re Winship, 397 U.S., at 361.

[14] *See* C. MCCORMICK, EVIDENCE § 341, at 576 – 78 (1992).

[15] 4 WILLIAM BLACKSTONE, COMMENTARIES, at 358.

[16] *Id,* at 349 – 50.

[17] In Re Winship, 397 U.S. at 364.

[18] Concrete Pipe and Products Of California, Inc. v. Construction Laborer's Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (noting that preponderance of the evidence is the "most common standard in the civil law"); Apprendi v. New Jersey, 530 U.S. 466 (2000) (noting that the preponderance of the evidence standard can be used for sentencing as long as the sentence is not more severe than the statutory maximum for the offense established by the jury's verdict).

The prohibition against Double Jeopardy stems from the 5th Amendment of the U.S. Constitution, which states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb".[19] In some respects this protection is similar to the doctrines of Res Judicata and Collateral Estoppel that are found in non-criminal cases. [20] However, there are some differences. In particular, one that has garnered much attention is the rule, unique to criminal proceedings, that normally prohibits prosecutorial appeals of initial trial acquittals, but permits defense appeals of initial trial convictions.[21]

Other procedural protections in the criminal context are the right to a jury trial,[22] the right to confront witnesses,[23] the ex post facto punishment rule,[24] and the excessive punishments prohibition.[25] This does not exhaust the list of protections that impose a pro-defendant bias. Although we will focus on a few core protections, we claim that the public choice theory provides the best explanation for most of them. However, before presenting the public choice account we will first examine the traditional explanation for procedural protections.

B. Traditional Justification for Core Criminal Procedural Protections

1. Reasonable Doubt Standard as Example

The reasonable doubt standard is the quintessential example of a pro-defendant protection. The traditional justification, captured in Blackstone's "10 guilty men" statement, is that in the criminal process we should be more concerned with false convictions than false acquittals.[26] Elaborating, the U.S. Supreme Court in

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[19] U.S. CONST. amend.V.

[20] *See* Robin W. Sardegna, *No Longer In Jeopardy: The Impact Of* Hudson *v.* U.S. *On The Constitutional Validity Of Civil Monetary Penalties For Violations Of The Securities Laws Under The Double Jeopardy Clause,* 33 VAL. U. L. REV. 115, 117 (1998) (noting that the civil procedure doctrines of res judicata and collateral estoppel are similar to prohibitions of the double jeopardy clause).

[21] *See* Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U.L.REV. 341 (2002); U.S. v. Ball, 163 U.S. 662, 671 (1896); Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals*, 31 IND. L. REV. 353 (1998); Kate Stith, *The Rise of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1 (1990); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81. In the non-criminal side the analogous doctrines (e.g., Collateral Estoppel) do not present such asymmetry in appeal rights. *See* Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) (noting that if the requirements are met both res judicata and collateral estoppel are available to plaintiffs and defendants).

[22] U.S. CONST. AMEND. VI.

[23] Id.

[24] U.S. CONST. ART. I, § 9, CL. 3.

[25] U.S. CONST. AMEND. VIII.

[26] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *358; *see also* In Re Winship, 397 U.S., at 372 (Harlan, J., concurring).

Winship identified three types of harm associated with false convictions: *loss of liberty*, *stigma*, and *dilution of the moral force of the criminal law*.[27]

We can classify the costs of false convictions and false acquittals as *sanctioning costs*, *deterrence costs*, and *disutility costs*.[28] Sanctioning costs are the costs of punishment, which include the loss of liberty and stigma effects. Deterrence costs refer to the practical effect of the dilution in the law's moral force caused by false convictions. For example, if the law punishes the innocent, then it weakens deterrence by giving people less incentive to comply. Disutility costs refer to the disutility individuals suffer when they know that the law fails to punish the guilty or that it sometimes punishes the innocent.

Translating *Winship* into these terms, the Supreme Court has said in effect that the additional sanctioning, deterrence, and disutility costs of moving from the reasonable doubt to the preponderance standard would outweigh the potential benefits. This is what we have referred to before as the traditional error-cost justification for the reasonable doubt rule.

2. Error Cost Analysis of Legal Standards: A Diagrammatic Exposition

In order to get a better understanding of the error cost analysis of legal standards, consider Figure 1,[29] which shows the relationship between error probabilities, evidence, and standards of proof. The vertical axis measures the probability of guilt. The horizontal axis measures the amount of evidence (of guilt). The 45 degree line OP captures the functional relationship between the probability of guilt and the quantity of evidence against the defendant. The vertical line *PE* reflects the preponderance-of-evidence standard. If the amount of evidence is below (to the left) of the *PE* line, the defendant will be found innocent, and if the evidence is above the *PE* standard then the defendant will be found guilty. Error probabilities under the *PE* standard are shown by the areas OBE and PBA in Figure 1. The probability of a false acquittal is given by OBE, to the left of the *PE* standard. The probability of a false conviction is given by PBA,

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[27] In Re Winship, 397 U.S. at 363-364. Although the Court did not conduct an examination of false acquittal costs, those costs presumably consist only of the third type of harm, dilution of the law's moral force.

[28] In theory one could consider the impact on the expressive effects of the law too. The expressive effect of the law is the effect it has on behavior without threatening a sanction. *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law,* 86 VA. L. REV. 1649 (2000), Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998). However, the law's expressive effect is probably more closely connected to the perceived legitimacy of the law – that is whether it is corrupt or easy to corrupt – rather than a particular trade off between types of errors. *See* Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Capital*, 49 SYRACUSE L. REV. 1039 (1999).

[29] The figure is based on the analysis in GORDON TULLOCK, THE LOGIC OF THE LAW 65 – 67 (1987 ed.). Perhaps the first to examine the error cost question in the context of criminal law was John Kaplan in his classic article "Decision Theory and the Factfinding Process". *See* John Kaplan, *Decision Theory and The Factfinding Process,* 20 STAN. L. REV. 1065 (1968).

to the right of the *PE* standard. Figure 1 also shows the same relationship under the reasonable doubt standard, where the vertical line labeled *RD* reflects the reasonable doubt standard.

Two intuitive points follow from Figure 1: the probability of a false acquittal and the overall likelihood of error are both larger under the reasonable doubt standard. In moving from the preponderance to the reasonable doubt standard, we reduce the probability of a false conviction by the area ABCD, and we increase the likelihood of a false acquittal by the larger area BDEF. It follows that if the social costs of false acquittals and false convictions are equal society should prefer the preponderance standard to the reasonable doubt rule. However, if the costs of false convictions and false acquittals are not equal, examining the overall probability of error will be insufficient to tell us whether the reasonable doubt rule is preferable to the preponderance rule.

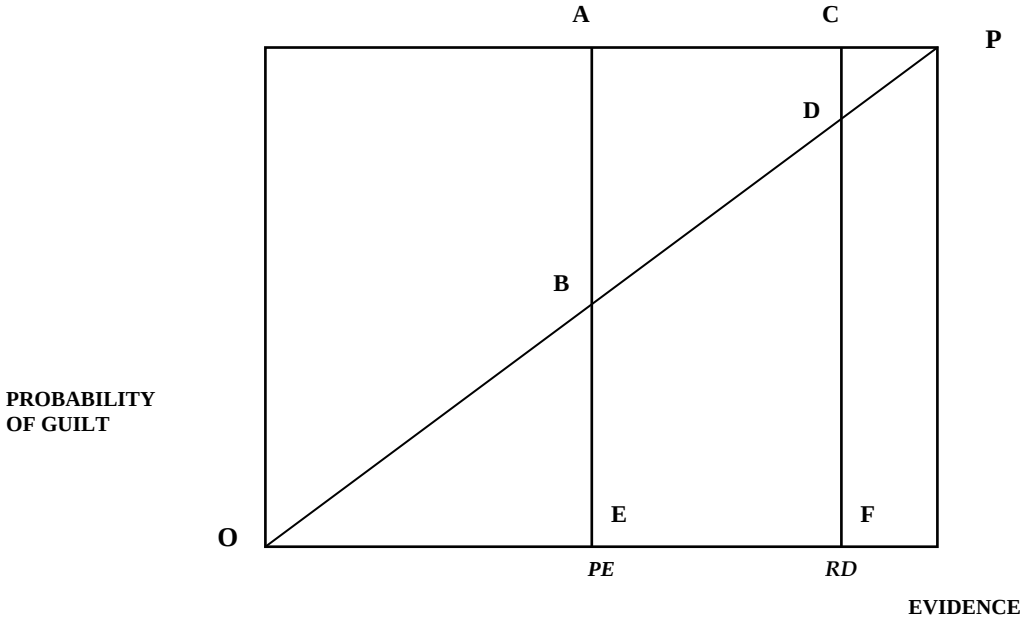

Figure 1

Society should prefer the reasonable doubt standard to the preponderance standard if the expected social costs are lower under the reasonable doubt standard. Thus, the reasonable doubt standard is preferable if the reduction in false conviction costs resulting from a move from the preponderance to the reasonable doubt standard exceeds the incremental false acquittal costs. In terms of Figure 1, the reasonable doubt rule is preferable if the change in the probability of a false conviction (ABCD) multiplied by the cost of a false conviction exceeds the incremental false acquittal probability (BDEF) multiplied

by the cost of a false acquittal. Given the difference in the probabilities, the actual cost of a false conviction must be substantially greater than the cost of a false acquittal in order to justify a switch from preponderance to reasonable doubt.

The Supreme Court identified the key components of the false conviction cost in its *Winship* opinion: additional sanctioning and disutility costs (and perhaps deterrence costs due to loss accuracy or of the law's moral force). The cost of a false acquittal can be considered primarily the cost of under-deterrence (due to the reduction in the expected punishment).

3. A Brief Empirical Examination

The *Winship* opinion asserts that the additional sanctioning, deterrence and disutility costs of the preponderance standard exceed the under-deterrence costs of the reasonable doubt standard. Is there empirical support for this claim?

There are data that enable a rough, back-of-the-envelope test. If we use the sum of losses due to injuries and property theft (including fraud) as a conservative definition of the aggregate harm from crime, David Anderson's study of the costs of crime suggests the annual aggregate crime cost is on the order of $1 trillion.[30] If we measure sanctioning costs by adding the opportunity costs of the inmate's time while locked up plus the costs of maintaining inmates in prison, Anderson's study suggests that the annual sanctioning cost for *all convictions* is roughly $70 billion.[31]

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[30] *See* David Anderson, The Aggregate Burden of Crime, 42 J. L. Econ 611 (1999) (estimating cost of crime at $1,102 billion, which represents the sum of 'Risks to life and health', 'Crime-induced production', and 'Opportunity Costs' (for criminals and victims)). The "risks to life and health" reflect the value of crime-related lives lost (approximately 72,111 lives lost per year valued at about $6.1 million each) and the value of non-fatal injuries, *id.,* at 624 – 626. The $6.1 million per life measure appears to be about the average value from many previous studies, *id.,* at 626. The value of non-fatal injuries is also based on an average of prior studies valuing non-fatal injuries, *id.,* at 626. The "crime-induced production" reflects the estimated amount of resources spent on items that result from or are associated with crime and hence cannot be spent on other items. *See id.,* at 616 – 617. "Examples include the production of personal protection devices, the trafficking of drugs, and the operation of correctional facilities." *Id.* at 616. Andersen provides a fairly detailed list of these expenditures, *id.,* at 620. The "opportunity costs" associated with crime in the text represent the value of the days victims were unable to work due to the crime event, the time and effort spent by criminals in undertaking crime, and the time and effort of victims in attempting to prevent crime (e.g., locking things), *id.,* at 623 – 624.

[31] *See id.*, at 620, 624 (this figure represents the sum of "Crime-Induced Production: Corrections" and "Criminal lost workdays: in prison"). Obviously, these numbers miss some important costs. Indeed, they do not include the stigma costs, part of the liberty costs, and the moral disutility costs of diluting the moral force of the criminal law referred to by the Court in *Winship*. However, we are using the numbers only to determine whether the sanctioning and deterrence costs of errors, as commonly understood, would justify the reasonable doubt rule. An important part of our analysis is to show the rough magnitude of other costs that need to be considered to justify the reasonable doubt rule if standard sanctioning and deterrence costs do not.

These numbers imply that the aggregate costs of crime, which can be treated as under-deterrence costs, are on the order of 15 times greater than the sanctioning costs for all convictions. In view of the magnitude of this differential, it seems improbable that the savings from a measure that reduces crime by enhancing the likelihood of punishment, such as moving to the preponderance standard, would be swamped by incremental sanctioning, stigma, and disutility costs. Indeed, the empirical evidence on the responsiveness of crime to changes in prison population suggests that this is unlikely.

Surveying evidence on the responsiveness of crime to incarceration, Donohue and Siegelman estimate that the elasticity of crime with respect to incarceration is .15 and Levitt finds an elasticity of .30.[32] Using the lower figure, an increase in sanctioning costs of 200% (i.e., tripling the prison population and increasing sanctioning costs from $70 to $210 billion), should be associated with a reduction in crime on the order of 30%, ((200)(.15) = 30). This yields a deterrence benefit of $300 billion (($1 Trillion cost of crime)(.30) = $300 Billion). Since the additional sanctioning cost of tripling the prison population ($140 billion) is less than the deterrence benefit ($300 billion), a switch to the preponderance standard appears desirable on traditional error-cost grounds.

We have discussed only deterrence and sanctioning costs, but there are stigma and disutility costs that should be considered too. Obviously, these are difficult to quantify. Still, our analysis suggests how large these other costs must be to justify the reasonable doubt standard on the traditional error cost account. It would appear that these costs need to be at least of the same order of magnitude as the incremental sanctioning costs generated by the preponderance rule. For example, return to the scenario just considered: a tripling of the prison population, caused by a switch from the reasonable doubt to the preponderance standard, which produces a deterrence benefit of $300 billion and an incremental sanctioning cost of $140 billion. To justify choosing the reasonable doubt standard over the preponderance standard, the stigma and disutility costs generated by the preponderance standard would have to add $160 billion to the change in total sanctioning costs.

The required magnitude of stigma and disutility costs is so large in relation to sanctioning and deterrence costs that one is compelled to view it with suspicion. If the stigma and disutility costs noted in *Winship* prove to be too small to justify the reasonable doubt rule, what other costs excluded from this analysis should be considered? We explore this question next.

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[32] *See* John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEG. STUD. 1, 13 (1998); Steven Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q. J. ECON. 319 (1996).

IV. PUBLIC CHOICE THEORY AND CRIMINAL PROCEDURAL PROTECTIONS

In our view, the traditional error cost justification offered for core criminal procedural protections, such as the reasonable doubt rule, is incomplete. In this part, we will set out the groundwork for a public choice approach. Specifically, we will offer an overview of the types of predation or rent-seeking practices that are likely to occur in connection with the criminal enforcement process, and the costs generated by these practices.

We contend that the reasonable doubt standard is designed primarily to make it harder for individuals and groups to use the criminal law enforcement process as a mechanism for wealth extraction. Moreover, most of the key pro-defendant procedural protections serve this purpose. This reduces the social costs generated by rent-seeking efforts to influence law enforcement and enhances the deterrent effect of the law.

Our argument should not be viewed as a rejection of error cost analysis in general. Rather, it should be viewed as a substantial modification of the error cost analysis of legal standards. In terms of the general approach associated with Figure 1, we contend that the false conviction costs should include the costs of rent seeking in the criminal law enforcement process. If these costs are included, it appears far more likely that the cost (on average) of a false conviction substantially exceeds the cost of a false acquittal – and substantial excess is necessary given the greater frequency of false acquittals under the reasonable doubt standard. We explain below how rent seeking happens in law enforcement and the costs that it generates.

A. Rent-Seeking in Law Enforcement

Rent seeking is essentially self-interested, profit motivated conduct observed within an institutional framework, such as the political or legal process, rather than in the market. In the law enforcement context, the core of the theory can be captured with a simple profit function for the prosecutor. Suppose the probability of a conviction from the prosecutor's perspective is p_p, the payoff to the prosecutor from a successful prosecution is π, and the cost of prosecution is c_p. The payoff to the prosecutor is itself a function of the amount that a prosecution target would bid to avoid punishment, and the amount that third parties would gain from the punishment of the target. Let v represent the loss to the target, which is the same as his bid to avoid punishment, and let g represent the gain to third parties. The profit function of the prosecutor can therefore be expressed as

(1) $$p_p \pi(g, v) - c_p \, .$$

This implies that the profit-motivated enforcer will have an incentive to target individuals who will offer substantial bids to avoid punishment, and to select targets that third parties will pay substantial amounts to see punished.

Rent seeking in the law enforcement process can occur in a variety of forms. However, we think two general types capture its observed forms. One is *inter-group wealth expropriation*, which arises when one group attempts to gain an advantage from law enforcement at the expense of other members of society.[33] In terms of the prosecutor's profit function (see (1)), these are third parties who are willing to bid g in order to see the prosecutor go after their preferred targets. The other type of rent-seeking is *simple corruption*, which occurs when an individual uses bribery or some other means, in connection with law enforcement, to extract wealth from society. In terms of the prosecutor's profit function, these are cases in which individual targets will be compelled to bid v in order to avoid punishment.

1. Inter-Group Wealth Expropriation

Inter-group wealth expropriation can be effected in a number of ways. For example, there is lobbying that results in targeted or selective enforcement. The familiar case is where prosecutors disproportionately bring charges against members of group B because of the lobbying efforts, or simply to curry the favor, of the dominant group A. This permits group A members to shift the burden of criminal enforcement onto group B or to impose costs on group B which result in some benefit to group A – e.g., the maintenance of a caste system. Indeed, in regimes in which prosecutors are elected, candidates for the position will have incentives to seek support from group A by promising to direct enforcement efforts against group B. [34] Perhaps the best known example of this in United States history is law enforcement in the South during the Jim Crow period, which involved prosecutors refusing to enforce the law against white citizens, while using the threat of criminal punishment to coerce black citizens.[35]

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[33] *See, e.g.*, Angela O. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 459 (2001).

[34] *See, e.g.,* William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505, 520 – 34 (2001); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System,* 25 COLUM. J.L. & SOC. PROBS. 601, 648, n. 81 (1993) (decisions to prosecute are susceptible to political influence because most prosecutors are elected); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 777 (1991) (noting career motivations of prosecutors as an influence on decisions).

[35] *See* RICHARD EPSTEIN, FORBIDDEN GROUNDS 91-97 (1992); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1839 (1998).

Another example of wealth expropriation in the enforcement process is where prosecutors ask for payoffs to avoid bringing charges against members of politically marginal groups. For example, a self-interested prosecutor who knows that politically powerful groups will have him removed from office if he threatens their interests, would then focus his extraction efforts on the politically marginal. The difference between this version of inter-group wealth extraction and the first is slight: in the first, the dominant group initiates the wealth extraction process and in the second, the prosecutor initiates the process. In the first case, the dominant group pays the prosecutor the smallest amount necessary to accomplish their ends, allocating the surplus to themselves. In the second, the prosecutor who initiates the wealth extraction process allocates the surplus to himself.

Yet another example of wealth expropriation is the passing of laws with disproportionate burdens on different groups. In order to effect wealth expropriation, the laws need not apply directly to group *B* members. The dominant group (*A*) may find that certain activities are carried out only, or predominantly, by group *B* members, or that group *B* members carry out these activities in a different manner from others. With this information, the dominant group may prohibit or place special burdens on the activity when carried out in a particular manner. For example, white majorities in the western United States enacted facially neutral statutes in the late 1800s that had the effect of prohibiting Chinese laundries, both to limit competition from them and to limit the independent work options of Chinese laborers.[36]

These cases are united by the common theme of one group benefiting at the expense of others through the use of the governmental process, whether law enforcement or legislation. As our concern is with law enforcement, we will not discuss in much depth the passing of laws with disproportionate burdens. However, the legislative and law enforcement processes provide alternative routes through which a predatory dominant group could extract wealth from others. In this sense, the legislative and law enforcement processes are substitutes in the eyes of the wealth extractor. The laws controlling rent seeking in these governmental processes can be understood as complements, in the sense that they prevent a predatory dominant group from shifting its expropriation efforts from one governmental process to another.

2. Simple Corruption

The other type of rent-seeking, simple corruption, involves the effort of a single individual or group to extract wealth from the general population. We have in

[36] *See* David E. Bernstein, Lochner, *Parity and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

mind two cases: that of an enforcement agent (police officer or prosecutor) who threatens to apprehend and charge an individual unless he pays the agent, and that of an enforcement agent who is willing to accept bribes from the general public or individuals to enforce or not to enforce the law in a particular way.[37] In general, these payoffs can take two forms. One, ex ante bribery, occurs when an individual bribes an enforcement agent before he commits a crime in exchange for an agreement by the agent not to enforce the law against him. In the other form, ex post bribery, the individual bribes the agent after he commits the crime.

There are many examples of simple corruption and its forms. A common example of ex post bribery is a police officer that accepts bribes in return for not issuing a ticket to a speeding motorist. Ex ante bribery appears to be less common, though there are many examples of it too. In most towns in the U.S., local government business is carried out by boards made up of residents with deep and strong connections to many of the parties who appear before them. In these settings, it is hard to distinguish the ordinary reciprocal exchanges that are part of normal social intercourse from ex ante bribery.

Because the criminal law enforcement process can be used by groups or by individuals as a means to extract wealth, we should anticipate a steady stream of efforts to use it for that purpose. In light of this it becomes important to get a sense of the precise costs generated by such behavior and methods for constraining them.

B. Costs Associated With Rent-Seeking in the Criminal Process

We have so far considered the private interests of the enforcement agent or agency. The social welfare effects of rent seeking are much broader and are by no means captured by the prosecutor's profit interests. We will consider the broader effects as additional costs from rent seeking in law enforcement. We divide our discussion of the costs of rent seeking in law enforcement into two parts: first, the costs related to the act of lobbying, and second, the costs related to the effect of lobbying on the deterrent force of the criminal law.

1. Direct Costs

[37] One could argue that the simple corruption category is the same as our second example of wealth expropriation, and we concede that the difference is more a matter of degree than of character. In the second example, the enforcement agent maintains his position through the support of local dominant groups. In the simple corruption story, the enforcement agent is either unconcerned with maintaining support from local dominant groups (in the case of the actively predatory enforcer), or passively accepts bribes in exchange for not enforcing the law.

Rent-seeking in the criminal process involves lobbying efforts to influence the selection and prosecution of cases. The process of lobbying itself generates costs that are from a societal perspective often wasteful.

As a useful analogy, consider efforts to obtain a monopoly. Expenditures to obtain a monopoly may be desirable when a firm secures a dominant position by improving its product or reducing its costs. However, some expenditures to obtain a monopoly are socially wasteful; consider, for example, lobbying efforts to obtain a government privilege, such as an exclusive license or tariff protection.[38]

In the context of criminal law enforcement, efforts by group *A* to lobby the prosecutor to enforce selectively against group *B* are often wasteful forms of wealth extraction. Of course, the result is not an entire waste if targeting group *B* reduces the overall costs of crime. [39] However, there is little reason to believe that lobbying for selective enforcement will always bring about an efficient result. For example, group *A* will have no interest in inducing the prosecutor to go after cases of crime involving only members of group *B* as victims. Further, group *A* members may discourage the prosecutor from enforcing the law when members of their own group commit crimes against group *B*.

So far we have focused on the costs associated with inter-group expropriation efforts, but analogous arguments apply in the context of simple corruption. Corruption creates costs in terms of the resources spent in bribing the enforcement agent to enforce or not to enforce the law in some way and the efforts of the agent in positioning himself to take bribes. However, there is an important feature of the corruption model that suggests that rent-seeking costs can be much larger than appears initially. The enforcement process is *vertically fragmented*, in the sense that it moves through a chain beginning with a police officer (and next his superiors), moving to a prosecutor, and on to a magistrate or judge, and so on. If each one of these agents demands bribes to enforce or not enforce the law, then the total social waste will be considerably larger than in a vertically integrated enforcement regime in which a single agent controls the process from arrest to punishment.[40]

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[38] *See* DENNIS C. MUELLER, PUBLIC CHOICE II 229 – 46 (rev. ed. 1989).

[39] It might be that lobbying coincides with what is socially desirable. *See* Gordon Tullock, *Efficient Rent-Seeking, in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 97 – 112 (James M. Buchanan, R.D. Tollison & Gordon Tullock eds., 1980).

[40] *See* Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q. J. ECON. 599 (1993). The vertical fragmentation of law enforcement means that each individual agent is in a position similar to that of successive owners of the pieces of a toll road. One of the standard results is that the sum of the tolls charged by successive owners will be larger than the toll charged by a single owner of a road. This is known in the monopolization literature as the double-marginalization problem, *see* Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950).

2. Deterrence and Other Costs from Rent-Seeking

Rent-seeking in the criminal process, if successful, has the effect of skewing law enforcement. In this part we discuss three ways in which rent seeking reduces the net social benefits from law enforcement: first, by reducing the direct sanctions imposed on offenders; second, by reducing indirect sanctions imposed on offenders through stigma and reputation costs; and, third, by increasing the cost of enforcing the law.

Some deterrent effects of selectively enforcing the law

Selective enforcement of the law due to lobbying can have corrosive effects on deterrence. Consider, for example, where lobbying by group *A* members results in selective law enforcement against group *B* members, with little regard to the actual guilt of the defendants, and disproportionately less enforcement against group *A* members.

In this scenario, deterrence is likely to drop for both groups *A* and *B*. Group *A* members are under-deterred because they are facing low expected sanctions for engaging in undesirable activities. The deterrent effect on group *B* members would also be reduced because they are now punished whether they have been "good" or "bad." In other words, the incentive to comply with the law is reduced for group *B* members because the payoffs from compliance and noncompliance have gotten closer.

An enforcement policy chosen by group *A* members that reduces deterrence may seem irrational, because it could lead to additional crimes being committed against group *A* members. However, there are scenarios in which such a policy could be chosen rationally by group *A*.

To see this we note that, in general, deterrence can be achieved through *substitution* effects or *scale* effects. Substitution effects occur when a change in the effective sanction leads potential offenders to substitute legitimate, law-complying conduct for illegitimate, undesirable conduct. Scale effects occur when enforcement causes potential offenders to stay out of certain areas, or off the streets at certain times. A selective enforcement policy in which group *B* is targeted implies, within a fixed budget setting, a diversion of resources from *substitution-oriented policies* to *scale-oriented policies*. This is analogous to shifting from a strategy of ticketing every motorist that speeds (inducing substitution toward slow driving) to a strategy of ticketing motorists who meet the profile of a speeder, whether or not they are speeding (inducing drivers who fit the profile to stay off the roads).

Keeping this in mind, we can then return to our example of *A*s and *B*s. If groups *A* and *B* are geographically segregated, then group *A* may choose to reduce potential crimes by *B*s on *A*s by apprehending all *B*s who venture into their territory, whether or not the *B*s are complying with the law.[41] Such a policy would make it costly for *B*s to move among *A*s, encouraging the *B*s to stay in their own territory. In other words, group *A* members may choose to rely on scale effects to reduce the risks posed to them by group *B* offenders. Such a policy, in a fixed budget setting, could easily result in a weakening at the substitution-effect level in deterrence among *B*s. [42]

Other costs: stigma, expressive, and enforcement cost effects

Rent seeking probably reduces the stigma associated with criminal punishment. If the criminal label carries some stigma then that becomes part of the total sanction for criminal behavior and influences deterrence. Anything that reduces the stigma, without causing a countervailing increase in the official sanction, reduces deterrence.

The stigma from being labeled a criminal stems in part from a belief that the person so labeled has violated a societal norm meriting condemnation.[43] If, however, being labeled a criminal is perceived by members of one's social circle as indicative of a biased use of the law, then the stigma from the criminal label diminishes.[44] For similar reasons, rent seeking is likely to reduce any expressive or symbolic features of the criminal law.

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[41] *See, e.g.*, David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters,* 84 MINN. L. REV. 265, 271(1999) (discussing law enforcement's tendency to subject black drivers in upscale neighborhoods to traffic stops). One implication of the theory here is that "racial profiling" may be socially undesirable. For some empirical evidence on racial profiling see John Knowles, Nicola Persico & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203 (2001).

[42] Another scenario might be where lobbying by group *A* members leads to selective enforcement against group *B* members focusing on those who are guilty, but again with disproportionately less enforcement against group A members. In this case the same potential under-deterrence problem for group A members exists because again they face low expected sanctions. However, for the group *B* members the situation has changed. The deterrent effect on group *B* members may still remain or be enhanced because in this case if a group *B* member complies with the law he is probably not going to be prosecuted and if he fails to comply he is more likely to be prosecuted. The overall impact on deterrence is ambiguous in this case. However, given that *A* members are assumed to control the enforcement process, one probable scenario is where their law enforcement agent (the prosecutor) is unable, because of unfamiliarity or indifference, to distinguish complying from non-complying members of group *B*. With a prosecutor unable or unwilling to distinguish the "good" from the "bad" among group *B*, a policy of targeting only the bad in group *B* would be infeasible. This suggests that the outcome discussed in the text, in which deterrence falls unambiguously, is a plausible outcome of selective enforcement.

[43] *See generally* Paul H. Robinson & John M. Darley, *The Utility of Dessert,* 91 NW.U. L. REV. 453 (1997).

[44] ERIC POSNER, LAW AND SOCIAL NORMS 97 – 100 (2000) (noting that criminal offenders can signal loyalty to a subcommunity by violating the law and being punished by the dominant group. The subcommunity is more likely to view criminal punishment as a signal of loyalty to the subcommunity the more the subcommunity believes the criminal justice system is "infected with a political agenda").

In addition to stigma and expressive effects, rent seeking may have enforcement-cost effects. If law enforcement is perceived to be biased then it is likely that some people will refuse to assist law enforcement. This would increase the difficulty and costs associated with apprehensions and prosecutions, which in turn reduces the likelihood that wrongdoers will be sanctioned.

V. PROCEDURAL PROTECTIONS AS METHODS OF CONSTRAINING RENT-SEEKING

In this Part we describe the precise function of pro-defendant procedural protections. Our description suggests a positive theory for the basic procedural rules.

A. Procedural Protections

Procedural protections constrain rent-seeking in the criminal process by making the process costly for both law enforcement agents and for society. Prosecutors, who are rewarded when conviction rates are high, bear much of the brunt of the costs of these procedures.[45]

The primary function of pro-defendant procedural protections is to alter the "relative prices" of various enforcement approaches in a way that makes predation unprofitable (or less profitable). In general, the rules increase the probability that a prosecutor and a bribing party will be unable to find a mutually-acceptable bribe, thus making the set of contractible bribes zero or close to it.

A simple model can be used to convey the argument at a general level. Recall that the profit function of the prosecutor is

$$p_p \pi - c_p \,, \tag{2}$$

where p_p is the probability of a conviction from the prosecutor's perspective, and c_p is the cost of prosecution. The payoff to the prosecutor, π, is a function of the gain to third parties (g) and the loss to the potential defendant (v) – i.e., $\pi = \pi(g, v)$. Suppose the defendant's prediction of the probability of conviction is p_d. In addition, let the cost of a criminal prosecution be c_d for the defendant. The cost function for the defendant is

[45] J. Mark Ramseyer & Eric B. Rasmussen, *Why is the Japanese Conviction Rate So High,* 30 J. LEGAL STUD. 53 (2001) (arguing that because of the stigma in Japan of acquitting defendants and the corresponding detrimental career effects it may have for prosecutors and judges, they prosecute only strong cases); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*, 44 VAND. L. REV. 45, n. 264 (arguing that "[t]o the extent a prosecutor's conviction rate is all that counts, the institutional incentives point toward minimizing the responsibility to 'do justice'.").

(3) $$p_d v + c_d \ .$$

Pro-defendant protections have the effect of reducing p_p and increasing c_p, though in a non-uniform manner across potential defendants. In particular, the reduction of p_p and increase in c_p are both substantially larger for innocent defendants than for guilty defendants. This change in relative prices induces prosecutors to shift their prosecution efforts away from the innocent and toward the guilty. In many cases, the relative price change should cause the prosecutor's expected profit to turn negative for innocent defendants ($p_p\pi - c_p < 0$), thus removing any credible threat of prosecution.

Bribes will be exchanged between the defendant and the prosecutor when two conditions are met: (1) the prosecutor can credibly threaten prosecution ($p_p\pi - c_p > 0$), and (2) the expected cost of a prosecution to the defendant exceeds the expected profit to the prosecutor ($p_d v + c_d > p_p\pi - c_p$).

It follows that pro-defendant procedural protections make bribery less likely through two incentive effects. First, the procedural protections destroy the credibility of the prosecution threat against innocent defendants. Second, in those cases where the threat remains credible against innocent defendants, procedural protections can reduce the defendant's expected probability of conviction to a level that may in large part eliminate the scope for mutually beneficial bribes.

Consider the effects of procedural protections on inter-group expropriation through selective enforcement. On the prosecutor's side, procedural protections raise the cost of targeting innocent parties as well as the costs of letting the guilty go free. If the prosecutor at the behest of group *A* targets innocent group *B* members, he is unlikely to be successful given the pro-defendant procedures. In terms of the profit function in (1), this reduces the amount, *g*, that a third party would be willing to bid for targeted enforcement. If the prosecutor maintains his promise to target group *B*, he will have few successful prosecutions, and will probably lose his job. This suggests that the prosecutor will demand a high bribe in order to adopt a selective enforcement policy. Moreover, given the risk of losing his job, potential bribers will doubt the credibility of the prosecutor's promise to selectively enforce. In view of the greater difficulty of implementing a successful selective enforcement policy and the doubtful credibility of a prosecutor who promises to do so, the potential briber's willingness-to-pay should fall substantially.[46]

[46] For analyses of bribery and law enforcement, *see* A. Mitchell Polinsky & Steven Shavell, *Corruption and Optimal Law Enforcement,* 81 J. PUB. ECON. 1 (2001). *See also* ROBERT KLITGAARD, CONTROLLING CORRUPTION (1988); Susan Rose-Ackerman, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978); Pranab

Next, consider the effects of procedural protections on simple corruption – i.e., individual attempts to use law enforcement as a path to wealth. Procedural protections make it difficult for such corruption to flourish. A prosecutor who on his own initiative threatens to arrest individuals on false charges would find it difficult to mount a credible threat against his victims in the presence of procedural protections. In terms of the prosecutor's profit function, this reduces the maximum bid that a potential defendant will offer to avoid punishment ($p_d v + c_d$). Moreover, the prosecutor's ability to credibly promise *not to enforce* the law against a particular defendant should fall. If the prosecutor charges the wrong person or no one at all, he most likely will be unsuccessful in obtaining a conviction. Given his difficulty in charging and convicting an alternate (innocent) candidate, the cost to the prosecutor of promising not to enforce against a particular defendant is relatively high, and the promise cannot be considered fully credible. The prosecutor's power to shake down individuals for money in exchange for a promise not to bring charges is severely diminished in the regime with procedural protections. Moreover, the potential defendant's willingness to pay a bribe falls since he is less likely to be convicted in the first place if he is innocent, and any promise by the prosecutor not to enforce against a guilty defendant cannot be regarded as credible. [47]

We can see in greater detail how procedural protections dampen corruption in the context of the two core procedural protections: the reasonable doubt standard and the double jeopardy rule. Both reduce the prosecutor's ability to selectively enforce. In this sense, they clearly fall within our analysis because they simultaneously raise the cost to the prosecutor of implementing a selective policy and lower the value to the potential beneficiary of seeking such a policy. The reasonable doubt rule accomplishes this task by directly reducing the probability of a guilty verdict and increasing the amount of evidence necessary for conviction. In terms of the prosecutor's expected profit function, the reasonable doubt rule increases c_p and reduces p_p. The double jeopardy rule aids in this task by preventing the prosecutor from substituting toward successive prosecutions against the same defendant in order to avoid the effects of the reasonable doubt rule. If (in equation (1)) p_p is too low to credibly threaten prosecution in a one-shot trial, the threat of successive prosecutions could restore credibility to the

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Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320 (1997); and Andrei Schleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599 (1993).

[47] We do not discuss what might happen if the defendant suffered a large stigma simply from being charged or indicted for certain kinds of wrongdoing. *See In re Fried*, 161 F.2d 453, 458 (2nd Cir. 1947) (noting that "[f]or a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased."). *See also*, Eric Rasmusen, *Stigma and Self-fulfilling Expectations of Criminality*, 39 J. L. & ECON. 519 (1996). In such cases the potential for corruption and wealth extraction are greater because the prosecutor can gain or impose costs without actually having to win at a trial.

prosecutor's strategy. For example, suppose the prosecutor is permitted to prosecute the defendant twice. In this case, one might observe:

(4) $$p_p\pi - c_p < 0 \ ,$$

(5) $$[p_p + (1- p_p)\ p_p)]\pi - \underline{c}_p > 0 \ ,$$

where $\underline{c}_p$ represents the prosecution cost for two trials, which implies that the prosecutor's threat could be credible against innocent defendants.

Under this theory the reasonable doubt and double jeopardy rules have complementary functions. No matter how low the probability of successful targeting is reduced as a result of the reasonable doubt rule, the prosecutor may still have an incentive to adopt a selective enforcement policy if he can bring successive actions against a defendant. In the extreme case in which the prosecutor can bring an infinite number of successive actions against the defendant, he is likely to eventually get a conviction, no matter how small the probability of conviction in the individual trial. The more worrisome case, however, is where the prosecutor learns from a previous mistake and uses the information from a "test trial" to boost the probability of conviction to a near certainty in the second trial.[48] The double jeopardy rule appears in this framework to serve the function of preventing enforcement agents from substituting toward a successive prosecution strategy in order to avoid the constraints imposed by the reasonable doubt rule and other single trial protections.

B. Penalty Restrictions

Another way to constrain the costs associated with abuses of prosecutorial or punishment authority is to put restrictions on the size of penalties or the process by which they are levied. David Friedman has described the size and process restrictions as "inefficient punishments".[49] Friedman distinguishes inefficient punishments, like prison, from efficient punishments, like the death penalty administered quickly or a large monetary penalty equal to the defendant's wealth. [50] The argument is that efficient punishments do not impose large direct costs on the state and hence prosecutors may have an incentive to use them to extract wealth from defendants.[51] However, inefficient punishments impose

[48] *See Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1341-49 (1979).

[49] *See* Friedman, *supra* note 4, at 259.

[50] *See id.,* at 260 – 61.

[51] *See id.,* at 261.

substantial costs on the state and therefore present obstacles to the use of the criminal process as a means of extracting wealth. [52]

Two types of penalty restrictions are relevant here: the prohibition of retroactive punishments and of cruel and unusual punishments.[53] The latter restriction fits with the analysis here as well as Friedman's. As Friedman notes, the state could easily adopt a low-cost system of punishment; defendants could be executed, enslaved, or put into laboratories for scientific experimentation and the harvesting of organs and tissue.[54] Instead, we observe a system in which the state forgoes the opportunity to extract all of the defendant's wealth, and incarceration prevents the state from taking full advantage of the convict's labor. The constitutional prohibition on cruel and unusual punishments is in part responsible for this choice, although the choice seems to have been made in some countries where there is no such explicit prohibition.[55]

The historical evidence is consistent with this view of the constraining function of the cruel and unusual punishment clause.[56] The first restrictions on excessive penalties in English law appeared in the Magna Carta, in chapters regulating discretionary fines.[57] The discretionary fines, or "amercements,"[58] obviously had the potential to be used as a source of revenue for the state, and as a source of private income in a period in which much of criminal prosecution was undertaken by private parties.[59] It was their abuse that led the authors of the Magna Carta to devote three chapters to their control.[60] These provisions later evolved into the modern prohibitions of excessive and disproportionate punishments.[61]

In terms of the profit function introduced in (1), Friedman's argument is easy to understand. Inefficient punishments work not by altering the cost of prosecution, c_p, but by modifying the payoff to the prosecutor, π. The prosecutor's payoff increases in the amount that a defendant would bid to avoid

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[52] *See id.,* at 263 – 64.

[53] *See* U.S. CONST. ART I, § 9, CL. 3 ("No Bill of Attainder or ex post facto Law shall be passed.") A similar prohibition applies to the states: "No State shall . . . pass any Bill of Attainder . . .." *Id.,* ART. I, § 10, CL. 1; U.S. CONST. AMEND. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[54] *See* Friedman, *supra* note 4.

[55] Malaysia, Morocco, Senegal, and the Ivory Coast do not have a rule prohibiting cruel and unusual punishment. Yet, the government in those countries has not gone to the extreme of trying to profit from punishing the guilty.

[56] *See* Anthony F. Grannuci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 844 – 848 (1969).

[57] *See id*., at 845.

[58] *Id.*

[59] On privately-initiated enforcement, *see, e.g*., Friedman, *supra* note 4, at 264.

[60] *See* Grannuci, *supra* note 56, at 845 – 846.

[61] *See id*.

punishment and the amount that third parties would bid to take the defendant's wealth. The payoff should decline as a function of the cost of punishment, since any increase in the cost of punishment reduces the net reward from using the criminal law to extract wealth. Consider, for example, a wealthy individual who would pay an enormous amount to avoid conviction for some criminal violation. If the law permits the prosecutor (or the state) to strip the defendant of his wealth, the payoff to the prosecutor can be approximated by the monetary loss to the defendant, $\pi = v$. For a wealthy potential defendant, the prosecutor's profit function would then be

(6) $$p_p v - c_p ,$$

which could be positive even if the likelihood of conviction is extremely low.

Penalty restrictions increase the cost of punishment to the state, dampening incentives for wealth extraction, and at the same time reduce the amount a potential defendant would be willing to pay in order to avoid being charged with a crime. The prohibition on cruel and unusual punishments reduces the potential for the state or prosecutor to punish innocent individuals in order to profit from their punishment. By raising the cost of punishment, the prohibition enhances the likelihood that the state will punish only the guilty – the same substitution effect induced by the reasonable doubt rule. It also dampens incentives individuals have to become prosecutors in order to enrich themselves.

The prohibition of retroactive punishments constrains rent-seeking at the legislative level. In the absence of such a restriction, a predatory enforcement regime could retroactively impose a criminal penalty on the activity of a particular group and use the new law as leverage to expropriate their wealth. The ex post facto and bill of attainder clauses in the Constitution both apply to this type of activity. The ex post facto clause applies specifically to legislative attempts to punish retroactively.[62] The bill of attainder clause applies to legislative attempts to punish particular individuals without a trial.[63]

The distinction between penalty restrictions and procedural protections suggests that these types of rules, both designed to dampen rent-seeking, serve as complements: procedural protections work better in the short run while penalty

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[62] *See* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking,* 84 GEO. L.J. 2143 (1996); Wayne A. Logan, *The Ex Post Facto Clause and The Jurisprudence of Punishment,* 35 AM. CRIM. L. REV. 1261 (1998).

[63] *See* Jane Welsh, *The Bill of Attainder Clause: An Unqualified Guarantee of Process,* 50 BROOK. L. REV. 77 (1983); Thomas B. Griffin, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause,* 70 VA. L. REV. 475 (1984). We will focus our discussion on the ex post facto clause for the sake of brevity. Note that both clauses induce a reactive type of rent seeking, as they seem to invite defendants to challenge virtually every effort to punish on the ground that it is either a disguised bill of attainder or retroactive penalty.

restrictions work better in the long run. The procedural protections described earlier – the reasonable doubt rule and the double jeopardy rule – operate in the short run to remove incentives for the prosecutor to selectively enforce the law. However, if the background institutional structure is one that allows the state to profit from the punishment of individuals, we should worry about how long the prosecutor will be able to stay out of the predatory enforcement game. Just as the potential for profit induces entry of new businesses in the private sector, the potential for profit in enforcement should induce entry of a similar sort in the public sector. Creative prosecutors would find ways to modify the procedural rules, plea bargain around them, or to lobby the legislature until the desired changes were enacted.[64] Penalty restrictions constrain this long-term erosion process by reducing the potential for profit in criminal law enforcement.[65]

C. Some Implications for the Jury

Although we have focused on rent-seeking in the enforcement process rather than in the legislative process, the jury serves as an important constraint against both types of rent-seeking. A prosecutor who brings politically motivated charges against members of politically weak groups faces the risk, under the jury system, of being unable to gain a unanimous verdict from a jury consisting of some members from the weak group. Indeed, the theory of this paper suggests an important rationale for the requirement of unanimity among jurors in criminal trials. The need to obtain a unanimous verdict makes it more difficult for the prosecutor to selectively target politically marginal groups or individuals in the law enforcement process. The need to obtain a unanimous verdict from the jury also gives the jury the power to nullify statutes designed to expropriate wealth from politically marginal groups.

Our theory provides some insight into the original function of challenges to the jury's composition, including the controversial problem of peremptory challenges. Challenges to individual jurors could be based on cause, or could be peremptory, in the sense of not being based on any of the accepted grounds.[66] Peremptory challenges were granted only to the defendant.[67] Although peremptory challenges have come under attack recently as a form of invidious discrimination,[68] the original purpose is somewhat easier to see in the context of

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[64] *See, e.g.*, Stuntz, *supra* note 34, at 509 – 515.

[65] The procedural constraints we have discussed might reduce the incentive to lobby law enforcers, but might lead parties to more lobbying on the legislative side. Penalty restrictions, to the extent they are part of constitutional law, reduce incentives for legislative lobbying. In addition, any set of restraints that forces rent-seeking groups to use more costly methods of extracting wealth should have the desired effect of dampening rent-seeking incentives. At a minimum, the restraints considered here have that effect.

[66] Blackstone Commentaries, *supra* note 17, at 361 – 63.

[67] *Id.*, at 362.

[68] *See* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140 (1994) (the Equal Protection Clause prohibits gender discrimination in the use of peremptory challenges); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (the

a rent-seeking model. The peremptory, in its original design, gave the defendant a zone of unquestioned authority in the choice of jurors, as long as he did not use it to an excessive degree. If a wily predatory sheriff had managed to choose conviction-prone jurors in a way that would be difficult to challenge on the accepted grounds, the defendant could fall back on his peremptory challenges. To the extent that this obstruction stood in the way of any effort to selectively enforce the law, the sheriff would have a much smaller incentive to try to control the composition of the jury.

VI. APPLICATIONS OF POSITIVE THEORY

We have been concerned so far with explaining broad institutional features. In this Part we extend the argument by taking a look at the case law associated with pro-defendant protections, focusing on double jeopardy law. Since criminal procedure is a vast area, we can provide only a sketch here. We claim that this paper's framework provides a good positive theory of substantial parts of criminal procedure doctrine.

A. Double Jeopardy

As a general matter, Double Jeopardy reduces the prosecutor's power to selectively enforce or abuse his discretion in a manner complementary to the reasonable doubt standard. Double Jeopardy complements the reasonable doubt rule by preventing the prosecutor from bringing successive prosecutions against the same defendant with the hope of eventually learning how to convict the defendant on weak evidence.[69] In brief, our claim is that *the essential purpose of Double Jeopardy doctrine is to prevent prosecutors from substituting toward successive prosecutions in order to avoid fundamental single-trial procedural constraints such as the reasonable doubt rule*. This proposition explains puzzles in Double Jeopardy doctrine as well as its overall structure.[70]

One of the important puzzles in double jeopardy doctrine is the tension between the decisions in *Blockburger v. United States*[71] and *Diaz v. United States*.[72] *Blockburger* established the principle that, for Double Jeopardy purposes, a greater offense is treated as the same as each of its lesser-included offenses.

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prosecutor's peremptory challenges based solely on race were unconstitutional under the Equal Protection Clause.)

[69] Benton v. Maryland, 395 U.S. 784, 796 (1969).

[70] On the puzzles of double jeopardy law, *see* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L. J. 1807 (1997).

[71] 284 U.S. 299 (1932).

[72] 223 U.S. 442 (1912). As Amar notes, the principle of *Diaz* was affirmed later by the Supreme Court in Garret v. United States, 471 U.S. 773 (1985). *See* Amar, *supra* note 70, at 1813.

Thus, under the *Blockburger* test it would be a violation of the Double Jeopardy rule to retry an individual for murder after that individual is acquitted on a charge of attempted murder (arising from the same set of facts).[73] However, in *Diaz* the Court permitted an individual to be retried for murder, after having been convicted of attempted murder, in a case in which the victim died after the first trial from injuries received in the initial attack.[74] Under a strict application of the *Blockburger* test, *Diaz* would have to be considered a mistake.

The tension between *Blockburger* and *Diaz* (and between *Blockburger* and several other decisions) appears to be a puzzle under a strict interpretation of *Blockburger*. However, under the anti-substitution thesis implied by our framework, there is no tension between *Blockburger* and *Diaz*. *Blockburger* prohibits a particular substitution strategy: the use of a later trial on either a greater or lesser-included offense in order to take two shots at convicting a defendant on one particular set of facts. The "*Diaz* exception" (if one wishes to call it that) applies to the case in which there is clearly no evidence that the prosecutor has adopted such a strategy. *Blockburger* and *Diaz* are easily reconciled under the anti-substitution principle.

A simple model of the problem under consideration may clarify this argument. Suppose a crime consists of elements {*A*, *B*, *C*}. Each element must be proved in order to hold the defendant guilty. For example, in the case of murder, *A* might be the intent element, *B* the attempt element, *C* the actual killing of the victim. Attempted murder would then require only the proof of elements *A* and *B*. *Blockburger* holds that in general, it is violation of double jeopardy to first prosecute the defendant for {*A*, *B*} and then later prosecute him for {*A*, *B*, *C*}. This seems sensible in light of the potential for predation. The predation potential is especially clear in the case in which the government loses on the {*A*, *B*} prosecution and then brings {*A*, *B*, *C*}. If the government wins {*A*, *B*} and then brings {*A*, *B*, *C*}, the predation concern is somewhat less, but still important.

Diaz is distinguishable from the standard case of successive prosecutions for two reasons: the government won in the first case, and the new element was only prospective at the time of the first trial. In terms of the model, at the time of trial, the crime could be described as consisting of *A* and *B* with only a chance of *C*. The government did not have a real choice between {*A*, *B*} and {*A*, *B*, *C*}, and given the absence of such a choice, the government's decision to bring {*A*, *B*} should not be called an example of strategic predation. When *C* was later realized, a prosecution based on {*A*, *B*, *C*}, offsetting for the punishment already

[73] *See* Amar, *supra* note 70, at 1813.

[74] The state was prepared to offset against the murder sentence time served under the attempted murder conviction. *See id*.

inflicted, preserves the deterrent effect of the law without introducing risks of government predation.

Consider another puzzle involving the splitting of possible charges. Suppose one charge consists of circumstances *A*, *B*, and *C*, and another of the circumstances *A*, *B*, and *E*. For example, suppose one charge is robbery and the other is murder, arising from the same set of events, and element *B* requires proof of the defendant's presence at the scene of the crime.[75] The defendant is tried under the *ABC* charge first, and the government loses because it cannot prove element *B*. Can the government turn around and bring the *ABE* charge? *Blockburger* would seem to imply that the answer is yes, because the charges do not involve the same elements. However, the Supreme Court held in *Ashe v. Swenson* that, under the Double Jeopardy Clause, the government was collaterally estopped from attempting to prove element B in the second prosecution.[76]

The tension between *Blockburger* and *Ashe* disappears under this paper's anti-substitution principle. If prosecutors were free to split up their charges into separate yet overlapping bundles – {*A*, *B*, *C*}; {*A*, *B*, *E*}; {*B*, *C*, *D*} – without having to fear that they would be barred by the Double Jeopardy rule, then this would clearly be a desirable way of skirting the single-trial constraints imposed by the reasonable doubt rule. It follows that Double Jeopardy doctrine should be understood to prevent this kind of prosecution stratagem. If the *Blockburger* doctrine is read to incorporate the anti-substitution rule proposed here, then there is no apparent conflict between *Blockburger* and the collateral estoppel rule of *Ashe*.

Our claim that the overall structure of Double Jeopardy doctrine is consistent with the model of this paper is supported by two other features of the doctrine: the asymmetry of appeal rights and the treatment of mistrials.

Consider the treatment of appeal rights. In *Kepner v. U.S.*, the Supreme Court held that appeal rights are asymmetric,[77] in the sense that the defense generally can appeal any conviction, but the prosecution's right to appeal acquittals is severely limited.[78] If we incorporate concerns over rent seeking then a strong

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[75] Amar, *supra* note 70, at 1827.

[76] 397 U.S. 436 (1970); for discussion *see* Amar, *supra* note 70, at 1827 – 28.

[77] Kepner v. United States, 195 U.S. 100, 105 (1904).

[78] Sanabria v. United States, 437 U.S. 54, 64 (1978) (holding that even if legal rulings on the exclusion of evidence leading to acquittals were erroneous the prosecution could not appeal); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (holding that the prosecution could not appeal an acquittal where the judge, who lacked the authority to do so, directed a verdict of acquittal before the prosecutor has rested his case); Carroll v. United States, 354 U.S. 394, 400 (1956); United States v. Ball, 163 U.S. 662 (1896) (holding that a defendant may not be prosecuted more than once for an offense).

rationale for asymmetric appeal rights emerges. The asymmetric appeal rights rule of *Kepner* has the effect of making the jury's initial determination of acquittal final. By denying prosecutors the option to have a jury's acquittal determination reviewed by an appellate court, the *Kepner* asymmetry rule enhances the power of the jury relative to that of the prosecutor. Given the unanimity requirement and the jury's composition after the defendant's challenges, the *Kepner* rule increases the difficulty facing any prosecutor who mounts a selective enforcement campaign.

The treatment of mistrials is another area of Double Jeopardy doctrine that shows a concern for constraining prosecutorial abuse. The kind of abuse we are concerned with here is that the prosecution may think, at some point in the initial trial, that a conviction is not likely and may then try to have a mistrial declared by the court to try to get another shot at the defendant.[79] If we permitted the prosecution to do this and bring another trial then the prosecution would have a tremendous incentive to have mistrials declared whenever it thought it might not win the initial trial.

The law appears to reflect these concerns in the way it addresses whether another trial will be permitted following a mistrial. One could characterize the law's approach to this problem as one that depends on the defense's attitude towards a mistrial. Thus, if the defense seeks or does not oppose a motion for a mistrial then the prosecution will normally be permitted to bring another suit.[80] This is consistent with our substitution thesis because if the *defense* is seeking a mistrial, the prosecution is not likely to be using the mistrial process to seek another trial to go after the defendant. An exception to this is observed where the defense seeks a mistrial based on something the prosecution did that appears deliberately calculated by the prosecution to induce the defense to seek a mistrial.[81] This is also consistent with the rent-seeking framework because in such cases there is a clear risk that the prosecutor could have induced the defense's motion for a mistrial in order take advantage of information gleaned from the initial trial.[82]

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[79] *See* Ashe v. Swenson, 397 U.S. 436, 447 (1970); Stephen Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 468-69 (1977).

[80] *See* United States v. DiFrancesco, 449 U.S. 117, 130 (1980); *see also* Oregon v. Kennedy, 456 U.S. 667, 676 (1982).

[81] *See* Arizona v. Washington, 434 U.S. 497, 508 (1978); United States v. Dinitz, 424 U.S. 600, 611 (1976) (stating that "[the Double Jeopardy law] bar retrials where 'bad-faith' conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions [or] a more favorable opportunity to convict the defendant;[W]here a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred"); United States v. Jorn, 400 U.S. 470, 485 (1971) (stating that "[t]hus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error").

[82] *See* Commonwealth v. Starks, 416 A.2d 498, 500 (1980) (arguing that prosecutorial overreaching "… signals the breakdown of the integrity of the judicial proceeding, and represents the type of

On the other hand, when the defense opposes a mistrial motion the courts have adopted a more cautious stance to permitting another trial – the prosecution must prove a "manifest necessity" for the next trial.[83] In addition, the factors that go to showing whether "manifest necessity" is present appear to be designed to ascertain whether the prosecutor was trying to abuse the criminal process – e.g., by getting a mistrial in order to avoid a loss in the initial trial.[84] For example, a hung jury leading to a mistrial does not present the same specter of potential abuse as does the injection of prejudicial error by the prosecutor to obtain a mistrial.[85] In the former case the prosecution is often granted another trial while the latter case will normally not result in another trial.[86] Further, when the reason for the mistrial was a move by the defense, without prosecutorial provocation, then the scope for prosecutorial abuse is also low and another trial is usually granted.[87] These factors are all consistent with an approach that seeks to constrain the prosecutor's ability to substitute successive prosecutions in order to avoid the effect of pro-defendant procedural protections.

B. Ex Post Facto Clause

The ex post facto clause bars retroactive application of certain changes in the criminal law.[88] The standard justifications are that it provides *notice* to defendants of the conduct that is illegal and the sanction for it, as well as *constraining the government* from passing arbitrary or vindictive legislation against a particular defendant.[89] The prohibition is only concerned with matters that amount to "punishment"[90] and applies more frequently in the context of legislative decisions as compared to judicial decisions.

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prosecutorial tactic which the double jeopardy clause was designed to protect against."). This exception to the bar on the application of double jeopardy where a defendant seeks a mistrial is a very narrow one. *See* Green v. United States, 451 U.S. 929, 931 (1981)(Marshall, J., dissenting) (stating that "I suspect that a defendant seeking to prevent a retrial will seldom be able to prove the Government's actual motivation."). Few courts have found intentional prosecutorial inducement. *See* Commonwealth v. Warfield, 227 A.2d 177 (Pa. 1967)(defendant was indicted for murder and voluntary manslaughter and the trial judge suppressed the defendant's confession, yet the District Attorney revealed in his opening statement that the defendant had made a confession to the police. After the defendant moved for a mistrial the District Attorney admitted that he sought to induce the defendant to seek a mistrial).

[83] *See* Arizona v. Washington, 434 U.S. 497, 505 (1978); WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE 1176-80 (3d ed. 2000).

[84] *See* Schulhofer, *supra* note 104, at 468-69.

[85] *See* Steinglass, *supra* note 21, at 361.

[86] *Id.* at 487.

[87] *See* JOSHUA DRESSLER, UNDESTANDING CRIMINAL PROCEDURE 607 (1997).

[88] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 428 (5th ed. 1995); Lindsey v. Washington, 301 U.S. 397 (1937).

[89] See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR. CRIMINAL LAW 97 - 100 (2d. ed).

[90] Sometimes "civil" sanctions may amount to "punishment" for purposes of ex post facto inquiry. *See* Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994) (finding that the punitive damage awards of the 1991 Civil Rights Act were similar enough to criminal sanctions to apply the *ex post facto* clause). However, this is not a frequent occurrence so that normally the legislative label is determinative (i.e., if it is labeled

Given that a concern for potential government oppression has always been one of the justifications for the ex post facto clause, the key contribution of the rent-seeking framework is its identification of a particular justification as central to efforts to understand case outcomes. The two standard justifications, notice and prevention of abuse, provide alternate approaches to explaining the case law. Under the notice approach, just about every change in the criminal punishment process, whether in the law or in evidentiary requirements, could violate the prohibition against ex post facto rules if applied retroactively. *Under the "abuse" or rent-seeking approach, only those changes in the punishment process that create a potential for abuse, by increasing the risk of targeted enforcement, should be deemed violations of the ex post facto clause.*

We have argued that the case law is more consistent with the latter view.[91] The most obvious illustration of this is that the ex post facto provision is understood today to be violated if a penalty is enhanced, but not if it is reduced. Obviously, any change in a penalty could be viewed as a violation of the ex post facto clause under the notice theory. The abuse theory, however, would imply a concern only for penalty enhancements.

Since it is clear that an enhancement of the penalty, applied retroactively, violates the ex post facto clause, much of the modern case law involve less clear changes such as rules governing the provision of benefits to prisoners (such as the timing of parole hearings) or the type of evidence admitted into court. The modern decisions suggest that the Supreme Court applies a balancing test that weighs the likelihood and potential severity of abuse against the administrative efficiencies. In the case of a reduction in certain benefits provided to prisoners, the administrative efficiencies come in the form of cost reductions to the state. This is weighed against the potential for targeted punishment against a person or class. In the case of evidence requirements, the potential for abuse is weighed against gains in the administration and accuracy of trials.[92]

C. Void-for-Vagueness

The void-for-vagueness doctrine serves as a constraint on legislators and law-enforcement agents that curtails their discretion. The early cases struck down laws that were deemed vague, in the sense that they granted law enforcement agents broad discretion in deciding what is legal and what is not. [93] Such

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"civil" by the legislature then it will most likely not amount to "punishment"). *See* Kansas v. Hendricks, 521 U.S. 346 (1997).

[91] Hylton & Khanna, *supra* note 1, at 100-104.

[92] *Id.*, at 102-104.

[93] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Fields v. City of Omaha, 810 F.2d 830 (8th Cir. 1987).

discretion gives enforcement agents wide power to extract wealth through the criminal law enforcement process. This raises the specter of rent seeking.

The purpose of the void-for-vagueness doctrine was confused to some extent by the Supreme Court's rationale in *Papachristou v. City of Jacksonville*, a decision striking down a Florida vagrancy ordinance. Rather than focusing solely on the enormous discretion the statute gave to law enforcers, the Court spoke at length about the class-stratification consequences of the ordinance. The Court noted that "[t]hose generally implicated by the imprecise terms of the ordinance – poor people, nonconformists, dissenters, idlers – may be required to comport themselves according to the life-style deemed appropriate by the Jacksonville police and the courts."

The Court's class-stratification worries in *Papachristou* led to the belief on the part of some litigants and commentators that a vague law should be upheld if it raised no class-stratification issues. So, for example, an ordinance giving law enforcers greater discretion to arrest gang members should be viewed positively in the absence of any race or class-stratification issues. If such an ordinance appeared to play no role as a mechanism for inter-group wealth expropriation, this reasoning would suggest that it should be upheld.

However, this view misses the fundamental point that the void-for-vagueness doctrine aims at suppressing the risk of what we described earlier as "simple corruption" – the use of the power to enforce as a path to enrichment. Excessively vague statutes give discretion to law enforcers to shake down law abiding citizens for bribes. This fundamental concern underlying void-for-vagueness doctrine remains a valid one, as suggested by the Court's decision upholding the doctrine in *Chicago v. Morales*.[94]

VII. CONCLUSION

Perhaps the most enduring statement of criminal procedure is Blackstone's claim that it is better to let ten guilty men go free rather than punish one innocent man. The public choice theory we have offered in this chapter is in accord with this claim. The Supreme Court later elaborated on this notion in its *Winship* decision by framing the problem as one of avoiding certain false conviction costs, such as stigma and disutility costs. It is this formulation that we find inadequate. We contend that public choice theory provides the best basis for understanding the key institutional features of criminal procedure. Moreover, the public choice theory suggests functions for each of the most important protections – such as

[94] Hylton & Khanna, *supra* note 1, at 104-106.

the double jeopardy, ex post facto, and reasonable doubt rules – that align well with the actual case law.