

The Political Economy of Prosecution¹

Sanford C. Gordon
Department of Politics
New York University
sanford.gordon@nyu.edu

Gregory A. Huber
Department of Political Science and ISPS
Yale University
gregory.huber@yale.edu

Abstract

We argue that contemporary advances in the field of political economy, particularly those concerning the subject of delegated authority, can provide a unifying framework for analyzing the behavior and political context of criminal prosecutors in the United States. This perspective, which considers a number of tradeoffs associated with mechanisms for compensating, reviewing, and constraining the discretion of public officials generally, is well-suited for studying these prosecutors, the vast majority of whom are elected but whose accountability is frequently called into question. Prosecutors serve in a variety of roles: as subordinates of voters (or other elected officials), superiors of subordinate prosecutors, collaborators in cooperative relationships with other officials in law enforcement and courtroom communities, and adversaries of defendants. Much of the behavior of prosecutors examined by scholars employing disparate disciplinary approaches may be explained with reference to (1) the extent of conflict between the prosecutor's motives and those of other actors, and (2) the degree to which information is unevenly distributed among those actors. A political economy perspective is especially well-suited to integrate these features of the prosecutor's environment into a coherent account. To illustrate the value of this unifying approach, we apply this perspective to three areas in the existing literature on prosecutors: plea bargaining, courtroom communities, and public corruption prosecution.

¹ We thank Ashley Lott for excellent research assistance.

1. Introduction

In the United States, the criminal prosecutor occupies a preeminent role in both the criminal justice system and in public life more generally. Criminal prosecutors exercise enormous discretion in coordinating investigations with law enforcement agencies, deciding which cases to bring to trial, and conducting plea negotiations with defendants. They also often retain considerable autonomy in setting the law enforcement priorities for the jurisdictions in which they operate. Given the profound importance of criminal prosecutors in American life, it is not surprising that legal scholars and social scientists from a wide variety of disciplines have devoted considerable attention to their study. What is more surprising is the relative isolation of studies of prosecutorial behavior from recent advances in the field of political economy – advances that have dramatically improved our understanding of the incentives and consequent behavior of government officials more generally. While the undeniable importance of criminal prosecutors makes them an object worthy of study in their own right, it is fruitful to consider the extent to which they are similar to other government actors to whom important authority is delegated, and for whom accountability is at issue.

Lest we give the impression that this disjuncture is a failure of others to turn to the insights of political economy, we should note two additional facts. First, we do not mean to suggest that scholars operating outside of this field have failed to comprehend the myriad issues of accountability and incentives critical to understanding the prosecutor. In fact, as we discuss in greater detail below, a common theme in studies of prosecutors across disciplinary boundaries is the realization that explaining their behavior requires, at its core, understanding prosecutors as

political actors embedded in a complex strategic environment, where concerns about evaluation and management loom large.

Rather, what is lost by this division is the absence of a common vocabulary and conceptual framework essential for the accumulation of general knowledge. To provide a simple example, it is a truism that the desire to secure reelection motivates prosecutors to secure high conviction rates. In this regard, prosecutors take their place among incumbents of all manner of offices (from judges to presidents and members of Congress) who alter their behavior in anticipation of voter review. The fact that voters might reward high conviction rates, long criminal sentences, strong macroeconomic performance, constituency service, or something else suggests a common problem stemming from the limited information available to voters about the qualifications, preferences, and behavior of incumbents. The conceptual framework of political economy provides a means to understand the mechanisms that underlie this and other related issues.

Second, *political scientists* have largely failed to apply these contemporary approaches to the study of prosecutors. In his 1999 APSA presidential address, Matthew Holden, Jr. noted the “great intellectual opportunity” the prosecutorial function presents for scholars of politics (Holden 2000). While important exceptions exist (and will be discussed in further detail below), scholars of domestic politics applying contemporary tools of theoretical and empirical analysis have not, by and large, taken up the study of the criminal prosecutor with the zeal afforded to the study of other officials. What makes this lacuna in the contemporary political science literature particularly remarkable is the unavoidably political nature of the position of criminal prosecutor – a feature not lost on careful observers of the office from other disciplines. Most obviously, the position of district or state’s attorney is, in the vast majority of American states, an *elected* office. Issues of electoral control, accountability, independence, and pandering are familiar in the

set of topics of perennial concern to the political scientist. At the federal level, United States Attorneys are political appointees who often possess strong partisan loyalties. U.S. Attorneys, together with the Public Integrity Section at the Department of Justice headquarters, prosecute violations of federal public corruption statutes and instances of alleged election fraud.

The purpose of this essay is to recast the existing literature on the politics of prosecution in the language of political economy, with the dual aim of familiarizing scholars of prosecution with that language and more fully engaging scholars of positive political science and political economy with the topic. In so doing, we hope to illuminate some of the outstanding questions concerning the role of the criminal prosecutor in politics and government. We begin with two (relatively) uncontroversial premises: first, prosecutors have goals and behave instrumentally in pursuit of those goals. Some of these goals concern the maintenance of abstract moral principles: for example, prosecutors may wish to pursue justice impartially, to maintain the rule of law, and to maintain their integrity. Prosecutors also face career incentives that may come into conflict with these principles.

Our second premise is that the objectives of prosecutors are influenced not only by their own choices but also by the choices of other officials and citizens with whom prosecutors interact. (Likewise, the welfare of other officials and citizens may be dramatically influenced by the choices of prosecutors). Some of these interactions are hierarchical in nature: prosecutors are both principals (superiors) in hierarchical organizations staffed with ambitious, career-minded subordinate attorneys, and agents (subordinates) to voters, presidents, attorneys general, and/or local party bosses. Other relationships are horizontal in nature, as in the prosecutors' sometimes uneasy alliances with law enforcement agencies, community groups, and journalists. And, of course, there are the (typically adversarial) relationships with defendants and their attorneys. An

explicitly political characterization of these interactions necessarily includes the extent to which the interests and goals of the individuals involved come into conflict with those of the prosecutor and by the asymmetric distribution of information across those actors. Given the inherently *strategic* nature of the prosecutor's environment, game-theoretic analysis is an especially promising avenue for future research (a fact that is already recognized by the extensive literature on plea bargaining from the field of law and economics, discussed below).

With these premises in hand, we are in a good position to reassess a number of salient political features of the position of the prosecutor previously studied by social scientists. What are the contours of the authority and discretion of the criminal prosecutor? How do the career objectives of prosecutors affect their behavior, and might those incentives vary depending on the office? How should we understand the development of cooperative norms in "courtroom communities" and the cultivation of ties with community groups and law enforcement agencies? Under what conditions are these norms and alliances sustainable? Given the relative ignorance of voters, are elected prosecutors truly unaccountable? How would we know? What constitutes the proper balance of accountability and independence for such powerful officials? Is the prosecution of political corruption itself politicized?

Before proceeding, we wish to point out what this essay does *not* do. First, space constraints prevent us from undertaking a comprehensive review of the entire social-scientific literature on prosecution. Second, we do not address the undeniably politically relevant issue of race and prosecutorial discretion. It is next to impossible to isolate the prosecutor's specific role without consideration of the place of law enforcement, judges, juries, and corrections officials, and so in the interest of sharpening the focus of our inquiry, we do not attempt to do so here.

2. Criminal Prosecutors in the United States

The vast majority of criminal prosecutions in the United States take place at the state level. The Bureau of Justice Statistics' National Prosecutors Survey reports that in 2005, there were 2,344 prosecutor's offices prosecuting felony cases in state general jurisdiction courts (Perry 2006). These offices vary dramatically in size and responsibilities. For example, the median number of full time assistant prosecutors in an office was 18, but the Los Angeles County District Attorney's office employed 856 full-time Assistant D.A.s. The L.A. office closed over 70,000 cases in 2005, compared with a sample median of 1,800. In Alaska, Delaware, and Rhode Island, the state's Attorney General is the chief prosecutor for the entire state; in all other states, chief prosecutors are local officials.

Federal criminal prosecutions are handled predominantly by the 93 U.S. Attorneys offices of the U.S. Department of Justice.² Each U.S. Attorney's Office corresponds to a federal judicial district. Although we lack recent data on the number of Assistant U.S. Attorneys broken down by district, variation in caseload gives a sense of variation in the magnitude of their operations. For example, the U.S. Attorney's Office for the Eastern District of Oklahoma closed 80 criminal cases in fiscal year 2007, whereas the Southern Texas Office closed over 5,000 cases (USDOJ 2007, Table 1).

Chief prosecutors are elected in every state except Alaska (where the state's Attorney General is appointed by the governor), Connecticut (where State's Attorneys are appointed by a commission), and New Jersey (where County Prosecutors are gubernatorial nominees). U.S. Attorneys are senate-confirmed presidential appointees. Although they serve at the pleasure of the president, dismissal by the president who appointed them was extremely rare (Scott 2007)

² Some prosecutions are handled by attorneys at "Main Justice," the DOJ's headquarters in Washington, DC.

until George W. Bush dismissed seven U.S. Attorneys following the 2006 election and several others in the preceding two years.

2.1 A Conceptual Framework: The Economics and Politics of Hierarchy

Given the power of criminal prosecutors, it is natural to question to whom they are accountable, and the extent of this accountability. As noted above, the vast majority of prosecutors in the United States are elected officials. The fact that so many district attorneys owe their positions to the choices of the electorate has led observers to different conclusions about their accountability. Observers have long pointed to the relative ignorance of voters and apparently high retention rates as evidence of their independence (AJ Davis 2007; KC Davis 1969; Gans 1913). Others (Bresler 1994; Medwed 2004) suggest that the need to secure reelection (or, alternatively, to pursue career ambitions) creates incentives for prosecutors that distort their behavior away from the proper pursuit of justice or social welfare.

2.2 Canonical Principal-Agent Models

Principal-agent models of electoral accountability provide a valuable means to explore these issues more systematically. Outside of the electoral context, canonical principal-agent models (Holmstrom 1979; Shavell 1979; Spence & Zeckhauser 1971) consider how one actor (the principal) must design an incentive scheme and (possibly) a monitoring technology to induce costly effort by another (the agent). The principal aims to maximize profits given two conditions: a *participation constraint* (the expected payoff to the agent of accepting employment under the terms of the contract must exceed that associated with the agent's other options) and an *incentive compatibility constraint* (the contract must align the incentives of the agent with the objectives of the principal sufficiently well to justify the cost relative to alternative potential contracts).

A critical feature of these relationships is that the principal and agent may know different things. Scholars generally group the consequences of these informational asymmetries into two categories. The first is *moral hazard* due to hidden action by the agent (e.g., shirking or other actions that the agent is aware of but which are contrary to the principal's objectives). The second is *adverse selection* due to the agent's hidden knowledge of either her own tastes and abilities or the state of the world.

The persistence of informational asymmetries between the principal and the agent implies that first-best solutions to this contracting problem rarely available. For example, the marginal product of the agent is usually either unobservable to the principal or observable only at non-trivial cost. Consequently, the principal must often rely on noisy measures to gauge the agent's performance. Those measures often depend in part on the actions and skills of the agent, but also in part on factors outside the agent's control. The principal may therefore have to pay the agent a premium to compensate her for accepting a contract that rewards her on the basis of such measures.

Two additional considerations are important for our examination of prosecutors. The first is the existence of *team production* problems (Alchian & Demsetz 1972; Holmstrom 1982). In many contexts, the principal's objectives can only be met by the joint efforts of a team of agents (as when the police and prosecutors have to work together to gather incriminating evidence and present it effectively at trial to obtain a conviction). Incentive contracts that reward individuals on the basis of the collective product may give rise to the familiar *free-rider* problems. Given this possibility (and the expense to the principal of implementing an incentive-compatible mechanism), employers may choose to rely on fixed compensation schemes, accepting that these may induce some shirking.

The second consideration is the existence of *multitask* problems (Baker 1992; Holmstrom & Milgrom 1991). Often, meeting an objective desired by a principal requires multiple inputs from an agent. Efficient production demands that the agent equalize the marginal returns across these inputs. An agent whose compensation depends only on inputs observable to the principal will over-invest in them and under-invest in others, to the detriment of overall performance. Principals mindful of this effect may again find it in their interest to rely on low-powered incentive schemes (e.g., fixed salaries).

2.3 Agency-Theoretic Models of Politics

Political scientists were quick to recognize the potential applicability of principal-agent models to politics. For example, in an influential review essay, Moe (1984) notes that politics is “structured by a chain of principal-agent relationships” from citizens down to the lowest-level bureaucrat, and that such models could be employed to investigate “even the most basic questions of democratic control and governance.” In this vein, two areas of application have proven most fruitful: the control of unelected bureaucrats by elected officials, and the selection and control of elected officials by voters.

Models of political control of the bureaucracy generally take as given the weak incentives to comply with the wishes of legislative principals afforded by civil service protections (although the threat of removal provides presidents with some leverage over political appointees; see, e.g., Moe 1985). Instead, they have tended to emphasize instead the means by which legislative principals can monitor agents efficiently (Banks 1989; McCubbins & Schwartz 1984) or structure administrative procedures (McCubbins et al 1987) and agency discretion (Epstein & O'Halloran 1999; Patty & Gailmard 2007; Volden 2002). A common feature of many of these models is the existence of an *ideology-expertise tradeoff* (e.g., Lewis 2008): political principals

will weigh their ideological distance from the agency to which authority is delegated against the need to capitalize on its expertise when contemplating grants of discretion; typically, therefore, discretion will increase when the former is small and the latter is large.

Agency-theoretic models of electoral control of officials tend to fall into three categories. In “pure” moral hazard models, voters condition their electoral behavior on observable incumbent performance in a way that induces maximal effort or ideological fealty from the official (Austen-Smith & Banks 1989; Barro 1973; Ferejohn 1986). In “pure” adverse selection models (e.g., Rogoff 1990), elected officials differ according to their abilities or preferences. Voters make inferences about those qualities on the basis of observable performance and adjust their retention decisions accordingly.

“Career concerns” models of elections incorporate issues of both moral hazard and adverse selection: voters make inferences about incumbent qualifications based on observable performance, which may be a function of both the incumbent’s qualities and her actions. Ironically, a desire to appeal to voters may give rise to incumbent behavior that is not in the voter’s interest. For example, a politician may have incentives to pander to voters by taking actions she knows voters would abjure were they fully informed (Canes-Wrone et al 2001; Maskin & Tirole 2004) or to allocate effort suboptimally across multiple tasks (Ashworth 2005) to avoid (rational but problematic) negative inferences by voters about their qualifications.

The problem of *commitment* is a key way in which agency-theoretic models of politics differ from canonical economic models. For example, voters do not literally enter into enforceable contracts with elected officials that hold out the promise of reelection in exchange for performance in the current period. A (sequentially rational) voter will therefore not generally be able to commit to rewarding (punishing) an incumbent electorally if a better (worse) replacement

is available, even though the voter might in expectation be better off if she could constrain her future decision calculus. The moral hazard models of elections cited above circumvent this problem by assuming that incumbents and potential replacements are identical in all relevant respects, which allows voters to commit to the *ex ante* optimal strategy. In the presence of type heterogeneity, however, this assumption becomes problematic (Fearon 1999).

An assumption shared by the models of elections cited above is that the incumbent's potential replacement is a "random draw" from a known distribution of challengers. Of course, serious challengers are strategic actors in their own right, and their (costly) decision to enter a race may provide additional information to voters about candidates (Gordon et al 2007). This suggests that the career concerns of prosecutors may induce officials to take actions in office not only to impress voters, but also to deter challengers.

Before moving on to our specific discussion of the criminal prosecutor, it is important to consider a number of important empirical implications of extant models of political accountability. First, there are fundamental issues of observational equivalence that severely constrain our ability to infer the presence or absence of electoral accountability from election data. For example, high rates of incumbent retention may indicate that an official can shirk with impunity, but it may also be evidence of the official's efforts to comply with voter demands. Likewise, low rates of entry by serious challengers may be a consequence of the prospective challenger's expectation of losing. This expectation could be a consequence of voters blindly reelecting the incumbent, or it could be a consequence of the incumbent's compliance with voter wishes. Finally, voter ignorance of politician performance may arise from the absence of serious challengers, which may itself arise from incumbent performance in office. For these reasons, recent empirical work on accountability has focused not on election outcomes and voter

knowledge, but rather on how exogenous variation in the strength of electoral incentives can affect the behavior of incumbents in office (Besley & Coate 2003; Gordon & Huber 2007; Huber & Gordon 2004).

3. Prosecutors in their Political Environments

In this section, we explore how a political economy perspective can shed light on prosecutor behavior. In particular, we consider the prosecutor's place in a political and administrative hierarchy; a collaborator in complex communities of participants in the criminal justice system; and an adversary of criminal defendants.

3.1 The Prosecutor's Preferences

According to the Criminal Justice Standards of the American Bar Association, "The duty of the prosecutor is to seek justice, not merely to convict."³ To understand and explain the extent to which the prosecutor's behavior meets or departs from this aspiration, it is necessary to account for her preferences. In the language of the political economy framework introduced above, prosecutors will seek to maximize their utility, and it is the task of the analyst to determine what this means more concretely. In this regard, it is useful first and foremost to distinguish between the prosecutor's *primitive* preferences – i.e., that which the prosecutor values intrinsically, and her *induced* preferences over actions or policies, which may be brought about by the conjunction of primitive preferences and her placement in the criminal justice system and her political environment. Different lines of scholarship have made distinct assumptions about the nature of these preferences.

³ http://www.abanet.org/crimjust/standards/pfunc_blk.html#1.4; last accessed January 15, 2009.

First, a significant body of research treats the prosecutor as what might be called “justice maximizing.” According to this perspective, justice is served when the innocent escape punishment and the guilty receive an appropriate sanction that is increasing in the severity of the offense. In some models of prosecutorial behavior (e.g., Baker & Mezzetti 2001; Grossman & Katz 1983; Reinganum 1988), an optimal weighting and mapping are assumed (e.g., those that maximize social welfare, however construed, once the social cost of prosecution and punishment are accounted for), and the prosecutor adopts this weighting in her role as social welfare maximizer. Of course, a key reason that crime policy is politicized is widespread disagreement concerning two key questions about justice: (1) how to compare the risk of convicting the innocent against that of acquitting the guilty (and thus, what the standard of proof should be), and (2) what the appropriate mapping from defendant culpability (assuming guilt is determined) to appropriate punishment should be (Huber & Gordon 2007).⁴

A second body of research assumes that prosecutors seek to maximize sentence-weighted convictions (subject to a budget constraint). The law and economics literature adopting this assumption begins with Landes (1971), who assumes that all defendants are guilty, so the prosecutor does not risk suffering disutility from convicting the innocent. Bar-Gill and Gazal Ayal (2006) present a model in which the prosecutor’s utility is increasing in the overall length of sentences assigned to a pool of defendants, not all of whom are guilty. Miceli (1990) examines how the optimal burden of proof at trial and statutory sentences should be adjusted when prosecutors do not mind punishing innocent defendants.

⁴ This lack of specificity is a concern in identifying how prosecutors should assign sentences across multiple defendants. If prosecution is costly, economic models of deterrence (e.g., Becker 1968) would suggest the optimal (cost-adjusted) degree of deterrence could be achieved by heavily punishing some random subset of all guilty persons. However, such an approach might violate the normative goal of “treating equal cases equally.”

To suppose that prosecutors prefer, *ceteris paribus*, that justice be done is relatively uncontroversial. To suppose, instead, that prosecutors prefer maximizing convictions – even if it means punishing the innocent – requires some elaboration. Prosecutors could primitively prefer maximizing convictions even if it means accidentally convicting the innocent if, for example, they are mean-spirited or “like the challenge.”⁵ A more interesting possibility is that this preference is induced by her political and organizational environment. This brings us to a third body of scholarship, heterogeneous in analytical approach and method, which pays attention to factors that might induce prosecutors to care about things other than obtaining “appropriate” punishment. Two sets of factors stand out: Those associated with career concerns and those associated with personal concerns.

Career concerns encompass an elected or appointed prosecutor’s desire to retain office (or obtain higher office) or seek subsequent employment outside of the prosecutor’s office. Particular attention has been devoted to the electoral concerns of chief prosecutors, who may face potential challengers for their office. As noted above, we cannot infer the independence of prosecutors from electoral concerns from the observation that serious challenges are rare. Moreover, they may not be as rare as sometimes claimed. For example, in Texas in 2008, there were 82 regularly scheduled D.A. elections in the state. Of these, only 41 were uncontested in both the primary and general elections. Ten incumbent D.A.s lost their bids for reelection – eight in their parties’ primaries, and another two in the general election contest. Further, fifteen incumbents did not seek reelection (Source: Texas Secretary of State Office, Elections Division).

Even appointed prosecutors must consider the relationship between their performance in office and subsequent opportunities for reappointment. Other prosecutors, especially lower-level

⁵ Consider the old D.A. joke quoted in the Errol Morris documentary, *The Thin Blue Line* (1988): “Any prosecutor can convict a guilty man. It takes a great prosecutor to convict an innocent man.”

attorneys in larger offices (e.g., assistant US Attorneys), may anticipate seeking private sector employment and/or more prestigious government posts (e.g., appointment to the federal bench). In order to develop the personal experience (social capital), track record, peer networks, and social relationships necessary to obtain those positions, these prosecutors might be inclined to consider factors other than the normatively desirable sentence for each defendant. They might, for example, take cases to trial that could otherwise be settled to develop trial experience and demonstrate their prowess to outside employers (Glaeser et al 2000). Some research suggests that obtaining convictions that carry long sentences demonstrates such prowess (Boylan 2005), although developing close working relationships with private attorneys might incline prosecutors to settle cases instead.

In addition to career concerns, prosecutors may also be motivated by personal concerns. These may include the allocation of individual effort and other factors associated with a more enjoyable work environment. For example, a (lazy) prosecutor may seek to settle cases to avoid spending time preparing for trial. Alternatively, those who choose to become prosecutors may enjoy the trial experience, and so may overinvest in that activity at the expense of settling multiple cases.

3.2 Asymmetric Information in the Prosecutor's Environment

An inescapable feature of the criminal justice system is the fact that information is asymmetrically distributed among relevant actors. Economists (e.g., Grossman & Katz 1983; Reinganum 1988) have emphasized asymmetric information between the prosecutor and defendant in models of plea bargaining (discussed below): at the most basic level, only the defendant knows whether he or she is truly guilty. The prosecutor, likewise, may or may not have private information about the quality of the incriminating evidence.

A political economy perspective on the prosecutor would stress asymmetric information between the prosecutor and her less-informed superordinates, be they voters, presidents, or more senior prosecutors. Political principals face moral hazard and adverse selection problems in holding prosecutors accountable. Moral hazard problems exist because prosecutors may shirk, failing to invest adequate effort into performing their duties or pursuing weak but career-enhancing cases. Adverse selection problems exist because the prosecutor's attributes may not be fully known to her principals. Such attributes may include skill in interpreting evidence and securing convictions, or preferences about criminal justice, for example, how to assess the relative cost of accidentally punishing the innocent against that of accidentally acquitting the guilty.

Voters or other principals may be stymied in their efforts to evaluate a prosecutor's actions or attributes by several factors. Most obviously, prosecutors' beliefs about any particular defendant's culpability will generally be better informed than those of the typical voter, as will her knowledge concerning the strength of the evidence against a defendant. Second, a team production problem arises because prosecutors do not operate in a vacuum: their cases depend on the quality of evidence assembled by law enforcement; their ability to obtain convictions at trial depends on juries; and their ability to secure high sentences for convicted criminals depends on the judge's decision and legal constraints on it.

How would the career concerns of a prosecutor alter her incentives to obtain "optimal" punishment for all potential defendants whom she might feasibly prosecute? For law and economics scholars such as Easterbrook (1983), optimal punishment weighs deterrence against the deadweight costs of administration. Voters concerned with both could therefore conceivably rely on crime and incarceration rates to evaluate the prosecutor. However, multiple actors

(especially law enforcement personnel) are responsible for both. Further, factors entirely outside of the criminal justice system generate significant variation in crime (e.g., the macro economy, education and welfare policy, etc.). Given those concerns, and assuming both that prosecutorial skill or effort is correlated with the likelihood of conviction and that voters believe most defendants are guilty (so that a hard-working, competent prosecutor is preferred to a lazy, unskilled one), high conviction rates may more efficiently reveal the prosecutor's incremental contribution to deterrence than other indicators of performance, including the crime rate itself.

Faced with this reality, prosecutors who recognize that they are being evaluated and rewarded on the basis of conviction rates and care about retaining office may shift their effort toward maximizing them, even though this does not necessarily imply maximizing deterrence. It is thus not surprising that incumbent prosecutors tend to advertise their conviction rates and argue that high rates imply competence. Given the limitations on what voters can typically observe, however, the multitask problem described above must necessarily also come into play. High conviction rates are easy to observe, but may reflect inefficient plea or charge bargaining, a failure to pursue challenging but meritorious cases (Rasmusen et al 2009), or an inefficient allocation of resources to career-enhancing high-profile cases at the expense of more low-profile ones (Moley 1926). Voters could make use of other indicators of performance, e.g., the number of dropped cases, although note that the fact of a dropped case can indicate a failing of either the prosecutor or of law enforcement.⁶

A skeptic might counter that the average voter is largely unaware even of the conviction rates of his or her local prosecutor. Here, however, the role of the challenger discussed above comes into play: A challenger can “audit” incumbent performance and advertise deficiencies to voters

⁶ To the extent that voters can condition their evaluation of prosecutors on dropped cases, their prior beliefs about defendant guilt and law enforcement competence will enter into the evaluation calculus.

(Arnold 1993). From the prosecutor's perspective, maximizing conviction rates may therefore serve both to satisfy informed voters and to deny challengers a case to make to less-informed voters. If prosecutors take the necessary steps, most voters will remain uninformed because incumbents' reelection bids will generally be uncontested.

Note that while the foregoing discussion suggests that prosecutors' career concerns may distort their behavior away from some normative ideal, this does not imply that independence from those concerns would not cause other, equally problematic distortions (e.g., shirking). Thus, depending on various conditions we will turn to presently, the existence of these concerns may or may not improve the accountability of those officials.

3.3 Formal Models of the Prosecutor as (Political) Agent

To date, two papers have adopted an explicitly agency-theoretic approach in modeling prosecutorial politics. Gordon and Huber (2002) consider the electoral incentives of prosecutors as a moral hazard problem: in their model, prosecutors would like to retain access to the benefits of office, but find it costly to exert effort at case development – even though doing so could potentially determine the true guilt or innocence of a defendant. Voters, who can directly observe case outcomes but not prosecutorial effort, wish to minimize both Type I (wrongly convicting the innocent) and Type II (wrongly acquitting the guilty) errors; they may vary, however, in the relative weights they assign to the cost of each. In the game, the prosecutor receives information concerning the probability the defendant is truly guilty and would, absent further effort by the prosecutor, be convicted at trial.⁷ The prosecutor may be induced to exert effort during case development if doing so enhances her reelection prospects. The authors demonstrate that an *ex*

⁷ It is not necessary for the underlying logic of the model that these exactly coincide, as long as they are positively correlated.

ante optimal strategy for any voter – even a voter maximally concerned with convicting the innocent – is always to reelect prosecutors who obtain convictions and never to reelect prosecutors who suffer acquittals. Doing so maximizes the range of signals for which prosecutors will exert effort. The optimal retention probability given a dropped case is interior (i.e., between zero and one), and varies depending on how the voter weights Type I and II error costs.

An advantage of the Gordon-Huber model is that its predictions comport with the empirical regularity, described above, that the careers of prosecutors are enhanced by high conviction rates. A criticism of the model is that its equilibrium requires the voter to pre-commit to a particular schedule of retention probabilities. As in the moral hazard models discussed above, this in turn requires that the voter be *ex post* indifferent between the incumbent prosecutor and her potential replacement. Of course, this may not be possible: if candidate prosecutors differ in their abilities, beliefs, or preferences, conditions may arise in which the voter would benefit from renegeing on the “deal” with the incumbent *ex post*.

With this in mind, Shotts and Wiseman (2008), building on earlier work by Canes-Wrone and Shotts (2007), describe a model in which both a prosecutor (labeled “investigator”) and her principal (in their running example, a President) prefer avoiding Type I and Type II errors, but may diverge in how they trade off between the two. The prosecutor receives a noisy signal of the defendant’s true guilt or innocence, and can either drop the case or proceed to a (potentially error-prone) trial. In the absence of control by a principal, three types of prosecutor will emerge: “passive” prosecutors who always drop the case regardless of the signal, “aggressive” prosecutors who always go to trial, and “neutral” prosecutors who follow their signal. Adding a principal introduces an incentive for some prosecutors to alter their behavior in order to avoid being dismissed in favor of a (potentially) ideologically distant replacement.

The authors demonstrate that in equilibrium, “aggressive leaning” principals (which include some principals who would prefer the prosecutor follow her signal) will always retain the prosecutor given *either* a conviction or acquittal, because either would indicate an ideologically congruent agent. At the same time, the aggressive leaning principal will always replace given a dropped case. A similar logic governs “passive leaning” principals, who will always retain given a dropped case, and always replace given either a conviction or acquittal. Interestingly, introducing the threat of replacement *degrades* accountability to the principal in some instances, because the threat might induce a neutral prosecutor to ignore her signal, even though the principal would prefer that she follow it. Only a narrow set of “truly neutral” principals will mimic the voter’s behavior in the Gordon-Huber model, retaining with certainty given a conviction, replacing with certainty given an acquittal, and retaining with some interior probability given a dropped case.

Given that, in the Shotts-Wiseman model, the likelihood of conviction given a trial is a function neither of the abilities nor actions of the prosecutor, it is not surprising that for most parameter values the principal will not distinguish between convictions and acquittals when deciding whether to retain her. In all likelihood, however, voters care about *both* the ideology and skill of the prosecutor, although they may disagree about the former.⁸ One avenue for future research is to embed the prosecutor-as-agent in a model of career concerns in which the prosecutor wishes to signal ability to the voter, perhaps in the presence of known ideological disagreement. In such an environment, we would anticipate that the premium on convictions would be restored if voters cared sufficiently about prosecutorial skill. Further, a criticism that

⁸ In fact, they may disagree about the latter as well: if some voters believe that the pool of cases from which the prosecutor is drawing cases consists largely of innocent defendants, they would prefer, *ceteris paribus*, an *unskilled* prosecutor in the position.

may be leveled against the Gordon-Huber and Shotts-Wiseman models is that in both the challenger is not a strategic actor. Introducing strategic challengers could further complicate the incentives of prosecutors, as well as the retention decisions of voters given their incomplete knowledge of candidate attributes.

An additional avenue for inquiry is to develop models in which prosecutors must dispose of a pool of cases (that vary in their quality). With multiple cases, prosecutors must consider the information transmitted by the conjunction of case outcomes, as well as the opportunity costs associated with exerting effort toward any one case.

4. Applications and Areas of Exploration

4.1 Plea and Charge Bargaining

Perhaps no aspect of the criminal prosecutor's job has been more scrutinized than that of plea bargaining. The vast majority of criminal cases end with a guilty plea by the defendant, often for a lesser charge than that listed on the indictment, and invariably for a sentence lower than the defendant could expect to receive given conviction in a jury trial (Adelstein 1978). Although ultimate discretion over the imposition of a plea agreement typically resides with the judge to whom the prosecutor makes a sentencing recommendation, discretion in deciding what charges to file and what agreements to suggest to the defendant affords the prosecutor significant agenda control.

Accordingly, scholars across social science disciplines have invested considerable effort in better understanding plea bargaining as an institution. Alschuler (1968) provides a seminal introduction to the topic, describing the historical origins of plea bargaining in the United States largely as a means to reduce the caseload of overburdened urban criminal courts. Friedman

(1979) disputes this account, tracing its origins instead to the professionalization of prosecutors and police forces. Padgett (1985) considers the organizational form of plea bargaining (e.g., charge bargaining versus sentencing recommendations to judges), arguing that it is conditioned by the desire of participants to maintain the internal integrity of sentencing schemes and structures of control in the criminal justice system.

Scholars in the law and economics tradition have emphasized several functions of plea bargaining. Landes (1971) and Adelstein (1978) articulate models in which prosecutors allocate their finite resources across cases to maximize sentence-weighted convictions (see above). Defendants may accept plea offers if the implied sentence reduction is preferable to the lottery of the full trial. Both prosecutors and defendants may benefit by avoiding the full cost of a trial. Easterbrook (1983) conceives of criminal justice institutions as constituting a market system in which the “price” of an offense is determined, given the broader social goal of enhancing deterrence, by compelling offenders to internalize the costs of their crimes. Plea bargaining, in this regard, may be an efficient mechanism for arriving at such a price and, again, permitting the parties to avoid the cost of a trial.

More recent studies have studied the functioning of plea bargaining via game-theoretic analysis. Grossman and Katz (1983), for example, suggest two functions for plea bargaining. First, plea bargaining is a form of insurance, which permits both parties to avoid the risk of a trial. Second, and more intriguingly, they suggest the value of plea bargaining as a screening device: in their model, only defendants know whether they are guilty of the crime of which they have been accused. Grossman and Katz demonstrate that if all defendants are equally risk averse, a separating equilibrium exists in which guilty defendants accept the plea bargain proposed by the prosecutor and innocent defendants choose a trial.

Reinganum (1988) introduces two-sided uncertainty: in particular, the defendant knows his true guilt or innocence (as in Grossman and Katz), while the prosecutor has private information correlated with the defendant's regarding the strength of her case. The author considers two discretionary regimes: one in which the prosecutor can tailor the offer to the defendant to the strength of the individual case, and one in which the prosecutor cannot. In the equilibrium to the game with unlimited discretion, prosecutors will not pursue the weakest cases, and both the prosecutor's offer and the probability the defendant rejects the offer are increasing in the strength of the prosecutor's case. In the game with limited discretion, prosecutors cannot reveal the strength of their cases through an individually-tailored sentence. Because guilty and innocent defendants have, respectively, different expectations about the probability of conviction at trial, the plea bargain may serve the same screening function as in the Grossman and Katz model. The possibility of screening may, in turn, improve social welfare by minimizing punishment errors and avoiding trial costs.

Baker and Mezzetti (2001) raise an important criticism of the screening argument: consider an equilibrium in which a defendant's decision to proceed to trial reveals his innocence. For screening to be possible, the prosecutor must proceed to trial after a plea is rejected knowing that this may lead to an innocent person being punished – a feature described as “disturbing” by Reinganum (1988, 722). *Ex ante*, the sorting of guilty and innocent defendants may minimize errors of justice. *Ex post*, however, there is no reason to assume that a prosecutor who wishes to avoid punishing the innocent could credibly commit to going to trial anyway. It is, further, insufficient to assume that a prosecutor, in such a circumstance, could “throw the case.” If this were true, then guilty defendants would have an incentive to pool with the innocent and proceed to trial. In the model described by Baker and Mezzetti, the prosecutor's precommitment issues do

not materialize because, conditional on a rejected plea bargain, the prosecutor has the opportunity to invest in acquiring more information about the defendant's guilt. The equilibrium they describe is semi-separating: some guilty defendants accept the plea bargain, and the remaining guilty defendants and all innocent defendants reject it.

A second important issue is the extent to which the prosecutor has private information about the quality of her case. For example, in the landmark *Brady vs. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court ruled that prosecutors who withheld material exculpatory evidence requested by defendants violated the due process clause of the 14th amendment. In *Kyles vs. Whitley*, 514 U.S. 419 (1995), the Court ruled that prosecutors have an affirmative duty to learn of and communicate evidence favorable to the defendant held by government actors, including the police.

How do these cases affect our interpretation of the prosecutor's role in plea bargaining? In the version of the Reinganum model with full prosecutorial discretion, revelation of the prosecutor's private knowledge about case quality is brought about in equilibrium by her sentence offer to the defendant, not through any formal discovery mechanism. In a model where prosecutors' career concerns motivate them to maximize expected sentence length, however, their career concerns might conflict with the Court's injunction to share evidence. Consequently, an important consideration to keep in mind is the penalty, if any, that a prosecutor would face for withholding exculpatory evidence. Gordon and Huber (2002) derive the minimal sanctions that would effectively deter a career-minded prosecutor from withholding exculpatory evidence. Dunahoe (2005) provides an extensive discussion of sanctions for prosecutorial misconduct. Studying sanctions *empirically* faces two impediments, however. First, the prosecutor who withholds exculpatory evidence, in effect, also obscures the evidence of her own crime; thus, it is difficult

to ascertain the extent to which withholding occurs. Second, if prosecutors are fully deterred by the threat of sanction, we should rarely see sanctions issued – precisely what we would observe if the threat of sanction is meager or nonexistent.

Critics of the law and economics literature on criminal procedure (see, especially, Schulhofer 1988) have contended that it ignores the fact that prosecutors are agents in political hierarchies. The prosecutor's desire to be reelected may create incentives that conflict with the preferences of voters, even if the voters themselves are motivated by concerns about deterrence.

In this vein, embedding the institution of plea bargaining more explicitly in its political context would be a fruitful agenda for scholars. Two areas are of particular interest. The first concerns how asymmetric information between the prosecutor and the voter – and not simply between the prosecutor and the defendant – affects the prosecutor's incentives during the plea bargaining process. Consider, for example, defendants accused of highly-publicized crimes. Typically, the media will cover the proceedings leading up to a trial, including guilty pleas. Suppose the prosecutor's case is weaker than the public believes it to be. Offering a lenient plea bargain consistent with the quality of the case may cause voters to make negative inferences about the prosecutor's talents. Under such circumstances, a prosecutor may prefer the gamble of a trial to settling for a sentence of which voters are likely to disapprove. Alschuler (1968, 106-107) provides anecdotal evidence for such calculations (see also Pritchard 1986), but a more systematic assessment could prove highly instructive. By the same token, if the public's preferences lead it to be forgiving of acquittals (as in Shotts and Wiseman 2008), recalcitrance in the plea bargaining stage would be an even more appealing stance for the prosecutor.

The second area of interest concerns the interaction of the prosecutor's politically-induced preferences and the *judge's*. Judges serve both a direct and indirect function in the plea

bargaining process. Direct influence stems from the fact that bargaining between prosecutors and defendants takes place in the shadow of the judge, who must ultimately agree to the negotiated sentence (i.e., the sentence recommended by the prosecutor). Note that the fact that judges rarely reject plea bargains is not evidence of the judge's irrelevance to the process; to the contrary, if the parties are able to correctly anticipate the judge's position on a case, *no* plea bargains should be rejected. (This is especially true when judges actively manage criminal cases; see, e.g., the comparison of the U.S. and Japan in Ramseyer & Rasmusen 2003.)

Indirect influence in the plea bargaining process stems from the judge's discretion in setting sentences given conviction at trial. (Of course, this discretion is limited by, *inter alia*, sentencing guidelines and determinate sentencing laws.) A common feature of all bargaining environments that helps to shape bargaining outcomes is the *reversion point*: that is, what would happen were the bargaining process to break down. A reversion more favorable to one party tends, *ceteris paribus*, to afford that party more leverage in the bargaining process. In plea bargaining, the reversion is the expected payoff from a full trial – the expected sentence discounted by the probability of conviction. While formal models of plea bargaining treat the reversion as exogenous, it is in fact shaped in part by the preferences of, and discretion afforded to, the presiding judge (Kessler & Piehl 1998).

In 39 states, judges must run periodically for reelection, and in eight more they are subject to other forms of periodic retention proceedings. Empirical evidence suggests that electoral pressures on judges affect sentencing behavior. In their study of sentencing by judges presiding in Pennsylvania's Courts of Common Pleas, Huber and Gordon (2004) find that the judges tended to sanction more punitive sentences as reelection drew nearer. Gordon and Huber (2007) exploit an interesting institutional feature of the Kansas District Courts: roughly half of the

judges must run for reelection in partisan competitive elections, and the other half in noncompetitive retention elections. Gordon and Huber find that judges elected via the former method tended to be more punitive than those elected by the latter, an effect that may be attributed to the threat of potential challenger entry (which is nonexistent in the retention districts).

The interaction of political constraints on prosecutors and judges and its effect on bargaining outcomes is an area ripe for study. One area in which both theoretical and empirical work could prove fruitful concerns the question of bargaining breakdown. One reason that plea bargains are so much more frequent than full trials is that in the presence of sufficiently common expectations about the likely outcome of a trial, a common range of sentences are preferred by defendant and prosecutor to the lottery of a full trial. Depending on the political environment, however, sentences in that range may be unacceptable to the presiding judge. This may occur because voters face team production problems in evaluating the prosecutor and the judge. A prosecutor may agree to a lenient plea bargain to avoid the political risk of an acquittal at trial. A purely career-minded judge may not incur quite the same electoral cost of an acquittal (if voters assign greater blame to the prosecutor), whereas the judge may suffer electorally by agreeing to the lenient plea bargain. How these incentives operate may further depend on the electoral calendar, and the extent to which the terms of prosecutors and judges coincide.

A second fruitful area of study concerns the effect of constraints on judicial discretion. Empirical and legal scholars (e.g., Bibas 2004) have argued that determinate sentencing, sentencing guidelines, and mandatory minima can strengthen the prosecutor's leverage in the plea bargaining process by raising the expected sentence associated with being found guilty. One area in which future theoretical and empirical work on this topic could prove fruitful is by

examining additional effects of these reforms on bargaining. For example, if sentencing reforms cause the penalties associated with conviction on a given charge to be more certain (because judges cannot shape the sentences to their own proclivities or features of the defendant), there are potentially offsetting effects. Reductions in the uncertainty associated with trials will have differential effects on the sentences prosecutors and defendants are willing to offer and accept depending on their relative degrees of risk aversion. Putting aside the question of relative risk aversion, constraints on judicial discretion may also make bargains more attractive to defendants because judges can no longer “throw the book at” a defendant who pleads guilty in return for a lenient sentencing recommendation by a prosecutor. In fact, the move to charge bargaining (or, even, pre-charge bargaining) in the face of restrictive sentencing rules can be seen as further limiting judicial involvement in the defendant-prosecutor bargaining environment.

Concerns about the abuse of plea bargaining have also led to discussions of potential institutional reforms of those negotiations. At one extreme are efforts that assign sentences based not on charged crimes, but on case facts. These “real offense” sentencing rules have faced substantial scrutiny (Reitz 1993), but their effect on plea bargaining is ambiguous. On the one hand, if prosecutors can’t offer sentence reductions for pleading guilty, defendants are less likely to agree to a negotiated guilty plea and more will be found innocent at trial. On the other hand, real offense sentencing may simply move bargaining to earlier in the criminal process—by causing prosecutors and defendants to negotiate about what “facts” will be presented in a charging indictment, because those facts shape what sentence is assigned if a defendant pleads or is found guilty. This form of charge bargaining may force prosecutors to negotiate before learning the true quality of a case during the course of trial preparation. Similar concerns arise given efforts, often initiated by chief prosecutors themselves, to abolish plea bargaining entirely.

In anticipation of the reduction in guilty pleas after such a move, prosecutors can either accept the cost and difficulty of taking many more cases to trial or may instead have to (1) drop more cases or (2) engage in more careful pre-charge bargaining.

4.2 Courtroom Communities and Organization

The literature on “courtroom communities” provides one of the dominant analytical accounts of the behavior of prosecutors (Eisenstein et al 1988; Eisenstein & Jacob 1977; Flemming et al 1992; Myers & Talarico 1987; Ulmer 1997). The central insight of this perspective is that prosecutors (both chief prosecutors and their subordinates) are embedded in the larger criminal justice system, and this placement and interconnectedness with other actors fundamentally alters their behavior. Prosecutors are therefore best viewed neither as idealized enforcers of a normatively desirable vision of the law, nor as isolated actors whose circumstances can be isolated from the social, political, and organizational concerns of other actors in the criminal justice system. This literature therefore incorporates considerations of organizational interactions, extending them beyond the familiar judge-prosecutor-defendant triad discussed above.

One of the central empirical findings of research in this vein is that different communities have arrived at fairly stable routines and informal norms for disposing of criminal charges, and prosecutors are responsible, in part, for the nature of these routines (e.g., Heumann 1978). One important source of these differences is community size, because smaller communities are more likely to be characterized by less-bureaucratized prosecutor’s offices and closer and frequent interactions among prosecutors, police, defense attorneys, and judges (see Eisenstein et al 1988). These differences affect the routinization of case disposition practices, including the way in which plea bargaining takes place and the accompanying “going rates” for different crimes.

At first glance, this focus on cooperative intra- and inter-organizational practices might seem divorced from the positive political economy perspective introduced above. However, this divergence likely reflects a gap in common language rather than central differences in analytical accounts. To see how the perspective of political economy can be fruitfully applied to understanding differences in established case disposition practices across communities, consider one element of interconnectedness identified by Eistenstein, Flemming, and Nardulli (1988): frequent and repeated interactions among actors.

In communities where interactions are frequent and repeated, actors come to know one another well and judges, prosecutors, and defense attorneys are more likely to arrive at sustained agreements about what constitutes appropriate punishment for a case. Additionally, in these (often smaller) communities, judges, prosecutors, and defense attorneys are likely to have similar social networks, so that future career concerns and desirable social experiences are likely to be enhanced by remaining friendly toward one another. Together, these factors create incentives in which both prosecutors and defense attorneys may be willing to forgo the “battle for truth” of a trial and instead seek a “reasonable” settlement that reflects their knowledge of how a given case compares to the many others they have seen and dealt with together.

The political economy framework conceives of these cooperative relationships as solutions to the team production problems discussed above, and suggests the value of comparing explicitly the payoffs to the prosecutor and other actors in the criminal justice system of informal, cooperative arrangements against the inevitable tensions that exist given disparities in the objectives of those actors. These conflicts are likely to impede cooperation when interactions are short-term. By contrast, cooperative equilibria are more likely to arise in situations characterized by repeated interactions among the relevant actors. Because actors know they will interact with

one another in the near future (in their current positions, or outside of work, perhaps when seeking subsequent positions), prosecutors (and judges and defense attorneys) are more likely to trust that other actors will reciprocate in being reasonable and in sustaining cooperation over the long run. The reasons such cooperation is sustainable is that an actor who fails to behave in manner that both sides deem appropriate (e.g., a prosecutor misrepresents the strength of evidence in a particular case during plea negotiation) knows that in the future they will be unable to reach smooth agreements with the other side or will face private sanctions (in seeking employment or socially). Smaller communities also enhance these reputational concerns because actors who “defect” by behaving unreasonably are more likely to be detected by their peers and are likely to become known to other actors as unreasonable and therefore undeserving of similar cooperative treatment. Formally, cooperation emerges in the repeat play context because the shadow of future negotiations and social and career concerns outweigh the incentive to act otherwise in any given case considered alone.

By contrast, larger communities (e.g., urban areas) have larger prosecutor offices and less frequent interactions between the same prosecutors and the same defense attorneys (and under the watchful eye of the same pool of judges). Social networks in these communities are also more diffuse, so prosecutors and defense attorneys may see little of one another except in court. These circumstances likely contribute to the absence of easily identified and enforced agreements about established “going rates.” Furthermore, chief prosecutors in these larger offices are more likely to have a difficult time monitoring directly the courtroom behavior of their subordinates. In these circumstances, we observe the replacement of informal social norms and personal relationships as mechanism of control with formal and more bureaucratized

structures which seek to guide and constrain subordinate prosecutors (and in doing so keep superior prosecutors informed about the behavior of those subordinates).

These basic differences between small and large communities are also apparent in the interactions between prosecutors and law enforcement actors. Observers of police-prosecutor relations (Feeley & Lazerson 1983; McDonald 1982) have argued that the goals of prosecutors and police officers are fundamentally different: police want to restore order and assert authority, and may be less concerned with securing convictions. In small communities, prosecutors are more likely to have direct and frequent contact with the law enforcement personnel who investigate cases and testify in court. These repeated interactions are less likely to be subject to abuse by any party because of their frequency and the interconnectedness of the actors' personal and career concerns. Social trust and repeat play will be less effective in ensuring cooperation when (bureaucratized) prosecutor's offices interact with a large and changing pool of officers.⁹

This focus on differences between large and small communities should not obscure one of the other more interesting findings from this literature: that even prosecutor's offices in similarly-sized communities may be organized very differently. At one extreme are systems in which subordinate prosecutors shepherd a case from its initial intake through the final stages of case disposition, whether that is by dismissal, plea bargain, trial verdict, or appellate review. (Such systems may separate cases by type, so that different prosecutors focus on different sorts of cases, but the basic cradle-to-grave approach for a given case remains the same.) At the other extreme are systems in which different parts of the processing of a criminal case are handled by prosecutors who specialize in that phase of proceedings. In this model, for example, certain prosecutors might handle all initial case intake before passing selected cases on to an attorney

⁹ Richman (2003) considers means to sustain cooperation between federal law enforcement officials and prosecutors.

who specializes in grand jury presentations and/or pre-trial negotiations, who may herself be different than the prosecutor who presents a case at trial or works on appellate review.

A political economy perspective can provide insights into the tradeoffs associated with these sorts of organizational choices. Briefly, note what is lost and gained in each arrangement. When prosecutors oversee a case from start to finish, they are more likely to develop extensive information about all elements of a case relevant for its appropriate disposition. At the same time, a prosecutor needs to have different sorts of experience and expertise to work effectively with the police in deciding whether a case is worth charging than when presenting a case before a jury. A single prosecutor overseeing a single case also places a different burden on the prosecutor's supervisor, who cannot rely on information collected or reported by another prosecutor when discerning whether a case was handled correctly. By contrast, specialization by trial phase harnesses expertise in different aspects of case handling, but brings with its own challenges. These include the difficulty of ensuring that actors overseeing a given phase of case review (e.g., initial intake) consider the overall merits of case and are not unduly influence by their repeat interactions with individuals outside of the prosecutor's office (e.g., the police or defense attorneys) and the general problems of team production, in which the shared oversight of a case makes it harder for a chief prosecutors to attribute blame for a poor outcome to a particular prosecutor. Overall, different forms of hierarchy involve different problems of oversight and risk different sorts of efficiency losses (e.g., from not knowing enough about a given case relative to not knowing enough about how to best handle a particular phase of the case disposition process). These tradeoffs suggest that there is may be no ideal system, but rather systems that minimize certain costs at the expense of others.

4.3 Politicization in the Prosecution of Political Crimes

Political corruption, conventionally defined as the use of public office for private gain, is a ubiquitous feature of political life. Given the foregoing discussion, it is not surprising that the investigation and prosecution of alleged acts of corruption are in and of themselves political phenomena. In April of 2007, Congress convened hearings to investigate the dismissal of seven U.S. Attorneys by the Bush administration. Although U.S. Attorneys are political appointees who serve at the pleasure of the President, their removal was widely regarded as an unprecedented, overtly political act. Several of the fired prosecutors suggested that their dismissal was a direct consequence of either failing to prosecute Democrats for violations of federal corruption and election fraud statutes with sufficient vigor, or for prosecuting Republicans too vigorously.

This controversy raises two immediate concerns of interest to scholars operating from a political economy perspective. The first is measuring the extent of partisan bias in public corruption prosecutions. Because prosecution or conviction for political crimes can have a detrimental effect on the political career of an elected official, an appointed prosecutor's preference for prosecuting individuals from one party (whether because of innate preferences or career concerns) may produce significant political fallout. Meier and Holbrook (1992) find some evidence of disproportionate targeting of Democratic localities under the Reagan administration. Heidenheimer (1989, 583-584) argues that anecdotal evidence suggests disproportionate targeting under Nixon and Ford. Gordon (2008) develops a formal model of public corruption prosecutions that predicts a career-minded, partisan-biased prosecutor will pursue systematically weaker cases against partisan opponents than allies. The model anticipates that in the presence of partisan bias, the average observed sentence of an opponent will be lower than of an ally. Gordon

finds evidence of partisan bias under both the George W. Bush and Clinton administrations, although the evidence may overstate the case for bias under Clinton while understating it for Bush.

The second concern – more immediately related to the theoretical discussion above – is the extent to which the “politicization” of public corruption prosecutions is the product of efforts by the President and Attorney General to exert centralized control over U.S. Attorneys and their offices. Historical accounts of the Justice Department have in large part focused on the struggle for centralized control generally (e.g., Eisenstein 1978; 2008). Whitford (2002) finds empirical evidence for responsiveness in U.S. Attorney policy priorities to national political trends. Richman (2008) describes efforts to centralize and politicize prosecution in the Bush administration. With respect to the Bush-era Justice Department Scandals, one interesting question of immediate relevance to political economy scholars is the extent to which politicization of public corruption prosecutions is driven by *selection* or *incentives*. According to the selection account, Bush succeeded, for the most part, in appointing overtly partisan U.S. Attorneys. Those who revealed themselves to be insufficiently partisan were replaced with individuals who were.¹⁰ According to the incentives account, the now very-real threat of dismissal was intended to induce other U.S. Attorneys to be more overtly partisan in their prosecutions.

Finally, it is important to note the critical distinction between centralization and politicization. Lewis (2008) argues that presidents will employ politicization strategies (e.g., placing political appointees in positions of key policy making responsibility) to control ideologically distant

¹⁰ Due to an obscure provision of the 2006 reauthorization of the PATRIOT Act, the President was able to appoint replacements for the dismissed U.S. Attorneys without Senate confirmation. The provision has since been repealed.

agencies, especially when the cost (in terms of the value of foregone expertise to the president) is relatively small. To the extent that the career staff of an agency like the DOJ is composed of officials sympathetic to one of the two major parties, Presidents from that party will not *need* to exert central control over the agency. Given those partisan leanings, however, it would be wrong to interpret the absence of efforts at centralized control as evidence of the agency's political neutrality. Likewise, highly decentralized agencies can potentially be sympathetic to local political interests (Kaufman 1960); in such cases, greater centralization can arguably reduce the extent to which an agency is "politicized." Finally, attention must be paid to the efforts of U.S. Attorneys to insulate their offices from overhead control by presidents and attorneys general (for examinations of such strategies in other bureaucratic contexts, see Carpenter 2001; Huber 2007). Taking each of these factors into account, scholars will be better situated to understand the conditions under which overt partisanship is more or less likely to manifest itself in corruption prosecutions.

5. Conclusion

In this essay, we have argued that a perspective grounded in contemporary political economy research can help to illuminate a number of perennial issues of concern to observers of criminal prosecutors in the United States. In understanding the fundamentally *political* nature of the office, we have focused in particular on the position of the prosecutor as an agent and principal in political hierarchies, a collaborator in the criminal justice system more generally, and an adversary to defendants. We have stressed how each of the prosecutor's political relationships can be analyzed with respect to the congruence of interests with the actor in question and

asymmetries in the distribution of information between the prosecutor and that actor. We have also suggested a number of avenues for future research in this vein, including:

1. the extent to which, in the presence of severely limited information, voters' desire to select and retain ideologically similar prosecutors conflicts with their desire to select skillful ones, and what effect this conflict has on the incentives of prosecutors themselves;
2. how the electoral incentives of prosecutors and judges affect plea bargaining, particularly in well-publicized cases;
3. the conditions under which different organizational forms for prosecutors' offices may emerge; and
4. the conditions under which the prosecution of political crimes will be itself politicized.

Of course, this is by necessity an incomplete list. Overall, the perspective we have advocated allows for considerable innovation in the questions that may be asked about these important officials.

References

- Adelstein RP. 1978. The Plea Bargain in Theory: A Behavioral Model of the Negotiated Guilty Plea. *Southern Economic Journal* 44:488-503
- Alchian AA, Demsetz H. 1972. Production, Information Costs, and Economic Organization. *The American Economic Review* 62:777-95
- Alschuler AW. 1968. The Prosecutor's Role in Plea Bargaining. *The University of Chicago Law Review* 36:50-112

- Arnold RD. 1993. Can Inattentive Citizens Control their Elected Representatives? In *Congress Reconsidered, 5th Edition*, ed. LC Dodd, BI Oppenheimer, pp. 401-16. Washington: CQ Press
- Ashworth S. 2005. Reputational Dynamics and Political Careers. *J Law Econ Organ* 21:441-66
- Austen-Smith D, Banks JS. 1989. Electoral Accountability and Incumbency. In *Models of Strategic Choice in Politics*, ed. P Ordeshook, pp. 121-48. Ann Arbor: University of Michigan Press
- Baker GP. 1992. Incentive Contracts and Performance Measurement. *The Journal of Political Economy* 100:598-614
- Baker S, Mezzetti C. 2001. Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial. *J Law Econ Organ* 17:149-67
- Banks JS. 1989. Agency Budgets, Cost Information, and Auditing. *American Journal of Political Science* 33:670-99
- Bar-Gill O, Gazal Ayal O. 2006. Plea Bargains Only for the Guilty. *The Journal of Law and Economics* 49:353-64
- Barro RJ. 1973. The control of politicians: An economic model. *Public Choice* 14:19-42
- Becker GS. 1968. Crime and Punishment: An Economic Approach. *The Journal of Political Economy* 76:169-217

- Besley T, Coate S. 2003. Elected Versus Appointed Regulators: Theory and Evidence. *Journal of the European Economic Association* 1:1176-206
- Bibas S. 2004. Plea Bargaining Outside the Shadow of the Trial. *Harvard Law Review* 117:2463-547
- Boylan RT. 2005. What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys. *Am Law Econ Rev* 7:379-402
- Bresler K. 1994. Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions. *Georgetown Journal of Legal Ethics* 7:941-58
- Canes-Wrone B, Herron MC, Shotts KW. 2001. Leadership and Pandering: A Theory of Executive Policymaking. *American Journal of Political Science* 45:532-50
- Canes-Wrone B, Shotts KW. 2007. When Do Elections Encourage Ideological Rigidity? *American Political Science Review* 101:273-88
- Carpenter DP. 2001. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928*. Princeton: Princeton University Press
- Davis AJ. 2007. *Arbitrary Justice: The Power of the American Prosecutor*. New York: Oxford University Press
- Davis KC. 1969. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press

- Dunahoe AW. 2005. Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors. *New York University Annual Review of American Law* 61:45-110
- Easterbrook FH. 1983. Criminal Procedure as a Market System. *The Journal of Legal Studies* 12:289-332
- Eisenstein J. 1978. *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems*. Baltimore: Johns Hopkins University Press
- Eisenstein J. 2008. The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context. *Seattle University Law Review* 31:219-64
- Eisenstein J, Flemming RB, Nardulli PF. 1988. *The Contours of Justice: Communities and their Courts*. Boston: Little, Brown, and Company
- Eisenstein J, Jacob H. 1977. *Felony Justice: An Organizational Analysis of Criminal Courts*. Boston: Little, Brown, and Company
- Epstein D, O'Halloran S. 1999. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge: Cambridge University Press
- Fearon JD. 1999. Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance. In *Democracy, Accountability, and Representation*, ed. B Manin, A Przeworski, S Stokes. Cambridge: Cambridge University Press

- Feeley MM, Lazerson MH. 1983. Police-Prosecutor Relationships: An Interorganizational Perspective. In *Empirical Theories About Courts*, ed. KO Boyum, L Mather, pp. 216-43. New York: Longman
- Ferejohn J. 1986. Incumbent performance and electoral control. *Public Choice* 50:5-25
- Flemming RB, Nardulli PF, Eisenstein J. 1992. *The Craft of Justice: Politics and Work in Criminal Court Communities*. Philadelphia: University of Pennsylvania Press
- Friedman LM. 1979. Plea Bargaining in Historical Perspective. *Law & Society Review* 13:247-59
- Gans HS. 1913. The Public Prosecutor: His Powers, Temptations and Limitations. *Annals of the American Academy of Political and Social Science* 47:120-33
- Glaeser E, Kessler D, Morrison Piehl A. 2000. What do prosecutors maximize? An analysis of the federalization of drug crimes. *Am Law Econ Rev* 2:259-90
- Gordon SC. 2008. Assessing Partisan Bias in Federal Public Corruption Prosecutions. New York University Working Paper
- Gordon SC, Huber GA. 2002. Citizen Oversight and the Electoral Incentives of Criminal Prosecutors. *American Journal of Political Science* 46:334-51
- Gordon SC, Huber GA. 2007. The Effect of Electoral Competitiveness on Incumbent Behavior. *Quarterly Journal of Political Science* 2:107-38
- Gordon SC, Huber GA, Landa D. 2007. Challenger Entry and Voter Learning. *American Political Science Review* 101:303-20

- Grossman GM, Katz ML. 1983. Plea Bargaining and Social Welfare. *The American Economic Review* 73:749-57
- Heidenheimer AJ. 1989. Problems of Comparing American Political Corruption. In *Political Corruption: A Handbook*, ed. AJ Heidenheimer, M Johnston, VT LeVine, pp. 573-84. New Brunswick: Transaction Books
- Heumann M. 1978. *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys*. Chicago: University of Chicago Press
- Holden M, Jr. 2000. The Competence of Political Science: "Progress in Political Research" Revisited: Presidential Address, American Political Science Association, 1999. *The American Political Science Review* 94:1-19
- Holmstrom B. 1979. Moral Hazard and Observability. *The Bell Journal of Economics* 10:74-91
- Holmstrom B. 1982. Moral Hazard in Teams. *The Bell Journal of Economics* 13:324-40
- Holmstrom B, Milgrom P. 1991. Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design. *Journal of Law, Economics, and Organization* 7:24-52
- Huber GA. 2007. *The Craft of Bureaucratic Neutrality: Interests and Influence in Governmental Regulation of Occupational Safety*. Cambridge: Cambridge University Press

- Huber GA, Gordon SC. 2004. Accountability and Coercion: Is Justice Blind when It Runs for Office? *American Journal of Political Science* 48:247-63
- Huber GA, Gordon SC. 2007. Directing Retribution: On the Political Control of Lower Court Judges. *J Law Econ Organ* 23:386-420
- Kaufman H. 1960. *The Forest Ranger: A Study in Administrative Behavior*. Baltimore: Johns Hopkins University Press
- Kessler DP, Piehl AM. 1998. The Role of Discretion in the Criminal Justice System. *J Law Econ Organ* 14:256-76
- Landes WM. 1971. An Economic Analysis of the Courts. *Journal of Law and Economics* 14:61-107
- Lewis DE. 2008. *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance*. Princeton, NJ: Princeton University Press
- Maskin E, Tirole J. 2004. The Politician and the Judge: Accountability in Government. *The American Economic Review* 94:1034-54
- McCubbins MD, Noll RG, Weingast BR. 1987. Administrative Procedures as Instruments of Political Control. *Journal of Law, Economics, & Organization* 3:243-77
- McCubbins MD, Schwartz T. 1984. Congressional Oversight Overlooked: Police Patrols versus Fire Alarms. *American Journal of Political Science* 28:165-79
- McDonald W. 1982. *Police-Prosecutor Relations in the United States*. Washington, DC: National Institute of Justice

- Medwed DS. 2004. The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence. *Boston University Law Review* 84:125-83
- Meier KJ, Holbrook TM. 1992. "I Seen My Opportunities and I Took 'Em:" Political Corruption in the American States. *The Journal of Politics* 54:135-55
- Miceli TJ. 1990. Optimal Prosecution of Defendants Whose Guilt Is Uncertain. *Journal of Law, Economics, & Organization* 6:189-201
- Moe TM. 1984. The New Economics of Organization. *American Journal of Political Science* 28:739-77
- Moe TM. 1985. Control and Feedback in Economic Regulation: The Case of the NLRB. *The American Political Science Review* 79:1094-116
- Moley R. 1926. Politics and Crime. *Annals of the American Academy of Political and Social Science* 125:78-84
- Myers MA, Talarico S. 1987. *The Social Contexts of Criminal Sentencing*. New York: Springer-Verlag
- Padgett JF. 1985. The Emergent Organization of Plea Bargaining. *The American Journal of Sociology* 90:753-800
- Patty JW, Gailmard S. 2007. Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise. *American Journal of Political Science* 51:873-99
- Perry SW. 2006. Prosecutors in State Courts, 2005, U.S. Department of Justice, Office of Justice Programs
Washington, DC

- Pritchard D. 1986. Homicide and Bargained Justice: The Agenda-Setting Effect of Crime News on Prosecutors. *The Public Opinion Quarterly* 50:143-59
- Ramseyer JM, Rasmusen EB. 2003. *Measuring Judicial Independence: The Political Economy of Judging in Japan*. Chicago: University of Chicago Press
- Rasmusen EB, Raghav M, Ramseyer JM. 2009. Prosecutors' Choices of Prosecution and Conviction Rates; Theory and Evidence. *American Law and Economics Review*, forthcoming
- Reinganum JF. 1988. Plea Bargaining and Prosecutorial Discretion. *The American Economic Review* 78:713-28
- Reitz KR. 1993. Sentencing Facts: Travesties of Real-Offense Sentencing. *Stanford Law Review* 45:523-73
- Richman D. 2003. Prosecutors and Their Agents, Agents and Their Prosecutors. *Columbia Law Review* 103:749-832
- Richman D. 2008. Political Control of Federal Prosecutions -- Looking Back and Looking Forward. Columbia Law School: Columbia Public Law and Legal Theory Working Paper 09160
- Rogoff K. 1990. Equilibrium Political Budget Cycles. *The American Economic Review* 80:21-36
- Schulhofer SJ. 1988. Criminal Justice Discretion as a Regulatory System. *The Journal of Legal Studies* 17:43-82

- Scott KM. 2007. U.S. Attorneys Who Have Served Less than Full Four-Year Terms, 1981-2006, Congressional Research Service Report for Congress
- Shavell S. 1979. Risk Sharing and Incentives in the Principal and Agent Relationship. *The Bell Journal of Economics* 10:55-73
- Shotts KW, Wiseman AE. 2008. Information, Accountability, and the Politics of Investigations. Stanford University Graduate School of Business working paper
- Spence M, Zeckhauser R. 1971. Insurance, Information, and Individual Action. *The American Economic Review* 61:380-7
- Ulmer JT. 1997. *Social Worlds of Sentencing: Court Communities under Sentencing Guidelines*. Albany: State University of New York Press
- USDOJ. 2007. United States Attorneys' Annual Statistical Report: Fiscal Year 2007, Executive Office for United States Attorneys, Washington, DC
- Volden C. 2002. A Formal Model of the Politics of Delegation in a Separation of Powers System. *American Journal of Political Science* 46:111-33
- Whitford AB. 2002. Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys. *J Public Adm Res Theory* 12:3-27