JEL Class: K14, K41

TOWARD AN ECONOMIC THEORY OF PRO-DEFENDANT CRIMINAL PROCEDURE

By: Keith N. Hylton† & Vikramaditya S. Khanna††

Abstract

In this paper we provide a justification for the pro-defendant bias in American Criminal Procedure that we argue paints a more complete picture of the extent and breadth of these pro-defendant procedures than the most commonly forwarded justifications to date. The most commonly forwarded rationale for the pro-defendant bias in American Criminal Procedure is that the costs associated with false convictions (i.e., sanctioning and deterrence costs associated with erroneous imposition of non-monetary or criminal sanctions) are greater than the costs associated with false acquittals. We argue that on closer inspection this rationale does not, by itself, justify the extent of our pro-defendant criminal procedures. We offer another justification for these protections – to constrain the costs associated with abuses of prosecutorial or governmental authority. In a nutshell, our claim is that these procedural protections make it more costly for self-interested actors, whether individuals or government enforcement agents, to use the criminal process to obtain their own ends. The theory developed here explains several key institutional features of American Criminal Procedure and provides a positive theory of the case law as well.

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I. INTRODUCTION

For many people who study the American criminal justice system the procedural protections offered to defendants seem likely to increase the crime rate.[1] At the simplest level, these protections permit some factually guilty defendants to escape conviction, which should increase the incentives of wrongdoers to engage in criminal acts.[2] This seems odd given that criminal wrongs are considered the most serious wrongs in society and hence the ones we should most wish to reduce.[3] What might then explain the seeming willingness

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[1] *See, e.g.*, Raymond A. Atkins & Paul H. Rubin, *Effects Of Criminal Procedure On Crime Rates: Mapping Out The Consequences Of the Exclusionary Rule*, (Oct. 23, 1998) (unpublished manuscript available on file with authors) (finding *Miranda* may have increased total crime rates by eleven percent and violent crimes rates by thirty-three percent); Paul G. Cassell, *The Guilty & The "Innocent": An Examination Of Alleged Cases Of Wrongful Conviction From False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 n.30 (1999)[hereinafter *Guilty & Innocent*]; Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387, 451 (1996)[hereinafter *Social Costs*] (finding after *Miranda* criminal suspects are less willing to confess to their crimes). *But see*, John J. Donohue, III, *Did Miranda Diminish Police Effectiveness*, 50 STAN. L. REV. 1147 (1998) (dissecting the statistical analyses in Cassell's work and criticizing the use of statistics in measuring the import of Court decisions).

[2] *See Miranda's Social Costs*, *supra* note 1, at 485.

[3] *See* S.E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CAN. J.L. & JURIS. 7, 7 (1998) (the term "criminal" indicates a serious condemnation of an activity or action); Susan Estrick, *Rape*, 95 YALE L.J. 1087, 1183 (1986) ("conduct is labeled 'criminal' in order to announce to society that these actions are not to be done and to secure that fewer of them are done"); Henry M. Hart, Jr., *The Aims of The Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-05 ("[w]hat distinguishes a criminal from a civil sanction . . . is the judgement of community condemnation which accompanies and justifies its imposition"). *See also* John. C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV 193, 194 (1991) ("the factor that most distinguishes the criminal law is its operation as a system of moral education and socialization . . . [a]s a result, the criminal law often and necessarily displays a deliberate disdain for the utility of the criminalized conduct to the defendant");

of American law to permit wrongdoers to escape conviction and thereby potentially increase the crime rate?

Many commentators have offered a variety of reasons to support "pro-defendant" procedural protections.[4] In particular, many have argued that in the criminal process we should be more concerned about the social costs generated by a false conviction (e.g., diluted deterrence and the costs associated with putting someone in prison wrongfully) than the similar costs generated by a false acquittal.[5] This rationale, which we term the "traditional error-cost rationale", suggests that because the costs of false convictions are greater than false acquittals we should be willing to reduce false convictions even if that leads to an increase in false acquittals and a net increase in the total number of errors.[6] In *In Re Winship*, the Supreme Court adopted this rationale as the primary justification for the high standard of proof in criminal trials.[7] We, however, argue that for the traditional error-cost rationale to justify our current criminal procedure system we would need to make Herculean assumptions about the frequency and costs of false convictions relative to false acquittals, and the evidence is simply not there to support such assumptions.[8] Consequently, the traditional error-cost rationale is unlikely to provide a good justification for the extent and magnitude of the pro-defendant bias in American criminal procedure.

In this paper we offer another justification for these procedural protections: to constrain the costs associated with abuses of prosecutorial or governmental authority. We argue that this justification gives a more complete picture of why it might be desirable for criminal procedure to be strongly biased

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Sanford H. Kadish, *Excusing Crime*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 87 (1987) ("Criminal conviction charges a moral fault . . ."; HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

[4] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE, (2d ed. 1997) (discussing various pro-defendant biases and their justifications); Donald J. Boudreaux & Adam C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79 (1996); Randolph N. Jonakait, *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 1992 UTAH L. REV. 67, 68 (arguing that pro-defendant evidence rules are defensible as they promote justice).

[5] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 604 – 05 (5th ed., 1998).

[6] *See* In Re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting that the reasonable doubt standard is used in criminal trials because society views false convictions as being far worse than false acquittals); Donald A. Dripps, *People v. Simpson: Perspectives On The Implications For The Criminal Justice System: Relevant But Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial And The Right To Put On A Defense*, 69 S. CAL. L. REV. 1389, 1418 (1996) ("[the reasonable doubt standard] strikes the balance very much in favor of [increasing] false acquittal[s]" as opposed to false convictions).

[7] *See* In Re Winship, *supra* note 6, at 363 – 64 (Brennan, J.)(stating that "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt"), 372 – 74 (Harlan, J., concurring) (noting that the reasonable doubt standard is used in criminal trials because society views false convictions as being far worse than false acquittals largely due to liberty and reputation costs).

[8] *See infra* Part III.C.

in favor of the defendant. Thus, this paper offers (depending on one's point of view) an alternative rationale for, or a significant modification of, the traditional error cost argument in favor of a strong pro-defendant bias in American Criminal Procedure.

In a nutshell, our claim is that criminal procedural protections make it more costly for self-interested actors, whether individuals or government enforcement agents, to use the criminal process to obtain their desired ends. Absent some constraint, prosecutors and government agents might be tempted to use the criminal process to benefit themselves or their constituents. History provides us with a number of examples of this.[9] Procedural protections impose constraints and make the criminal process more costly to use, thereby providing enforcement agents (e.g., prosecutors), and those who would lobby them, with a disincentive to use the criminal process for selfish ends.[10] This saves resources that otherwise would be eaten up in the lobbying process.[11] In addition, constraining this sort of behavior is likely to enhance deterrence. The reason is that when it is easy to enforce the law in selective ways, enforcement agents will come under pressure to sacrifice deterrence objectives for distributive goals (i.e. enforcing the law in ways favorable to a particular group).[12] The effects on deterrence and the direct costs associated with lobbying provide a more complete rationale for the existence and extent of our criminal procedural protections and a better positive theory of the criminal procedure case law. In particular, the theory we develop here provides a better explanation for the existence and specific form of key rules and institutional features: the reasonable-doubt and double-jeopardy rules, restrictions on excessive and retroactive punishments, features of the right to a jury, such as the unanimity requirement and peremptory challenges, and others. Our theory is also corroborated by empirical evidence on corruption from several countries.

Part II begins by providing a brief description of some core criminal procedural protections that currently inhabit our jurisprudence. These include the beyond reasonable doubt standard of proof, double jeopardy protections,

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[9] *See infra* Part IV.

[10] As the criminal process becomes more expensive to use then prosecutors and those who lobby them would prefer to substitute less costly methods of obtaining their desired ends (e.g., lobbying legislatures for particular kinds of laws that disproportionately burden another group). Whether this substitution is desirable and how we might contain rent-seeking in these other spheres is outside the scope of this paper. We do, nonetheless, briefly discuss this issue at *infra text accompanying notes* 192 – 195. For a recent discussion of the role of politics and the criminal law, see William J. Stuntz, *The Deep Politics of Criminal Law*, Draft 2001 (on file with authors).

[11] *See, e.g.*, GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING 96, (Gordon Tullock ed., Kluwer Academic Publishers 1989); CHARLES K. ROWLEY ET. AL., THE POLITICAL ECONOMY OF RENT-SEEKING 465-478, (Charles K. Rowley et al. eds., Kluwer Academic Publishers 1988).

[12] In addition, an increase in perceived selective enforcement is likely to reduce the stigmatic effect of the law and increase enforcement costs. *See infra* Part V.B.2.

and others.[13] A critical point to note at this juncture is that all of these protections have a cumulative effect of biasing the criminal process in favor of the defendant.[14] This raises the fundamental question of whether such a bias can be justified.

Part III inquires into the traditional rationales provided for these core criminal procedural protections. Because the core protections in our view are those that impart a pro-defendant bias to the law, we focus on the reasonable doubt standard as the quintessential procedural protection. We argue that the traditional error-cost rationale does not appear, by itself, to justify the reasonable doubt rule. We conclude that other rationales should be examined in order to provide a stronger basis for the current scope of pro-defendant protections.

Part IV argues that one other rationale for these procedural protections is that they constrain the behavior of enforcement agents and make it more difficult for such agents to use the criminal process to facilitate wealth extraction or to benefit themselves.[15] If prosecutors were allowed to easily use the criminal process to obtain their own selfish ends then individuals and groups would lobby the prosecutor to bring (or not bring) certain kinds of cases.[16] Legal history is riddled with examples of such behavior, which generates significant costs for society.

Part V discusses some of these costs. Lobbying efforts are often wasteful from society's perspective and generate additional costs, such as a dilution in the deterrent effect of criminal prohibitions.[17] These costs are significant and warrant consideration of methods to contain them.

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[13] Our reason for choosing these protections is that they seem to have the most historical support and most directly influence the probability of being punished or the actual punishment meted out. Other procedural protections (e.g., the Fourth Amendment's Unreasonable Search & Seizure) do not carry the same kind of historical pedigree and also do not impact the probability of being punished as directly as those listed in the text. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (noting that "the double jeopardy prohibition of the 5th Amendment represents a fundamental ideal in our constitutional heritage"); In re Winship, *supra* note 6, at 361 (1970) (noting that "the reasonable doubt standard is accepted as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt").

[14] *See* W. William Hodes, *Reform: Lord Brougham, The Dream Team, And Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1078 nn.7 & 46 (1996) (noting that a criminal trial favors the defense because of the many procedural protections); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (noting that these constitutional protects favor the defendant, but that there is still much discretionary power left with a prosecutor).

[15] This is essentially an argument that the procedural protections work as a method of reducing/constraining agency costs much like incentive schemes in the corporate context. *See infra* Part V.

[16] *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1473 (1993) (noting that "prosecutors have an incentive to discriminate against particular defendants or subgroups of defendants by attempting to settle like cases differently depending on defendants' personal characteristics unrelated to culpability").

[17] *See* TULLOCK, *supra* note 11, at 5, 96.

Part VI examines some methods of constraining self-interested prosecutors. These include procedural protections, restrictions on penalties, and other ways to limit prosecutorial abuse of the criminal process.[18] We conclude that the procedural protections appear to work, in ways consistent with our approach, as constraints on enforcement agents that are not fully replicated by other methods.

Part VII applies the analyses from Parts III through VI to examine some aspects of criminal procedure and constitutional law. In particular, the reasonable doubt standard of proof, certain aspects of double jeopardy protection, the right to a jury trial, the ex post facto rule, entrapment, and a host of others.[19] Part VII also provides empirical evidence based on corruption data from several countries that is consistent with our analysis. Part VIII concludes with suggestions for future research and analysis.

II. SOME CORE PRO-DEFENDANT CRIMINAL PROCEDURAL PROTECTIONS

There is a vast panoply of procedural protections attached to the criminal process in the U.S.[20] To focus our analysis we hone in on the handful of protections that appear to impose a significant pro-defendant bias in the criminal law process.[21] In particular, we focus on the reasonable-doubt standard of proof, double jeopardy protections, and the right to a jury trial. We reserve for later

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[18] *See* David Friedman, *Why Not Hang Them All: The Virtues Of Inefficient Punishment*, 107 J. POL. & ECON. 259, 262 - 63 (1999) (inefficient punishments); Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S.CAL. L. REV. 2001 (*forthcoming*).

[19] *See* Connally v. General Construction Co., 269 U.S. 385, 391 (1925) (stating that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of the law"); United States v. Russell, 411 U.S. 423 (1973) (court reaffirmed support for a subjective version of the federal entrapment defense).

[20] *See generally*, Lewis v. United States, 518 U.S. 322 (1996) (discussing the right to trial by jury, but deciding against permitting a jury trial on the facts of that case); Scott v. Illinois, 440 U.S. 367, 370 (1979) (right to counsel); Miranda v. Arizona, 384 U.S. 486 (1966) (secures suspects' privilege against self-incrimination).

[21] In our view, rules that directly impose a pro-defendant bias are those that reduce either the probability of conviction or the severity of the punishment. *See* Standen, *supra* note 16, at 1519 ("[Better rules] would limit opportunities for manipulation by prosecutors in their charging, and would require criminal offenders who wish to lower or eliminate their expected punishment to alter their behavior either to conform to the law or cause less harm."). Rules that merely restrict the type of evidence that can be presented, such as the exclusionary rule, do not fall within our definition of core pro-defendant protections. This is because their impact on the probability of conviction is not as direct as the reasonable doubt standard and also because they do not have the same kind of historical pedigree that the reasonable doubt standard has. *See* Lawrence H. Tribe, *Constitutional Calculus: Equal Justice Or Economic Efficiency?*, 98 HARV. L. REV. 592, 607 (1985) ("[E]xclusionary rule cases…are today treated as occasion for the assessment of the marginal deterrent effects of excluding particular categories of evidence"). Also note that it might be easier for police and other government agencies to satisfy some parts of the Fourth Amendment (e.g., giving a *Miranda* warning) as compared to satisfying the reasonable doubt standard. *See* Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998) (advocating a return to the "original" vision of *Miranda*).

discussion, in Part VII, other protections that also impact the criminal process in favor of the defendant.

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.[22] Although the reasonable-doubt formulation seems to have first appeared in 1798,[23] the notion that the standard of proof in criminal trials should favor defendants appears to have 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."[24] Coke, considerably earlier, said that "the evidence against a prisoner should be so manifest, as it could not be contradicted."[25] In 1970, the Supreme Court endorsed this by holding in *In Re Winship* that the due process clause protects the defendant against conviction except upon proof beyond a reasonable doubt.[26]

The reasonable-doubt standard stands in contrast to the "preponderance of the evidence" standard,[27] used most frequently in non-criminal cases and for sentencing issues in criminal proceedings.[28] 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. [29] The preponderance rule is considered the easier standard for the moving party to meet relative to the reasonable doubt standard.[30] Sometimes the preponderance rule is assumed to require that the decision-maker be 51% certain that the defendant is liable before finding against him, whereas the reasonable doubt standard is assumed to require that the decision-maker be somewhere in the range of 90% to 95% certain before

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[22] *See* In Re Winship, *supra* note 6, at 361.

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

[24] 4 WILLIAM BLACKSTONE, COMMENTARIES, at 358.

[25] *Id*, at 349 – 50.

[26] *See* In Re Winship, *supra* note 6, at 364.

[27] *See Ethyl, infra* note 31, at 28 n. 58 (noting that different levels of certainty are required to meet the distinct burdens).

[28] *See* 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); U.S. v. Lombard, 72 F.3d 170, 176 (1st Cir. 1995) (noting that the preponderance of the evidence can be used in sentencing issues [enhancements in this case]).

[29] *See* U.S. v. Mandanici, 205 F.3d 519, 532 (2d Cir. 2000) (Kearse, J. concurring) ("a preponderance means more likely than not").

[30] *See* Martin v. U.S., 277 F.2d 785, 786 (5th Cir. 1960) (noting that the preponderance of the evidence standard is a lesser burden than proof beyond a reasonable doubt).

convicting the defendant.[31] This imparts a significant pro-defendant bias in the criminal law.

Another procedural protection is Double Jeopardy.[32] The prohibition against Double Jeopardy stems from the 5th Amendment to 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". [33] In many respects this protection is similar to the doctrines of Res Judicata and Collateral Estoppel that are found in non-criminal cases. [34] However, there are some differences. In particular, one difference that has garnered much attention is the rule that normally prohibits prosecutorial appeals of initial trial acquittals, but permits defense appeals of initial trial convictions.[35] This asymmetry in appeal rights appears like it has a pro-defendant bias whereas in the non-criminal side the analogous doctrines (e.g., Collateral Estoppel) do not present such asymmetry in appeal rights.[36]

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[31] *See* Ethyl Corp. v. EPA, 541 F.2d 1, 28 n. 58 (D.C. Cir. 1976) ("It may be that the 'beyond a reasonable doubt' standard of criminal law demands 95% certainty [internal cites omitted]. But …, a preponderance of the evidence demands only 51% certainty."); Brown v. Bowen, 847 F.2d 342, 345-46 (7th Cir. 1988) (suggesting that certainty of 90% or more is sufficient to meet the reasonable doubt standard). There is yet another standard of proof that might be used in some instances. The clear and convincing evidence standard is used in some non-criminal contexts often as a method of determining if greater-than-compensatory damages should be awarded in a particular case. *See id*., at 346. This standard occupies an intermediate position between the preponderance and the reasonable doubt standards. *See, e.g.,* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 271 (1986); Cornell v. Nix, 119 F.3d (8th Cir. 1997). Although these three standards are sufficient for purposes of our analysis it is worth noting that in the past there have been other standards. In fact, there was at one time a standard even higher than the reasonable doubt standard. *See* Anthony M. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507, 511-19 (1975) (arguing that prior to the articulation of the reasonable doubt standard, a higher standard existed that required proof beyond any doubt). Although we have discussed three standards of proof, it is possible that other standards could exist as well. There is, in theory, a continuum of standards of proof, but in practice only three. *See* V.S. Khanna, *Corporate Criminal Liability*, 109 HARV. L. REV. 1477, 1516 n. 210; *See also* Lee, *infra* note 66, at 25; *See also* MCCORMICK, *supra* note 23, at 378. *See also*, Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1260 (2d Cir. 1996) ("The familiar burden of proof standards occur along a continuum with 'preponderance of the evidence' at one end and 'beyond a reasonable doubt' at the other. The 'clear and convincing evidence' standard falls somewhere in between.").

[32] *See* United States v. DiFrancesco, 449 U.S. 117 (1980); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, U. ILL. L. REV. 827 (1998); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995).

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

[34] *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).

[35] *See* Vikramaditya S. Khanna, *How Does Double Jeopardy Help Defendants*?, Discussion Paper No. 315, Discussion Paper Series, John M. Olin Center for Law, Economics, & Business, Harvard Law School (2001); 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.

[36] *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); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 144 (2nd Cir. 1993) (noting that "we recognize that arguments based on collateral estoppel or res judicata may be available to either side").

Other protections that are relevant in the criminal context are the right to a jury trial,[37] the ex post facto punishment rule,[38] and the excessive punishments prohibition.[39] Yet other protections exist that appear to have a pro-defendant bias (some of which we address later in Part VII), but the crucial point for now is that the criminal process appears biased in favor of the defense. This raises the basic question – what justifies this sort of bias in the criminal process?

III. TRADITIONAL JUSTIFICATION FOR THE CORE CRIMINAL PROCEDURAL PROTECTIONS: THE REASONABLE-DOUBT STANDARD

The reasonable-doubt standard presents the quintessential case of a pro-defendant protection. The most common justification given for it is that in the criminal process we are more concerned with false convictions than false acquittals and hence should prefer a pro-defendant bias (as that reduces convictions, which might also reduce false convictions).[40] We will refer to this below as the "traditional error-cost" rationale for pro-defendant protections. We conclude that although this rationale carries some persuasive force it is not strong enough, by itself, to justify the reasonable-doubt standard.

To show this, we approach the issue in a number of steps. We begin by trying to determine what kind of cost differential between false convictions and false acquittals we would need to justify the reasonable doubt standard over the preponderance standard using traditional error-cost arguments. We then describe and examine the factors that comprise the social costs of false convictions and false acquittals. Traditional error-cost arguments focus on the deterrence costs and sanctioning costs of both errors. After this we try to determine whether the empirical evidence on the cost differential (in terms of deterrence and sanctioning costs) between false convictions and false acquittals seems to justify society's choice of the reasonable doubt standard over the preponderance standard. We conclude that the answer to this question is most likely no, and hence we examine other justifications for pro-defendant protections in the remainder of the paper.

A. Traditional Error-Cost Analysis

Blackstone's claim that "it is better that ten guilty persons escape, than one innocent suffer"[41] captures the essence of the traditional error-cost justification,

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[37] *See* U.S. CONST. AMEND. VI.

[38] *See* U.S. CONST. ART. I, § 9, CL. 3.

[39] *See* U.S. CONST. AMEND. VIII.

[40] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *358; *see also* In Re Winship, *supra* note 6, at 372 (Harlan, J., concurring).

[41] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

which is that false convictions generate greater social concern than false acquittals.[42] In light of this a basic question is raised – how much of a difference in the costs of false convictions and false acquittals is needed to justify the reasonable doubt standard? Would a minor difference suffice (e.g., a false conviction costs society $10 and a false acquittal costs society $9) or would something more significant be needed (e.g., a false conviction costs $100 and a false acquittal costs $5) before the reasonable doubt standard was justified?

1. Basic Framework

Perhaps the first to examine this question was John Kaplan in his classic article "Decision Theory and the Factfinding Process."[43] Defining the standard of proof as the probability of guilt necessary for a rational jury to convict, Kaplan showed that the proof standard depends only on the ratio of the cost of a false acquittal to the cost of a false conviction. To be precise, if we let *P* represent the proof standard and *R* the ratio of the false acquittal cost to the false conviction cost (or ratio of error costs), Kaplan showed that

$$P > 1/(1+R)\ .$$[44]

Kaplan's formula implies that the preponderance rule is appropriate whenever the cost of acquitting a guilty person is equal to the cost of convicting an innocent person ($R = 1$).[45] The reasonable-doubt rule can also be justified in terms of Kaplan's formula, since the formula implies that the proof threshold should be increased as the cost of a false conviction rises relative to that of a false acquittal.[46]

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[42] *See* In Re Winship, *supra* note 6, at 372; POSNER, *supra* note 5, at 605 (noting that the social cost of false convictions outweigh the costs of false acquittals).

[43] *See* John Kaplan, *Decision Theory And The Factfinding Process,* 20 STAN. L. REV. 1065 (1968).

[44] *See id.*, at 1071 – 72.

[45] *See id.*, at 1072. Kaplan's formula for determining the probability necessary to convict tells us one important lesson from decision theory. The probability-of-guilt threshold that minimizes the overall costs of error depends only on the ratio of error costs. The absolute cost of a false conviction or false acquittal is not important in this analysis. The fact that false convictions may seem more costly for one type of criminal defendant than another is not an important datum under the decision-theoretic approach. The key question is whether the cost of a false conviction *relative* to the cost of a false acquittal is higher for one type of defendant than for another.

[46] If the ratio of error costs (R) is 1/3, so that each false conviction is three times as costly as a false acquittal, the probability of guilt necessary to convict becomes .75. If a false conviction is four times as costly as a false acquittal, the probability of guilt necessary to convict becomes .8. Blackstone's expression of the reasonable-doubt standard, that ten guilty men should be allowed to go free in order to avoid convicting one innocent, (*see* 4 WILLIAM BLACKSTONE, COMMENTARIES *358) implies an error cost ratio less than 1/10 and means that that the probability threshold must exceed 90%. Assuming 95% is a good approximation, this requires a cost ratio of 1/19. Thus, in order to accept Blackstone's description of the proof threshold as consistent with that of a rational jury, we must believe that the cost of a false conviction is nineteen times that of a false acquittal. To be precise, with a 10 to 1 cost ratio we obtain: $1/[1 + 1/10]$ or $1/[11/10]$ or simply 10/11 (i.e., .909090… or approximately 91%). As this seems like an odd percentage we will opt for a percentage that covers this cost ratio. 95% does, but 90% does not. Another reason for choosing 95% is that

Though enormously valuable as a clear statement of the assumptions underlying alternative proof standards, Kaplan's approach does not tell us whether we should prefer the reasonable-doubt to the preponderance standard. Kaplan's approach tells us which percentage proof requirement is to be preferred over all others given a particular ratio of error costs. However, we are choosing not from a continuum of proof requirements, but from only two – either the preponderance or the reasonable-doubt threshold. To determine which of these two standards is preferable, we will need to take a different approach.

2. When to prefer the reasonable doubt over the preponderance standard

To choose between the reasonable-doubt and preponderance standards, we will take advantage of an approach suggested by Gordon Tullock. The relationship between error probabilities and standards of proof can be illustrated with the diagram in Figure 1.[47] The vertical axis measures the probability of guilt. The horizontal axis measures the amount of evidence (of guilt). The straight line 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, 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.

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it agrees with the traditional statistical standard for hypothesis testing, which requires the rejection of a hypothesis when the evidence against could have occurred by chance in only one out of twenty trials. The standard approach would suggest that we should convict the defendant – i.e., accept the hypothesis that he is guilty – when the evidence suggests there is no more than a five percent chance that the evidence against him is all coincidental. *See* THAD W. MIRER, ECONOMIC STATISTICS AND ECONOMETRICS (3d ed. 1995).

[47] *See* GORDON TULLOCK, THE LOGIC OF THE LAW 65 (1987 ed.). Tullock uses a logistic or 'S' shaped curve instead of a linear one that we use. We chose the linear shape because of expositional ease and because using the linear shape, over the logistic one, should make it easier to justify the reasonable doubt standard. Proof available upon request from authors. If even on the easier linear standard we cannot justify the reasonable doubt standard then it is unlikely to be justified on the 'S' shaped logistic standard.

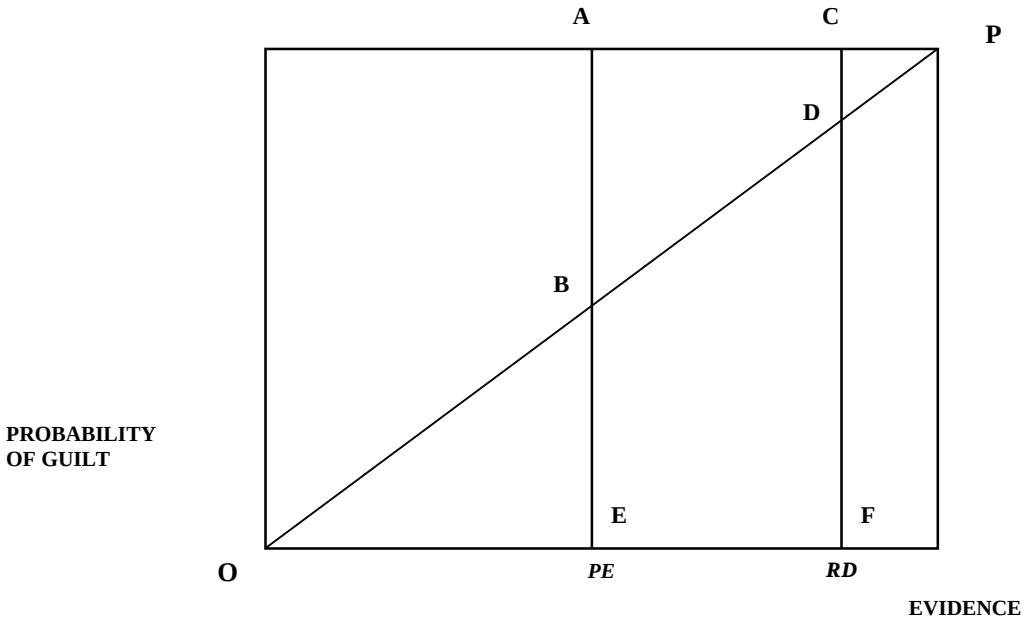

Figure 1

Two rather intuitive points follow from the diagram: 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.[48] 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.

If the costs of false convictions and false acquittals are not equal,[49] examining the overall probability of error will be insufficient to tell us whether the reasonable-doubt rule is preferable to the preponderance rule. In general, society should prefer the reasonable-doubt standard to the preponderance standard only if the expected social costs are lower under the reasonable-doubt standard. Thus, the reasonable-doubt standard is preferable if the change in the probability of a false conviction (ABCD in Figure 1) multiplied by the cost of a false conviction exceeds the incremental false acquittal probability (BDEF in Figure 1) multiplied by the cost of a false acquittal. Put simply, the reasonable-doubt rule is preferable if the reduction in false conviction costs exceeds the increase in false acquittal costs. Should one believe this holds?

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[48] *See id.*

[49] *See* POSNER, *supra* note 5, at 605.

3. Toward an Empirical Test

To determine whether, as an empirical matter, a move from the preponderance to the reasonable-doubt standard would reduce false conviction costs by a larger amount than it increases false acquittal costs, we must formulate in precise terms what we mean by the costs of false convictions and false acquittals. In the standard economic analysis of enforcement, the costs of false convictions and false acquittals can be categorized as either "deterrence costs" or "sanctioning costs".[50] Specifically, false convictions and false acquittals are socially costly to the extent that they lead to sub-optimal deterrence – that is, to a deterrence level either above or below the social optimum.[51] Sanctioning costs are the losses society bears by punishing a convicted offender, such as the social costs of maintaining prisons, the forgone labor of the convicted offender, and the deprivation of his liberty.[52]

Because a false acquittal involves no punishment at all, the only costs we need concern ourselves with are deterrence costs. In the case of false convictions, we need to consider both deterrence and sanctioning costs. Thus, the costs we are concerned with are the incremental deterrence costs of false convictions, the incremental deterrence costs of false acquittals, and the incremental sanctioning costs. To be precise, let D_{fc} = the incremental deterrence cost of one false conviction, let D_{fa} = the incremental deterrence cost of one false acquittal, and let C_c = the incremental social costs of imposing sanctions.

We are now in a position to state a rough empirical test to determine whether the reasonable-doubt rule is preferable to the preponderance standard. The reasonable-doubt rule is preferable only if the incremental sanctioning costs under the preponderance rule exceed the incremental deterrence costs (or "underdeterrence" costs) under the reasonable-doubt rule. In technical terms, and using Figure 1, the reasonable-doubt rule is preferable only if $(\Delta)C_c > (\text{BDEF})D_{fa} - (\text{ABCD})D_{fc}$, where Δ is the incremental probability of conviction.[53]

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[50] *See* POSNER, *supra* note 5, at 604 – 05; Thomas R. Lee, *Pleading And Proof: The Economics Of Legal Burdens*, 1997 B.Y.U.L. REV. 1, 5 (1997) (noting that "error costs are the social costs associated with erroneous legal judgments. Erroneous legal judgments include decisions for undeserving defendants (Type I errors) and decisions for undeserving plaintiffs (Type II) errors."); Peter Wendel, *A Law and Economics Analysis of the Right to Face-to-Face Confrontation Post-Maryland v. Craig: Distinguishing the Forest from the Trees*, 22 HOFSTRA L. REV. 405, 412-13 (1993) (stating that the risk of erroneous legal judgement, or cost of error, is the probability of an erroneous conviction times the cost of erroneous conviction, plus the probability of an erroneous acquittal times the cost of an erroneous acquittal).

[51] *See* POSNER, *supra* note 5, at 604 – 05; Lee, *supra* note 50, at 26 n.79.

[52] *See* POSNER, *supra* note 5, at 604 – 05; Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968); Wendel, *supra* note 50, at 426.

[53] Note that if P is the share of guilty individuals in the population, the incremental conviction probability, Δ, is equal to P(BDEF) – (1-P)(ABCD).

The empirical evidence does not directly address this question, but it does suggest that this necessary condition is unlikely to obtain.[54] The most direct source for such evidence is provided in Anderson (1999).[55] If we use, as a conservative definition of the aggregate harm from crime, the sum of losses due to injuries and property theft (including fraud), Anderson's study suggests the annual aggregate harm due to crime is roughly $1,177 billion.[56] 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 $71 billion. [57] From these numbers one can see that the aggregate costs of crime, which can be treated as "underdeterrence costs," are on the order of 15 times greater than the sanctioning costs associated with all convictions. In view of the sheer magnitude of this differential, it seems improbable that the savings from a measure that

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Also note that C_c is simply the sum of the sanctioning costs associated with the incremental false convictions (C_{fc}) and incremental correct convictions (C_{cc}) generated by switching to the preponderance rule. One might expect that C_{fc} per case is greater than C_{cc} per case.

Since BDEF > ABCD, the interesting *theoretical* question generated by this condition is whether $D_{fa} > D_{fc}$ – i.e., whether the deterrence costs of false acquittals exceeds the deterrence costs of false convictions. If so, then the incremental deterrence costs of the reasonable-doubt rule are definitely positive, and it is an open (empirical) question whether the sanctioning costs under the preponderance rule exceed these incremental deterrence costs. As a theoretical matter, it is straightforward in this framework to show that D_{fa} should be larger than D_{fc}. First, both are positive because increases in either type of error reduce the difference in payoffs for complying and not complying with the law, *see, e.g.*, Louis Kaplow & Steve Shavell, *Accuracy in the Determination of Liability*, 37 J.L. ECON. 1, 5 (1994). Second, $D_{fa} > D_{fc}$, as a theoretical matter for the following fundamental reason: in a well functioning enforcement system, enforcement efforts will be targeted at guilty actors. Given this, changes in false acquittal probabilities will far outweigh changes in false conviction probabilities in terms of their influence on incentives. For an independent formal analysis that reaches the same conclusion, *see* Henrik Lando, *The Optimal Standard of Proof in Criminal Law When Both Fairness and Deterrence Matter*, SSRN Working Paper available at http://papers.ssrn.com/paper.taf?abstract_id=238334. Both the framework here and Lando's are easily reconcilable with Craswell and Calfee's important article on the deterrence effects of error. See Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. L. ECON. & ORG. 279 (1986). For an analysis of the deterrence effects of error in the negligence context, see Keith N. Hylton, *Costly Litigation and Legal Error Under Negligence*, 6 J. L. ECON & ORG. 433 (1990).

[54] *See* David Anderson, *The Aggregate Burden of Crime*, 42 J. LAW & ECON 611 (1999); John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J.LEGAL STUD. 1 (1998). *See also* UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Costs of Crimes to Victims* (1994) (setting out the costs of specific crimes to victims, such as crimes of violence, rape, robbery, assault, theft, and motor vehicle theft).

[55] *See* Anderson, *supra* note 54. The sanctioning costs of the death penalty are not discussed here because of the number of executions each year. *See* Hashem Dezhbakhsh, Paul H. Rubin, & Joanna Mehlhop Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data*, Draft 2001 (on file with authors), at 29 (providing a table of the number of executions over the last 23 years which appear to be around 40 to 50 a year). For discussion of the value of life in different contexts *see* W. Kip Viscusi, *The Value of Life in Legal Contexts: Survey and Critique*, 2 AMERICAN LAW & ECONOMICS REVIEW 195 (2000).

[56] *See* Anderson, *supra* note 54, at 629 (providing this number which represents the sum of 'Risks to life and health' and 'Transfers').

[57] *See id.*, at 620, 624 (providing this figure which represents the sum of "Crime-Induced Production: Corrections" and "Criminal lost workdays: in prison").

reduces the costs of crime, such as moving to the preponderance standard, would be swamped by a rise in sanctioning costs.

For example, if shifting from the reasonable-doubt to the preponderance standard improved deterrence by 30% it would reduce the annual cost of crime by about $352 billion.[58] To disfavor such a move, we would need to believe that the sanctioning costs would rise by more than $352 billion – i.e., from roughly $71 billion to $423 billion. This would be equivalent to a six-fold increase in the prison population.[59] If the reduction in crime costs were 20 % (saving about $235 billion), we would need sanctioning costs to increase from $71 billion to $306 billion to offset the gain (a little over a four-fold increase in the prison population). If the crime reduction benefit were only 10 % (saving about $117 billion), we would need an increase of sanctioning costs to $188 billion to offset the gain. While it is impossible to rule out these scenarios, they each require the combination of a relatively modest impact on deterrence and an extremely large increase in sanctioning costs, on the level associated with at least a tripling of the prison population.[60] However, the empirical evidence on the responsiveness of crime rates to changes in prison population suggests that this combination is unlikely to be observed.

The empirical evidence on the elasticity of crime with respect to incarceration (i.e., the rate at which crime drops as incarceration / prison population increases) puts the figure in a range from roughly .15 to .30.[61] In other words, a one percent increase in the prison population results in a

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[58] We do not expect all crime to be avoided by such a change because the standard of proof may not be the only factor influencing crime rates and the optimal crime rate may not be 0. *See* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993); Anderson, *supra* note 54, at 616 (finding benefits of crime due to the fact that crime induces economic production); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. L. & ECON. 519, 533 (1996). For factors besides the standard of proof that might influence crime rates *see also* Peter Jost, *Crime, Coordination, and Punishment: An Economic Analysis* 21 INT'L REV. L. & ECON. 23 (2001) (allocation of police resources); David McDowall, Ronald P. Corbett, Jr. & M. Kay Harris, *Juvenile Curfew Laws And Their Influence On Crime* 64 FED. PROBATION 58, 60 (2000) (curfew laws); Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause The Recent Drop In California Crime? An Analysis Of The California Attorney General's Report*, 32 LOY. L.A. L. REV. 101,111 (1998) (economic opportunity).

[59] This assumes that sanctioning costs increase in a linear manner (i.e., if the number of prisoners increases by 10% so do the sanctioning costs). This assumption is made for analytical simplicity. Also note that false convictions may carry greater costs than correct convictions in terms of sanctioning costs because of, for example, the psychological harm caused to innocents who are wrongfully punished.

[60] Such a result seems implausible because if deterrence does improve that means that fewer crimes are occurring which should lead to fewer cases being brought and hence a smaller scope for false convictions as well. In the extreme if deterrence becomes perfect under a preponderance standard (i.e., zero crime) then there would be no false convictions, because there are no suits as there are no crimes. Under a reasonable doubt standard if crimes occur then there is still some chance of a false conviction. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfar*e, 114 HARV. L. REV. 961, 1244 – 1245 (2001).

[61] *See* Donohue & Siegelman, *supra* note 54, at 13 (surveying literature, which tends to suggest a .15 elasticity); Steven Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q. J. ECON. 319 (1996)(finding higher elasticity figure of .30).

reduction in crime somewhere between .15 and .3 percent. Using the lower figure, an increase in sanctioning costs of 165% (i.e., tripling the prison population and increasing sanctioning costs from $71 to $188 billion), should be associated with a reduction in crime on the order of 25%, ((165)(.15) = 24.75).[62] This yields a deterrence benefit of $292 billion. In other words, using as a basis for prediction the low crime-elasticity estimate of .15, tripling the prison population should result in a greater than 10% reduction in crime. Since the sanctioning cost of tripling the prison population ($117 billion) is less than the expected deterrence benefit ($292 billion), a switch to the preponderance standard would be desirable on traditional error-cost grounds. If we use the higher elasticity figure (.3), the benefit from crime reduction would be $582 billion (i.e., a 49.5% decrease in the cost of crime) and it would clearly be desirable to switch to the preponderance standard. In short, the empirical evidence suggests that it is very unlikely that increases in sanctioning costs would fully offset the crime-reduction benefits from switching to the preponderance rule.[63]

We thus conclude that it is highly unlikely that the traditional error-cost rationale for the reasonable-doubt standard is a complete explanation for it. The expected costs of false convictions generated under the preponderance standard do not appear likely to exceed the expected costs of false acquittals generated under the reasonable-doubt rule by a sufficient amount. Put another way, Blackstone's assertion that it is better to let 10 guilty men go free rather than punish one innocent is not supported by a traditional error-cost analysis. Some other justification must be offered for the pro-defendant bias in the standard of proof.[64]

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[62] There is a net gain of $175 Billion on these numbers by switching to the preponderance standard. Crime has dropped by $292 Billion and sanctioning costs have risen to $188 Billion from $71 Billion (i.e., an increase of $117 Billion). Thus, $292 Billion less $117 Billion is $175 Billion, which makes switching to the preponderance rule desirable on traditional error-cost grounds.

[63] One might ask how much might crime decrease from a switch to the preponderance rule? We cannot know for sure, but we should note that if we are switching from a 95% standard to a 51% standard we are substantially increasing the chance that the defendant will be convicted if brought to trial. One might then surmise that a greater than trivial increase in deterrence is likely to result.

[64] In addition, even without the foregoing analysis one might be somewhat skeptical about traditional error costs explaining the pro-defendant bias in criminal procedure. If one was only interested in reducing false convictions relative to false acquittals it might be more direct to simply increase the standard of proof to something beyond reasonable doubt (e.g., virtual certainty) rather to rely on the reasonable doubt standard plus other protections. Further, Double Jeopardy and the right to a jury trial and so many other protections may not have particularly clear or significant influences on the number of false convictions or false acquittals. *See* Khanna, *supra* note 35; Timothy Feddersen & Wolfgang Pesendorfer, *Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts* (Draft, 1997)(on file with authors)(arguing that under plausible assumptions the unanimity requirement may result in an increase in false convictions relative to a supermajority vote requirement). The mere presence of different criminal procedural protections that do not directly or significantly change error rates suggests that either a more nuanced view of error analysis is needed or that perhaps error analysis is not a complete explanation for the presence of criminal procedural protections. *See* Stuntz, *supra* note 14, at 1 (suggesting that the procedures are not necessarily correlated with

IV. ANOTHER JUSTIFICATION FOR PRO-DEFENDANT PROCEDURAL PROTECTIONS

Even if the traditional justification for the reasonable-doubt standard is not altogether satisfying or complete, perhaps, other justifications may provide us with greater support for it. One such justification, we suggest, is that the reasonable-doubt standard is designed to make it harder for individuals and groups to use the criminal process as a mechanism for wealth extraction (or to obtain their own desired ends). By making the criminal process harder to abuse we make it less likely that people or certain political groups will want to spend the resources to lobby prosecutors to enforce the law in certain ways. This reduces the social costs associated with lobbying and corruption, and enhances the deterrent effect of the law.

In explaining this justification for pro-defendant criminal procedure it is important to step back and examine what prosecutors are supposed to do and how we might attempt to ensure that they achieve those goals efficaciously. The first point to note is that prosecutors are agents of society in terms of enforcing the law. As agents it is possible that prosecutors' incentives may sometimes diverge from those of society (i.e., from maximizing social welfare). In other words, prosecutors' self-interest may not always match up with society's interests. This might occur for a number of reasons.

First, prosecutors might not value the same things that society might. For example, society might be trying to maximize the number of correct convictions and minimize the number of false convictions subject to a budget constraint.[65] On the other hand, prosecutors might be interested in trying to maximize the number of convictions, to advance further in their careers, make money, or a variety of other things.[66] As prosecutors and society may be maximizing different things we might expect some divergence between the prosecutor's

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guilt or innocence). This suggests that the traditional error cost justification seems a weak justification. *See* Stuntz, *supra,* at 100.

[65] *See* Khanna, *supra* note 35. For a similar approach, also see Edward Glaeser & Andrei Schleifer, *Incentives For Enforcement*, Draft 2000; Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision to Go To Trial, forthcoming* 17 J. L. ECON. & ORG'N (2001) (using a model where prosecutors are concerned about correct convictions and false convictions amongst other things); Dirk G. Christensen, *Comments: Incentives vs. Nonpartisanship: The Prosecutorial Dilemma in an Adversary System*, 1981 Duke. L. J. 311 (1981); Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 801 (2000).

[66] *See* Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 J.L. & ECON. 259, 262-266 (2000); Gordon Van Kessel, *Adversary Excess in the America; Criminal Trial*, 67 NOTRE DAME L. REV. 403, 441 (1992); William M. Landes, *Economic Analysis of the Court*, 14 J. LAW & ECON. 61 (1971); Standen, *supra* note 16, at 1477-78; Daniel C. Richman, *Essay Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, fn. 93 (1997); Christensen, *supra* note 92, at 321.

behavior and what is socially desirable behavior. [67] This is one source of agency costs.

Second, even if prosecutors and society value the same things, each may weigh them differently. For example, society might value the avoidance of a false conviction more than a prosecutor might. Society might also value certain convictions more than prosecutors might (e.g., society might value the conviction of one drug overlord more than 20 convictions of small time drug dealers, but prosecutors might view things differently).[68]

Third, error by prosecutors in assessing the social value of certain cases could be important. For example, prosecutors might value the same things as society and, in theory, give them the same weight as society might, but may have imperfect information so that results congruent with societal interests may not occur due to error.[69] The presence of these errors further widens the gap between prosecutorial behavior and behavior that maximizes social welfare. Because prosecutorial interests may not match societal interests in all cases (or prosecutors may make errors) we face an agency cost problem (prosecutors are agents for society with interests and behavior divergent, at times, from the social ideal). This can manifest itself in certain behaviors that might induce lobbying of prosecutors.

Lobbying prosecutors to bring cases selectively (a type of rent-seeking) can occur in a variety of forms. However, we think two general types capture the observed forms of rent-seeking. One is *inter-group wealth expropriation*, which

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[67] Of course, if society / the government could costlessly draft an agreement with prosecutors that perfectly aligned prosecutors' and society's interest then there would be little agency problem. As this seems unlikely, we are faced with diverging interests and agency costs. *Cf.* Christensen, supra note 65, at 311. This is analogous to the gap between private and social incentives to sue. *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. Law & Econ. 575 (1997).

[68] Note this seems to depend on how (and for what) prosecutors are rewarded. *See* Christensen, *supra* note 65, at 311; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation and Enforcement Discretion*, 46 UCLA L. REV. 757, 818 n. 101 (1999); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995). *See* Glaeser, *supra* note 66, at 261 (noting that decisions to prosecute are often influenced by prosecutors' interest in running for a higher office); Van Kessel, *supra* note 66, at 442 (1992) (noting how win-loss records are very important to state prosecutors). This raises interesting questions about why we reward prosecutors in the way we do. This is the subject of a separate paper and outside the scope of our present inquiry. As a first cut, one suspects convictions rates are the more verifiable assessment criteria relative to others (much like profits are a bit easier to verify as assessment criteria relative to others in the corporate sphere when dealing with the agency problem in that context).

[69] For example, assume that the prosecutor does value the same things and to the same degree as society. Thus, the prosecutor wants to maximize correct convictions, minimize false convictions subject to a budget constraint and values the avoidance of a false conviction as much as society. However, the prosecutor may incorrectly believe that a certain defendant is guilty even when in fact he may not be. In this situation, the prosecutor may pursue this innocent defendant even though the prosecutor values the same things and to the same extent as society.

arises when one group attempts to gain some advantage from the prosecutor at the expense of other members of society.[70] Equivalently, we might describe this type of rent-seeking/lobbying as an advanced version of tribalism. We treat this as wealth expropriation – group A attempts to obtain gains at the expense of other groups in society (we will refer to all non-A groups as group B for simplicity). The other general type of rent-seeking is *simple corruption*, which occurs when an offender or potential offender uses bribery or some other means to induce an enforcement agent to selectively enforce the law. Using these conceptions of rent-seeking we can discuss some examples.

A. Inter-Group Wealth Expropriation

Rent-seeking behavior is a result of prosecutors acting in their unconstrained self-interest. If there are no constraints prosecutors may use the criminal process to benefit themselves by selling, in some sense, their ability to enforce the criminal law to the highest bidder. What prosecutors receive could include direct or indirect monetary gain, enhanced chances for power and prestige, or anything else of value to the prosecutor.[71] To simplify we can say that prosecutors receive a certain sum – say $1 million – from the highest bidding group (A) to enforce the law in a particular manner. Enforcement of the law in this manner must benefit the highest bidding group by more than $1 million – say $1.5 million – and these gains would appear to come at the expense of the non-A groups (i.e., group B for simplicity). Thus, in a sense, A is using the prosecutor and the criminal process to extract $1.5 million from B by paying the prosecutor $1 million. The various groups realizing that the prosecutor is willing to sell his services will lobby to secure some of these gains from prosecutors and to prevent other groups from extracting wealth from them.[72] The lobbying and counter-lobbying efforts, we will see below, can generate significant social costs.[73]

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[70] *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35 (1991); Richard H. McAdams, *Cooperation and Conflict: The Economics Of Group Status Production And Race Discrimination*, 108 HARV. L. REV. 1003, 1029-1030 (1995) (noting that "[W]hen interest groups pursue what economists call "rent-seeking" legislation, such as farm subsidies and tax "loopholes," they seek merely to transfer resources from one group to another"); Angela O. Davis, *The American Prosecutor:Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 459 (2001).

[71] *See, e.g.*, Richman, *supra* note 68, at 818, n. 102 (noting prosecutors' eagerness for career advancement); Christensen, *supra* note 65, at 318 (noting that prosecutors are financially motivated).

[72] *See* MUELLER, *infra* note 92. *See also* Shavell, *supra* note 67, at 612 n. 46 (1997)(discussing factors that influence prosecutors from state compensation to collective private efforts).

[73] *See* Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 822-23 (1994)(discussing how rent-seeking motives of lawyers result in social waste). We have assumed that each group acts as a monolith. That is, we are abstracting away from intra-group sharing issues. Of course, in reality even within each group there may be some competition for the rents that the group earns. Discussion about how this affects our analysis is left for another time. *See generally* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 QUARTERLY JOURNAL OF ECONOMICS 371 (1983); Sun & Ng, *infra* note 104 (noting how size and number of interest groups affects rent-dissipation (i.e., may initially increase then decrease)).

Inter-group wealth expropriation can be effected in a number of different ways. For example, there is lobbying that results in targeted enforcement. This occurs when prosecutors disproportionately target certain groups in society for purposes of bringing prosecutions due to the lobbying efforts of certain other groups. The quintessential case would be where prosecutors disproportionately brought 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 they might otherwise bear onto group B members or to otherwise impose costs on group B members which result in some kind of benefit to A (e.g., the maintenance of a caste system). [74] Indeed, in regimes in which prosecutors are elected, candidates for the position will have incentives to seek support from group A members by promising to direct enforcement efforts against group B members.[75] Perhaps the best known example of this in United States history is law enforcement in the South during the Jim Crow period, which involved numerous instances of prosecutors refusing to enforce the law against white citizens, while using the threat of criminal punishment to coerce black citizens.[76]

Another example is where prosecutors directly ask for some benefit to avoid bringing charges against members of politically marginal groups. This is akin to extortion or a protection racket. Knowing that politically powerful groups will have him removed from office if he threatens their interests, the self-interested prosecutor could focus his extraction efforts on the politically marginal.[77] In this version of wealth expropriation, the prosecutor seeks to extract wealth from members of politically marginal groups, while providing benefits to the politically powerful in order to keep his position. The difference between this version of inter-group wealth extraction and the first is slight: in the first, the powerful group initiates the wealth extraction process and in the

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[74] *See* RICHARD EPSTEIN, FORBIDDEN GROUNDS 91-97 (1992); Dwight L. Greene, *Symposium: Criminal Law, Criminal Justice and Race Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in* Bostick *v.* Florida, 67 TUL. L. REV. 1979, 1982 (1993); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1498 (1989).

[75] *See* Daniel C. Richman, *supra* note 68, Stuntz, *supra* note 10, at 20 – 37 (discussing the incentives of various participants in the American Criminal Justice system); John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571 (1997); 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) (noting that 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 that "Prosecutors … are capable of conducting their offices in ways to advance their own political careers").

[76] *See* EPSTEIN, *supra* note 74; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1839 (1998) (noting that robbery laws in the Jim Crow era were enforced against blacks more often than whites especially where white robbers stole from black victims).

[77] *See* William N. Eskridge, *Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2447 (1997); Greene, *supra* note 75, at 799.

second, the prosecutor initiates the extraction process. In the first case, the powerful group is likely to pay 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 will allocate the surplus to himself. One example of this process occurs in rural areas of China, where local police officers have tried to enrich themselves by enforcing certain prohibitions, such as the one-child policy, against relatively poor farmers.[78]

Yet another example is the passing of laws (including criminal laws) with disproportionate burdens on different groups.[79] This is analogous to targeted (i.e., disproportionate) enforcement. 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. [80] With this information, the dominant group may prohibit or place special burdens on the activity, or the activity when carried out in a particular manner. For example, white majorities in the western United States enacted several 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.[81]

All three of these cases are united by a common theme: one group benefits at the expense of others – wealth expropriation – by using the governmental process, whether law enforcement, legislation, or adjudication. As our concern is with prosecutorial behavior, we will not discuss in much depth the passing of laws with disproportionate burdens as that is the legislative context.[82] However, it is important to note that the legislative and law enforcement processes provide alternative routes through which a predatory dominant group could extract

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[78] *See* Elisabeth Rosenthal, *Rural Flouting of China's One-Child Policy Undercuts Census*, N.Y. TIMES, April 14, 2000.

[79] *See, e.g.*, Stuntz, *supra* note 76, at 1795 (discussing the heightened police attention given to urban crack markets dominated by the lower economic class while law enforcement pays relatively little attention to the upscale powder-cocaine market); *1976 Supreme Court, Term 1: Constitutional Significance of Racially Disproportionate Impact*, 90 HARV. L. REV. 114, 119 (1976).

[80] *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 469, n. 149 (2000) (noting the disparate impact on women that the facially neutral marital rape exceptions had); Kevin R. Johnson & George A. Mason, *Discrimination By Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1245 (2000) (noting that "tough on crime" laws such as the "three strikes" laws, have "racial bents" although written in neutral terms).

[81] *See* David E. Bernstein, Lochner, *Parity and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999); Stacy Suzan Kahana, *Crossing the Border of Plenary Power: the Viability of an Equal Protection Challenge to Title IV of the Welfare Law*, 39 ARIZ. L. REV. 1421, 1436 (1997).

[82] *See generally*, William E. Adams, *Is it Animus or a Difference of Opinion? The Problems Caused By the Invidious Intent to Anti-Gay Ballot Measures*, 34 WILLIAMETTE L. REV. 449 (1998) (discussing the legislative measures aimed at homosexuals); Kahana, *supra* note 81, at 1421.

wealth from other groups. [83] In this sense, the legislative and law enforcement processes are substitutes in the eyes of the wealth extractor. The laws controlling lobbying / rent-seeking in these governmental processes can often 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.[84]

B. 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 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 (e.g., extortion), and that of an enforcement agent who is merely willing to accept bribes from the general public.[85] 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.[86]

There are numerous examples of simple corruption. 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.[87] In these settings, it is hard to distinguish the ordinary reciprocal exchanges that are part of normal social intercourse from ex ante bribery. The Supreme Court grappled with a rather routine example of this in *City of Columbia v. Omni Outdoor Advertising*,[88] which involved the efforts of a local billboard company to protect its incumbency

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[83] *See* Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523 (1996).

[84] For discussion of how the procedural protections may induce greater lobbying at the legislative level see Stuntz, *supra* note 10 *passim*. We discuss this matter *at infra text accompanying notes* 157 – 160.

[85] *See* James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1701 (1997). One could argue that the simple corruption category is the same as our second example of inter-group expropriation, and we concede that the difference is more a matter of degree than of character. In the second example of wealth expropriation, 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.

[86] *See* Mehmet Bac & Parimal Kanti Bag, *Law Enforcement Costs and Legal Presumptions* 5 - 6 (Draft, 2000)(on file with authors). *See also* Mehmet Bac, *Corruption, Supervision and the Structure of Hierarchies*, 12 J.L. ECON & ORG'N. 277 (1996).

[87] *See generally* Mehmet Bac, *The Scope, Timing and Type of Corruption*, 18 INT'L REV. L. & ECON. 101, 104 (1998).

[88] 499 U.S. 365 (1991).

advantage by encouraging the city council to prohibit the erection of new billboards.[89]

Thus, because of the gap between prosecutorial and societal interests, there are agency costs that are manifested in the behavior of parties seeking to expropriate wealth through lobbying for selective enforcement of the law. In light of this it becomes important to get a sense of the costs generated by such behavior (Part V) and also some methods for constraining this kind of behavior (Part VI).[90]

V. COSTS ASSOCIATED WITH "RENT-SEEKING" BEHAVIOR IN THE CRIMINAL PROCESS

We divide the discussion of the costs of lobbying or rent-seeking into two parts. First, in section A, we discuss the costs related to the act of lobbying. Second, in section B, we discuss the costs related to the effect of lobbying (and the perception of successful lobbying) on the deterrent force of the criminal law.

A. Direct Costs From Rent-Seeking – Wasteful Expenditures

Rent-seeking in the criminal process involves lobbying efforts by certain individuals or groups to influence the selection and prosecution of cases. The process of lobbying itself generates costs that are, from a societal perspective, often essentially wasteful. In order to discuss these costs in greater depth a useful starting point is an analogy to the efforts to obtain a monopoly. Monopoly status provides the person holding it with the ability to extract supra-competitive prices for some period of time and hence make supra-normal profits.[91] These profits are attractive and are likely to induce people to spend resources on obtaining this monopoly.[92] This expenditure of resources is sometimes socially desirable and at other times socially undesirable.

Expenditures to obtain a monopoly may be desirable when a firm secures a dominant position through competition because a firm typically does this by improving its product, or reducing its costs, activities that increase the total

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[89] The excluded firm brought an unsuccessful antitrust lawsuit on the ground that the incumbent firm had colluded with city officials. The Supreme Court's reluctance to apply the antitrust laws to this behavior is based in large part on the difficulty in distinguishing ex ante bribery from ordinary social intercourse. *See id.* at 379 – 80.

[90] This is similar to the conflict of interest that can be a problem for individuals with decision-making authority in a corporation since these individuals may have to decide between their own welfare and the welfare of the corporation. *See* ROBERT CHARLES CLARK, CORPORATE LAW 147 (Little, Brown, & Company 1986).

[91] *See* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 16 (5th ed. 1997).

[92] *See* DENNIS C. MUELLER, PUBLIC CHOICE II 229 – 46 (rev. ed. 1989)(1979).

surplus.[93] In general, this is a benefit to society because competition to be the "best" inures to the benefit of consumers and society. [94]

However, certain expenditures to obtain or maintain a monopoly are wasteful from society's perspective. Such expenditures include duplicative lobbying efforts to obtain a government privilege (e.g., an exclusive license or tariff protection), to obtain certain kinds of governmental behavior, to retard research progress, and others.[95] This kind of naked wealth extraction creates no additional surplus (i.e., no benefit to society) and merely transfers an asset from one party to another.[96] The gap between the resources expended and the benefit to society (the benefit is zero in the case of pure transfer of wealth) is wasteful from society's perspective.[97]

In the context of criminal law enforcement, efforts to lobby the prosecutor are often wasteful in a sense similar to naked wealth extraction. If we assume an unbiased prosecutor then lobbying such a prosecutor to bring selective enforcement against one group (say, group B) by members of group A could be wasteful in certain instances. Of course, the result is not wasteful if targeting group B reduces the overall costs of crime.[98] However, there is little reason to believe that lobbying for selective enforcement when there is an *unbiased* prosecutor will always bring about an efficient result.[99] For example, group A will have no interest in inducing the prosecutor to go after cases of crime involving only members of group B. Further, group A members may discourage the prosecutor from enforcing the law when members of their own group

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[93] *See* AREEDA & KAPLOW, *supra* note 91, at 7 (noting that "[c]ompetitive forces generate efficiency in two ways. Productive efficiency occurs as low cost producers undersell and thereby displace the less efficient. Allocative efficiency occurs as exchanges in the marketplace direct production away from goods and services that consumers value less and toward those they value more...").

[94] *See id.*

[95] *See* MUELLER, *supra* note 92, at 229 – 46.

[96] *See id.,* at 231.

[97] *See id.,* at 229-246.

[98] It might be that lobbying coincides with what might be socially desirable. Also lobbying is not necessarily limited to inter-group lobbying. For example, if the victims of crimes by members of group B are other group B members then group B may lobby prosecutors to stop crime in their areas and hence lobby for prosecutions against other group B members. This sort of lobbying does not raise the kinds of concerns we are discussing in this paper. *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).

[99] Note that even if the prosecutor is unbiased she may still not prosecute the cases that would be in society's interests. This stems from the prosecutorial agency costs discussed earlier. *See supra* Part IV. Further, lobbying may in some instances overcome (or reduce) the agency problem, but in others it might exacerbate them. Of course, if the prosecutor has the same interests as society and places the same weights on things as society does then lobbying that prosecutor can only be efficiency-enhancing if the prosecutor may make errors in deciding which cases to bring. However, once again, there is no particular reason to believe that lobbying will generally result in more accurate, as opposed to less accurate, decisions.

commit crimes against group B members.[100] In these cases lobbying is a social waste.[101]

This waste includes some portions of the lobbying efforts of politically dominant groups, the counter-lobbying efforts of politically non-dominant groups, and some portion of the effort and time spent by government officials in addressing wealth transfers and maneuvering to obtain positions in which they can direct such transfers.[102] The easier it is to obtain governmental favors the more lobbying should appear.[103] Also, as the value of the issues at stake increases one should expect greater expenditures as well.[104]

To this point we have largely focused on the costs associated with inter-group expropriation efforts, but analogous arguments apply in the context of simple corruption.[105] Corruption creates costs in terms of the resources spent in

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[100] Group A members may do this for a variety of reasons. For example, if they have their own methods of social control (for A members) besides official law enforcement then they may prefer to rely on those methods rather than official law enforcement. *See* Kelly D. Hine, *Vigilantism Revisited: An Economic Model of the Law of Extra-Judicial Self Help or Why Can't Dick Shoot Henry for Stealing Janet's Truck?*, 47 AM. U. L. REV. 1221 (1998).

[101] Even if lobbying did produce an efficient rule (i.e., an overall reduction of crime) it might be that there was too much lobbying to achieve that end or that an alternative means of influencing prosecutorial behavior would have lower costs. *See generally* GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING 11-27 (1989).

[102] *See* MUELLER, *supra* note 92, at 334 (citing G.S. Becker, *A Theory of Competition among Pressure Groups for Political Influence*, QUARTERLY JOURNAL OF ECONOMICS 371, 373-374 (August 1983)); *See generally* Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 201- 04 (1991).

[103] *See* MUELLER, *supra* note 92, at 334; Beermann, *supra* note 102, at 183.

[104] *See* Daniel Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 324 (1996); Arthur B. Laby, W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: the Civil Money Penalties*, 58 ALB. L. REV. 5, 50 (1994) (noting that more defendants are willing to invest in litigation against the SEC rather than settle since the penalties have been increased under the Remedies Act); Stephen J. Spurr, *An Economic Analysis of Collateral Estoppel*, 11 INT'L REV. L. & ECON. 47 (1991). Also, as the number of groups, political or otherwise, increase (e.g., the more heterogeneous the population) the more potential lobbying groups and the more likely that wasteful spending might occur. *See also* Guang-Zhen Sun & Yew-Kwang Ng, *The Effect of the Number and Size of Interest Groups on Social Rent Dissipation* (Draft)(on file with authors), (suggesting that the amount of resources expended in rent-seeking would probably first increase as the number of groups increased and then, after some point, begin to taper off).

[105] Note that a bribe might be efficient in some cases, much as lobbying for targeted enforcement might be. *See* Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L 877, 899 (2000). Such a situation would be subject to the same arguments as with targeted lobbying (if efficient). *See supra* note 99. *See also* Rebecca A Pinto, *The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L. Q. 1343, 1367 (1999) (noting that "private financing has the potential to further public values by providing a corrective offset of fiscal and other institutional influences on prosecutorial discretion that lead to inequitable allocation of criminal justice resources. Canceling out such influences would enable prosecutors to make charging decisions on a financially-level playing field and enhance the prosecutor's freedom to pursue cases and offenders most deserving of prosecution."); *See also* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

bribing the enforcement agent and the efforts of the agent in positioning himself to receive 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 perhaps 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, 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.[106]

The vertical fragmentation of the enforcement process means that each individual agent is in a position similar to that of successive owners of the pieces of a long toll road. One of the standard results of economics is that sum of the tolls charged by successive owners will be larger than the toll charged by a single owner of a road.[107] The reason is that successive owners do not take into account the fact that any increase in their individual tolls will reduce the revenue to the owners of the other pieces of the toll road. The same phenomenon is likely to be observed in the law enforcement process when corruption is rampant.

The problem here is entirely analogous to the familiar double-marginalization problem in the theory of vertical integration. *See* Andy C.M. Chen & Keith N. Hylton, *Procompetitive Theories of Vertical Control*, 50 Hastings L.J. 573, 623 (1999) (noting that "the monopolist manufacturer must worry about the 'double-marginalization' problem…the monopolist will apply a monopoly surcharge to the item he produces, and the distributor will apply an additional monopolistic surcharge to the same item at the downstream level."). A fragmented enforcement process allows several individuals to impose a monopoly surcharge for their services. A vertically-integrated enforcement process allows one individual to impose a surcharge. *See id.* at 624 (noting again that "the monopolist can eliminate this problem by vertically integrating forward, and transferring his own products at marginal cost to the downstream segment of the integrated unit."). The overall costs of corruption and reduction in service are considerably greater under the fragmented regime. *See* Schleifer & Vishny, *infra* note 134.

[106] We are not necessarily suggesting that law enforcement should be vertically integrated (this may raise "checks and balances" concerns), but we are saying that fragmenting enforcement can increase the amount of loss from corruption.

[107] *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 69 U. CHI. L. REV. 1, 23 (2001) (arguing that "under simple models of vertical control where the downstream firm is assumed to have market power, social welfare is unambiguously increased by the elimination of the double marginalization. One firm rather than two marks up the price of the upstream product, leading to a lower price and higher output."); *See* John E. Lopatka & Andrew N. Kleit, *The Mystery of Lorain Journal and the Quest for Foreclosure in Antitrust*, 73 TEX. L. REV. 1255, 1297 (1995) (arguing that "if the products were complements, their provision by a single supplier could increase efficiency, for monopoly provision of complementary products can avoid the kind of double-marginalization problem well recognized in the context of vertically related, or successive, monopolies. In essence, when complementary inputs are supplied by different monopolists, price may be higher and output lower than if both are supplied by a single seller.") For discussion of a related problem – the problem of the anti-commons see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets'*, 111 HARV. L. REV. 621 (1998); James Buchanan & Yong J. Yoon, Symmetric Tragedies: Commons and Anticommons Property, *Journal of Law and Economic*s, (*forthcoming 2000*); Francesco Parisi**,** Ben Depoorter, & Norbert Schulz, *Duality in Property: Commons and Anticommons*, University of Virginia School of Law, Law & Economics Research Papers Series, Research Paper No. 00-16 (Draft 2001) (on file with authors).

Although the costs of lobbying and corruption might be quite large that does not end the potential costs associated with this kind of behavior. In the context of the criminal process such lobbying, corruption, and general rent-seeking (and in particular the perception of this kind of behavior) might have effects on compliance with the law and with deterrence that need to be accounted for as well.

B. Deterrence and Other Costs from Rent-Seeking

In the context of the criminal process rent-seeking (if successful in any measure) has the effect of skewing the enforcement of the law. If members of society perceive (i) skewed enforcement (i.e., disproportionate enforcement) and (ii) that such enforcement is related to rent-seeking/lobbying efforts by certain groups (i.e., that law enforcement is "political") then compliance with the law and the deterrent effect of the law are likely to be compromised. The effects on compliance and deterrence are multi-faceted and we address some of them in the following sections.

1. Some deterrent effects of selectively enforcing the law

Selective enforcement of the law due to lobbying by certain groups can have corrosive effects on deterrence. In this section we consider two scenarios. First, 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 (case 1). Second, 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 (case 2).

In case 1, deterrence is likely to drop for both groups A and B. The reason is as follows. 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 (inducing drivers who fit the profile to stay off the roads).

Now, in case 1, the group A members will be under-deterred because they are facing low expected sanctions for engaging in undesirable activities (as law enforcement occurs less frequently against them due to their lobbying).[108] Consequently, they have an increased incentive to engage in these activities relative to where law enforcement was not biased in their favor. The deterrent effect on group B members would also be reduced. This is because they are now punished whether they have acted "good" or "bad."[109] In other words, the incentive to act "good" is reduced for group B members because the payoffs from acting "good" and "bad" have gotten closer. Thus, deterrence for both groups (A and B) drops.

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. For example, if groups A and B are geographically segregated, group A may choose to reduce potential crimes by Bs on As by apprehending all Bs who venture into their territory, whether or not the Bs are complying with the law.[110] Such a policy would make it costly for Bs to move among As, encouraging the Bs to stay in their own territory.[111] 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

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[108] *See* A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J. L. ECON. & ORG'N 99 (1989) (noting that if a potential defendant will not be prosecuted whether or not he obeys the law, he "will not obey the law, because there is a cost to obeying but no benefit (assuming, of course, that there is a benefit in disobeying)".

[109] *See id.*, at 104 (stating that "A type II error (a truly innocent defendant is found liable) lowers the incentive to obey the law because he will face liability even if he obeys, thereby reducing the benefit to him of obeying the law").

[110] *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); Tracy Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 203-4 (noting that "Law-abiding African Americans who are unable to physically separate themselves from victimizers might desire to draw legal boundary lines in order to reconstitute healthy, law-abiding communities around them. These law-abiding African Americans might argue in favor of calling upon the machinery of the state to make a distinction between themselves and law-breaking African Americans who reside in their neighborhoods. Under this view, imprisonment might be the most effective form of line-drawing because imprisonment distinguishes law-abiders from law-breakers by removing law-breakers from the community. By relying on incarceration, law-abiders can create physical distances between themselves and law-breakers. In this way, severe legal sanctions that lead to the removal of law-breakers from the community are akin to leaving the neighborhood. Indeed, this reasoning suggests that victimized law-abiding African Americans should welcome state enforced distinctions between law-abiding and law-breaking African Americans").

[111] This is one potential explanation for racial profiling, to the extent it exists. 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); John J. Donohue III & Steven Levitt, *The Impact of Race on Policing, Arrest Patterns, and Crime* (Draft 1998)(on file with authors).

budget setting, could easily result in a weakening at the substitution-effect level in deterrence among Bs.[112]

Case 2 presents the same potential under-deterrence problem for group A members because again they may 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 acts "good" he is probably not going to be prosecuted and if he acts "bad" he is more likely to be prosecuted.[113] However, given that A members are assumed to control the enforcement process, the more probable scenario is one in which their agent (the prosecutor) is unable, because of unfamiliarity or indifference, to distinguish complying from non-complying members of group B. With a prosecutor unable to distinguish the "good" from the "bad" among group B, a policy of targeting the bad in group B would be infeasible. This suggests that case 1, in which deterrence clearly falls, is the more likely outcome of selective enforcement.

2. Other costs: stigma effects, expressive effects, enforcement cost effects

Rent-seeking behavior may also reduce the stigma associated with the criminal law and thereby dilute deterrence. If the criminal label carries some stigma then that becomes part of the total sanction (i.e., the official sanction plus the stigma) for criminal behavior and influences deterrence.[114] If something reduces the stigma without a countervailing increase in the official sanction then deterrence is reduced because potential wrongdoers face a lower expected sanction. [115]

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[112] Also, group A members may want to have less enforcement against other group A members for a variety of reasons including that some group A crime may victimize group B members, group A may have its own methods of addressing crime by group A members on other group A members, and so forth. In the case of crime by A on A it is possible that A may prefer to avoid official law enforcement. This could involve issues of intra-group wealth extraction, other benefits from avoiding enforcement by officials (reputation, etc…), and that alternative means of policing A members may be available (e.g., social norms). If the social norms option is the driving force it may be that deterrence in group A would not suffer as a result of lobbying for less official enforcement because the social norms may engender adherence to the law or the norm. Of course, this raises all kinds of issues about whether the social norms track the law, are the norms efficient, and whether the amount of deterrence obtained through social norms is the same as the amount through official law enforcement. *See* Jonathan Simon, *Law, Democracy, and Society: Megan's Law: Crime and Democracy in Later Modern America*, 25 LAW & SOC. INQUIRY 111, 1119 (2000) (arguing that "in most of the original cases charges resulted in acquittals or were never brought at all, as juries, prosecutors**,** and police seemed to collude in sheltering concededly fringe elements of the white community").

[113] Since under this scenario, the marginal expected sanction either increases or stays the same, deterrence (at the substitution-effect level) remains intact.

[114] *See* Khanna, *supra* note 31, at 1508 – 9; David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L. J. 2547, 2561 (1995).

[115] *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997); Richard Moran, *Home Sweet Home: Given a Choice, Many Convicts are Now Opting for Jail Instead of Probation: Why?*, BOSTON GLOBE, October 29, 2000, at E1.

One suspects that the stigma from being labeled a criminal stems in part from a belief that the person so labeled has violated some societal norm meriting condemnation and has been adjudicated in a "fair and impartial" manner.[116] If, however, being labeled a criminal is perceived by members of your social circle as partially indicative of a political/biased use of the law, rather than that you are worthy of condemnation, then the stigma from the criminal label likely diminishes.[117] In this case the stigma from being labeled a criminal is less than the stigma suffered by someone labeled a "criminal" who is part of a group of people who believe that adjudication is fair and impartial to their group. [118]

This seems consistent with some anecdotal (and empirical) evidence that sometimes criminal sub-cultures form that do not consider the criminal label to be terribly stigmatizing (the criminal label might actually enhance one's respect amongst certain groups).[119] If there is a differential stigma impact when rent-seeking or lobbying is perceived to be a problem as compared to when it is not then the presence of rent-seeking reduces the stigma suffered by violators and hence reduces the deterrent impact of the criminal law. [120]

For reasons similar to those related to the stigma argument, greater rent-seeking is likely to reduce any "expressive" features of the criminal law. The expressive effects of the criminal law are argued to take many forms and we focus on two to highlight our argument.[121] First, that the criminal law expresses to society what is undesirable behavior and this encourages individuals not to engage in this activity because they respect (or otherwise value) the law (i.e., norm or law internalization). [122] If so, then a perceived increase in rent-seeking

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[116] *See* Paul H. Robinson & John M. Darley, *The Utility of Dessert*, 91 NW.U. L. REV. 453 (Winter 1997) (noting the message that being labeled a "criminal" sends to the community); Janice Nadler, *The Effects of Perceived Injustice on Deference to the Law*, at 9-10, Draft 2000 (on file with authors).

[117] *See* 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"); Dan Kahan, *supra* note 115, at 357 – 58; Nadler, *supra* note 116, at 10 (suggesting that, if the law is seen to be imposed in an irrelevant or immoral manner, it will not be deferred to).

[118] *See* POSNER, *supra* note 117, at 98; Kahan, *supra* note 115; Nadler, *supra* note 116, at 10. For this argument to work all we need is that stigma is different (and lower) if some part of your social circle will not ostracize you because of perceived misuse of the criminal process.

[119] *See* Kahan, *supra* note 115, at 357 (suggesting that sometimes gang members wear their convictions and prosecutions like "Badges of Honor"); Moran, *supra* note 115.

[120] This seems to suggest differential sanctions for different groups in society based on how much stigma they are likely to perceive from the criminal label. However, engaging in differential sanctioning may further exacerbate the perceived political use/misuse of law enforcement.

[121] *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L.REV. 1649, 1659 – 63 (2000)(citing THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 54 – 58(1963)).

[122] *See, e.g.*, Robert Cooter, *Do Laws Make Good Citizens? An Economic Analysis of Internalizing Legal Values*, U.C. Berkeley Law and Economics, Working Paper Series, p. 16. ; Dan Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603 – 04 (1996); Richard McAdams, *Legal Construction of Norms*, 86

can only serve to weaken this respect because the message that the activity is undesirable is clouded to some extent by the message that law enforcement is selective and biased. This reduces, one would expect, whatever ability the criminal law has to shape preferences and influence behavior outside of purely deterrence based arguments (focussing on expected sanction arguments).[123] Second, members of society may derive some utility from expressing condemnation.[124] Although this may be true in some instances the benefits inuring from this must be weighed against the costs of rent-seeking and how much the perception of rent-seeking reduces the utility from expressing condemnation.[125]

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 certain people will refuse to assist law enforcement. An "us" and "them" mentality may arise making it more difficult to solicit information and evidence.[126] This would increase the difficulty and costs associated with prosecutions, which in turn reduces the likelihood that wrongdoers would be sanctioned. As the probability of being sanctioned decreases the deterrent effect of the law is reduced because the expected sanction drops, all else equal.[127]

VI. METHODS OF CONSTRAINING RENT-SEEKING

Taken together the direct and deterrence-related costs of lobbying or rent-seeking seem significant enough to consider methods of constraining them subject to how much we want to spend monitoring prosecutorial behavior. In this Part we examine two structural methods of constraining prosecutorial behavior: procedural protections and "inefficient" punishments. We also discuss the implications of our theory for the jury's institutional role.

Constraining prosecutorial behavior to reduce rent-seeking related costs is, in a sense, analogous to the efforts of corporate law in constraining the agency

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VA. L. REV. 1649 (2000); Cass Sunstein, *Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022, 2025-29 (1996).

[123] *See* Kahan, *supra* note 122; Sunstein, *supra* note 122.

[124] *See* Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L.R. 691, 693 – 94; *see also* Interdisciplinary Program Series, *The New Chicago School Myth of Reality?*, 5 U. CHI. L. SCH. ROUNDTABLE 1, 3 (1998); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U.L. REV. 453, 472 (1997).

[125] *See generally* Kaplow & Shavell, *supra* note 60.

[126] *Cf.* Nadler, *supra* note 116, at 32 – 41 (discussing results of certain experiments which suggest that group identity does matter when law enforcement is perceived to be "unjust" reflected in willingness to commit unrelated wrongs and mock juror verdicts).

[127] One possibility worth noting is that if a group of people are reluctant to provide information to law enforcement about other members in their group (absent selective enforcement issues) then that might be a reason itself to proceed with selective enforcement in that group to increase the probability of being sanctioned. *See* Kay B. Perry, *Fighting Corruption At The Local Level: The Federal Government's Reach Has Been Broadened*, 64 MO. L. REV. 157, 162 (1999).

costs arising from the separation of ownership and control.[128] The prosecutor can be viewed as an agent for society in a manner similar to how a manager or employee is often viewed as an agent for a corporation.[129] However, unlike the corporate context, environmental factors that constrain the agency costs of private firms are not fully present in the case of governments. Since governments do not issue stock, we do not observe discounts in their share prices due to agency costs, nor do governments face the same risk of losing out to competitors because of agency costs as business enterprises do.[130] Hence, explicit constraints on rent-seeking, such as pro-defendant procedural protections, play a relatively important role in the public sector.

A. Procedural Protections

The argument for how procedural protections constrain agency costs in the criminal process is that they make using the criminal process costly for both prosecutors and for society. These costly protections should deter those who would seek to transfer wealth through the criminal process relative to where the protections were absent, and hence reduce the incentive to engage in, and the costs associated with, rent-seeking in the criminal setting.

Procedural protections increase costs to *society* because they require greater effort by the prosecutor to obtain convictions which increases the cost of bringing prosecutions as well as potentially increasing the number of false acquittals or increasing the number of meritorious cases not brought.[131] Prosecutors, because they are often rewarded when conviction rates are high, bear much of the brunt of the costs of these procedures because they make cases more difficult to prosecute and win.[132] The difficulty of using the criminal

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[128] *See generally* ROBERT C. CLARK, CORPORATE LAW (1986); WILLIAM A. KLEIN & J. MARK RAMSEYER, BUSINESS ASSOCIATIONS – AGENCY, PARTNERSHIPS, AND CORPORATIONS (4th ed. 2000).

[129] *See* Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115 (1997) (noting that "[a] prosecutor… is the agent of the people whom the office purports to protect."); Caroline Heck Miller, *Knowing the Danger from the Dance: When the Prosecutor is Punished for the Government's Conduct*, 29 STETSON L. REV. 69, 78 (1999) (stating that "[p]rosecutors are agents of the sovereign that employs them.").

[130] *See* CLARK, *supra* note 128, Ch. 4 (1986); Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 811 (1983) (arguing that different compensation schemes and techniques should have the effect of reducing conflicts of interest with fiduciaries.)

[131] *See* Kahan, *supra* note 115, at 389 (noting that "the 'exclusionary rule', the *Miranda* doctrine, and like constraints reduce the price of crime by lowering the probability that offenders will be convicted. The cost of such rights, then, consists of the resulting increase in crime, or the resources that must be invested- primarily in increased severity of punishment- to offset the rights discount on price of crime"). *See generally*. Atkins & Rubin, *supra* note 1; Cassell, *Guilty & Innocent*, *supra* note 1; Cassell, *Social Costs*, *supra* note 1; Donohue, *supra* note 1.

[132] *See* J. Mark Ramseyer & Eric B. Rasmussen, *Why if 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

process and the attendant costs involved makes it less useful as a wealth-extraction tool.

Thus, a key function of pro-defendant procedural protections is to 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. This works as follows. On the prosecutor's side, procedural protections raise the cost of targeting innocent parties. If the prosecutor targets innocent group B members, he is unlikely to be successful given all the pro-defendant procedures relative to where these protections are absent.[133] If he maintains his promise to target group B, he will have very few successful prosecutions, and will probably lose his job (as high conviction rates are important to prosecutors). This suggests that the prosecutor will demand a very high bribe in order to adopt a selective enforcement policy. Moreover, given the risk of losing his job, potential bribers should doubt the credibility of the prosecutor's promise to selectively enforce. Given the difficulty of implementing a successful selective enforcement policy, the doubtful credibility of the prosecutor, and the negligible benefits to both parties, the potential briber's willingness-to-pay should fall substantially. [134]

Procedural protections also make it more difficult for corruption to flourish. A prosecutor who threatens to arrest individuals on false charges would find it considerably more difficult to mount a credible threat against his victims in the presence of pro-defendant procedural protections relative to where these protections were absent. Hence, the prosecutor's power to "shake down"

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'.") *See also* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV 851 (proposing a system of incentives to effect prosecutors' conduct).

The difficulty of using the process and the attendant cost involved makes it less useful as a wealth-extraction tool than perhaps other options and should shift lobbying and rent-seeking away, to some extent, from the criminal process to other methods of influencing government behavior. *See* Paul H. Rubin, Christopher Curran, & John Curran, *Litigation Versus Legislation: Forum Shopping by Rent-Seekers*, Draft 1999 (on file with authors).

Note that the use of conviction rates, as opposed to some other measure(s), for assessing prosecutorial performance is an issue worthy of further exploration, but is currently outside the scope of this paper.

[133] *But see* Stuntz, *supra* note 14, at 27 – 28 (noting that while the constitution defines what the criminal law process looks like, it is prosecutors and defenders who define what issues and contests to bring) . We address some of these points and issues related to legislative lobbying in text accompanying notes 157 – 160.

[134] *See* A. Mitchell Polinsky & Steven Shavell, *Corruption and Optimal Law Enforcement*, J. PUB. ECON. *(forthcoming 2001);* A. Mitchell Polinsky and Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999). *See also* Kaplow & Shavell, *supra* note 60, at 961 n. 637. On the social costs of corruption, see ROBERT KLITGAARD, CONTROLLING CORRUPTION (1988); Susan Rose-Ackerman, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978); Pranab 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).

individuals for money in exchange for a promise not to bring charges should be considerably less in the regime with procedural protections. Even the prosecutor's ability to credibly promise not to enforce the law against a particular defendant should fall. For if the prosecutor charges the wrong person or no one at all, he most likely will be unsuccessful in obtaining a conviction for this crime (given pro-defendant procedural protections). Given his difficulty in charging and convicting an alternate candidate, the cost to the prosecutor of promising not to enforce against a particular defendant is relatively high (i.e., one less conviction), and the promise probably cannot be considered completely credible. These factors suggest the prosecutor will demand a large bribe. From the perspective of the potential defendant (who is in the process of a shake down), his willingness to pay a bribe falls since he is less likely to be convicted in the first place, and any promise by the prosecutor not to enforce cannot be regarded as completely credible.[135] We can then examine some protections to consider how they might help to constrain agency costs.

In this paper we have identified two major types of procedural protection: the reasonable doubt standard and the double jeopardy rule. Both reduce the prosecutor's power to selectively enforce and hence help to constrain agency costs. In this sense, they clearly fall within the analysis of this section because they simultaneously raise the cost to the prosecutor of implementing a selective policy and lower the value to the potential defendant 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. The double jeopardy rule aids in this task 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. For example, a prosecutor who loses his first case against a particular defendant could discover that his loss was due in large measure to the weak testimony of a non-credible witness. [136] Upon learning this, the prosecutor might have an incentive, in the absence of a double jeopardy rule, to coach his

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[135] 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. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal."); Eric B. Rasmusen *Stigma and Self-fulfilling Expectation 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 (i.e., without having to obtain a conviction). These instances are simply outside the scope of this paper.

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

originally non-credible witness in order to boost his credibility before a jury in a later trial.[137]

Our theory suggests that the reasonable doubt and double jeopardy rules work hand-in-hand as complementary rules. Both rules impose important restraints on a prosecutor who seeks to implement a selective or predatory enforcement policy. The reasonable doubt rule reduces the probability of success in each case of targeted enforcement. But no matter how low the probability of success is reduced, the prosecutor may still have an incentive to adopt a selective enforcement policy if he can bring successive actions against a particular defendant. Suppose, for example, that the probability of conviction is the same in every trial. In the extreme case in which the prosecutor can bring an infinite number of successive actions against the defendant, he is very likely to eventually get a conviction, no matter how small the probability of conviction in the individual trial.[138] 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.[139] In either of these cases (fixed probability of conviction or increasing probability of conviction), the reasonable-doubt rule alone is probably insufficient to dampen the prosecutor's incentive to selectively enforce. The reasonable doubt rule should be coupled with a double-jeopardy-like rule to substantially dampen the prosecutor's incentive to selectively enforce the law.[140]

B. Penalty Restrictions or "Inefficient Punishments"

Another way to constrain the costs associated with abuses of prosecutorial or governmental authority is to utilize restrictions on the size of penalties or the process by which they are levied. David Friedman has described the size restrictions as "inefficient" punishments.[141] This epithet is not meant to be pejorative. 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.[142] The argument is that "efficient" punishments may not impose large direct costs *on the state* and hence

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[137] *See id.*

[138] Suppose the probability of conviction in one trial is p. If the prosecutor can bring an infinite number of successive actions, each with the same probability of conviction, the likelihood of eventual conviction is $p + (1-p)p + (1-p)^2p + \ldots + (1-p)^Np$, which approaches 1 as N approaches infinity.

[139] *See Developments*, *supra* note 136.

[140] This statement is not meant to exclude alternate means of perhaps restraining prosecutorial retrials. For example, if in the initial trial the reasonable doubt standard required 95% certainty of guilt before conviction then we could require a 96% certainty of guilt in retrial number 1. If there was a second retrial then we could require a 97% likelihood of guilt and so forth. Even then, given the argument in *supra* note 138 it is doubtful that much would be gained through this approach.

[141] *See* Friedman, *supra* note 18, at 259.

[142] *See id.*, at 260 – 61.

prosecutors may be willing to use them to extract wealth from defendants.[143] However, "inefficient" punishments impose greater costs *on the state* than "efficient" punishments (e.g., the costs of maintaining prisons) and hence reduce the incentive of prosecutors and the state to use the criminal process to extract wealth.[144] Simply put, "inefficient" punishments increase the costs of using the criminal process relative to "efficient" punishments for the state thereby reducing the incentive of the prosecutor to use the criminal process for self-interested ends *relative* to where only "efficient" punishments were available. [145]

At least two types of penalty restrictions are relevant to this analysis: the prohibition of retroactive punishments and the prohibition on cruel and unusual punishments.[146] The latter restriction fits comfortably with the analysis here as well as Friedman's. The state could easily adopt a low-cost (for itself) system of punishment. Defendants could be executed, enslaved, or put into laboratories for scientific experimentation and the harvesting of organs and tissue. [147] Instead, we observe a system, in which the state forgoes the opportunity to extract all of the defendant's wealth in the form of a penalty, and prison terms force the state to forgo the full value 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 prohibition.[148]

Consistent with Friedman's argument, our analysis suggests that the adoption of "inefficient punishments" increases the cost of punishment to the state, relative to "efficient punishments", and at the same time reduces the amount a potential defendant would be willing to pay in order to avoid being charged with a crime. Since the latter effect is obvious, only the former effect deserves some discussion. The prohibition on cruel and unusual punishments reduces the potential incentive for the state or the prosecutor to punish innocent individuals in order to profit from their punishment. By raising the cost of punishment, or simply making punishment costly, the prohibition enhances the

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

[144] *See id.,* at 263 – 64.

[145] *See id.,* at 263.

[146] *See* U.S. CONST. ART I, § 9, CL. 3 (stating "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 (stating "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[147] *See* Friedman, *supra* note 18.

[148] For example, Malaysia, Morocco, Senegal, and the Ivory Coast do not have a rule prohibiting cruel and unusual punishment. Yet, the state in those countries has apparently not gone to the extreme of trying to profit from punishing the guilty. For information on Transparency International's Corruption Perceptions Index, see <http://www.worldbank.org/html/prddr/trans/>.

likelihood that the state will punish only the guilty.[149] It also dampens incentives individuals might have to become prosecutors in order to enrich themselves.

The prohibition of retroactive punishments – a restriction on the penalty imposition process – constrains rent-seeking at the legislative level. In the absence of such a restriction, interest groups could use the criminal process to confiscate the wealth of other groups or of particular individuals. 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.[150] The bill of attainder clause applies to legislative attempts to punish particular individuals without a trial.[151] As we will argue below, our approach to criminal procedure provides some insight into the doctrines courts have developed to deal with these challenges.

Although Friedman's analysis of inefficient punishments is generally consistent with ours, it does raise an interesting question – why do we need procedural protections when we could use inefficient punishments or vice versa? For example, if we thought our current level of inefficient punishments had not sufficiently reduced the costs associated with abuses of prosecutorial authority we could simply make punishment even more inefficient rather than creating a pro-defendant bias in criminal procedure. The presence of both methods of constraining prosecutorial behavior suggests that that there may be some advantages that the pro-defendant procedures possess that make them attractive relative to simply making punishments more inefficient.

The key difference between inefficient punishments and procedural protections has to do with how much of the cost of each method (the procedure or the punishment) the prosecutor bears. The costs of inefficient punishments appear to be largely borne by the state and society, but not particularly by the

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[149] The reason for why the incentive to go after the truly guilty increases because of inefficient punishments requires some explanation. An inefficient punishment increases the costs of convicting anyone (guilty or innocent), and hence increases the costs of convicting both types of defendants. This should result in the state (and the prosecutor) shifting more resources towards targeting the truly guilty rather than bringing cases against the innocent as the expected payoffs from convicting the truly guilty are probably higher than the expected payoffs from convicting the innocent as a general matter.

[150] *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).

[151] *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 *infra* 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.

prosecution. They may impose only an indirect cost on the prosecution. However, pro-defendant procedures impose more direct costs on prosecutors because they make obtaining convictions more difficult (i.e., the probability of winning decreases). Given that high conviction rates are important to many prosecutors for career reasons, and perhaps personal ones, we would expect prosecutors to respond more to these more direct measures than to indirect concerns about how much a punishment is costing the state.[152] This is especially so when many prosecutors are paid by local authorities and prisons are funded by state authorities.[153] Consequently, one might view procedural protections as being more direct means of influencing prosecutorial behavior than simply making punishments inefficient.[154]

This distinction between inefficient punishments (or more generally, penalty restrictions) and procedural protections suggests another sense in which rules designed to dampen rent-seeking may serve as complements. The procedural protections described earlier – the reasonable-doubt rule and the double-jeopardy rule – may work well in the short run in removing the incentives for the prosecutor to selectively enforce the law. However, if the background institutional structure is one that allows the state to profit in some sense 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. Eventually the procedural protections would be watered-down to a point that would enable self-interested enforcement agents, and their support coalitions, to reap the rewards from selective enforcement.[155] Thus, inefficient punishments and procedural protections can work as complements. [156]

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[152] *See* Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 88 (1999) (arguing that if a prosecutor feels his efforts will escape public notice, the prosecutor will expend less personal effort and the result will not be aligned with the public's desire to punish). In some respects one can view the procedural protections as alignment measures – trying to align prosecutors' interests with social welfare (or the benevolent state), whereas the inefficient punishments might be seen as constraints on a non-benevolent state.

[153] *See* Stuntz, *supra* note 10, at 20 – 37 (discussing the incentives of the different actors in law enforcement).

[154] Note that if punishments were "inefficient" then the state may want to constrain prosecutorial behavior and may do so by using pro-defendant procedural protections. However, it is not necessary for the state to have "inefficient" punishments before it might consider relying on procedural protections.

[155] *See* Stuntz, *supra* note 14, at 26 (arguing that despite pro-defendant protections, prosecutors have held conviction rates constant and lowered the average cost of prosecution by prosecuting "winning" cases). *See* Stuntz, *supra* note 10, at 6 – 15 (arguing that because criminal codes are so broad it gives a prosecutor the ability to selectively enforce).

[156] One point to note is that procedural protections, inefficient punishments, and other measures may work as substitutes to some extent as well. There may be some overlap with each kind of measure (even though there are differences too). Which is the optimal balance of measures is outside the scope of

This also suggests why we would not want to rely exclusively on procedural protections to reduce rent-seeking.

One might also ask why we should bother to have procedural protections if all that might happen is prosecutors find ways around them or groups in society substitute increased legislative lobbying for the now more costly prosecutorial lobbying. [157] Our response is two-fold. First, we do not suggest that procedural protections will perfectly align prosecutor's interests with social welfare. We are simply claiming that pro-defendant procedural protections reduce the incidence and costs of rent-seeking in the criminal enforcement process relative to where these protections are absent.[158] Second, an increase in legislative lobbying due to procedural protections does not mean that there has been no improvement in social welfare as a result of the procedural protections. Absent any kinds of constraints we would expect interest groups to lobby at all levels of the government process (e.g., investigation and enforcement, adjudication, legislation) until the marginal benefits from each kind of lobbying

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this current paper, but is a matter worthy of greater inquiry. Such matters invoke questions about things like why we should have these 3 procedures and this magnitude of inefficiency in punishments as opposed to, say, 4 procedures and a different magnitude of inefficiency in punishments.

In addition to the procedures discussed above there may be other areas of law that have some tendency to curtail self-interested behavior by prosecutors even though that may not be the primary reason for that area of law. Consider, for example, intent or mens rea requirements in the criminal law. *See* Cass & Hylton, *supra* note 18, at 45 – 53 (suggesting that intent requirements may constrain rent-seeking behavior as they limit the ability of litigants (whether plaintiffs or prosecutors) to threaten to bring suits in the antitrust context). By making conviction harder to obtain (due to the requirement of proving mens rea) we reduce the incentive of prosecutors to use the criminal law to benefit themselves. *See Mens Rea In Federal Criminal Law* 111 HARV. L. REV. 2402, 2419 (1998). Although this may sometimes be a benefit of intent requirements we argue that these requirements are different to the procedural protections we are considering in a number of ways.

First, intent standards are subject to some change by the legislature (witness the corporate crime area which has many strict liability offenses and over 120 mens rea standards at the federal level alone), whereas the Constitutional procedural protections are not that easy to change by the legislature. *See* William A. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049 (1992). Second, even if the intent requirement is not met there may be a lesser-included offense of which the defendant might be guilty. *See* Theodore E. Lauer, *Burglary In Wyoming*, 32 LAND & WATER L. REV. 721, 786 (1997). If so, the prosecutor can still threaten the defendant with that lesser offense (although since it probably carries a less severe penalty than the mens rea offense the threat may not be as strong). *See* Stuntz, *supra* note 14, at 7 (noting that the use of simple traffic laws to procure reasonable suspicion and sodomy laws in sex cases are means that prosecutors use to punish defendants without proving the real crime). However, if there is a violation of a procedural protection it will be difficult to convict the defendant at all (absent harmless error or some other exception). *See* DRESSLER, *supra* note 4, at 57 – 61 (discussing harmless error doctrine). Third, intent requirements may be justified by many other things besides a concern with rent-seeking, whereas procedural protections appear more clearly designed to target abusive behavior by prosecutors. *See* Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 *passim* (1993); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1247 – 49 (1985). Thus, although there may be other ways to reduce rent-seeking costs it would appear that pro-defendant procedural protections may be more direct and effective means of constraining these costs than exclusive reliance on other means of impacting prosecutorial behavior.

[157] *See* Stuntz, *supra* note 14, at 27 – 28, 30.

[158] *See id.*

equaled the marginal costs.[159] This division of lobbying efforts should provide the highest returns to interest groups. Further, it seems safe to assume that lobbying is subject to diminishing returns (i.e., after a certain point the payoffs from lobbying in one sphere begin to diminish relative to earlier expenditures). When we impose pro-defendant constraints we make the costs of rent-seeking higher in the criminal enforcement context and drive some of the lobbying in that sphere into some other activity (e.g., lobbying for legislation). By assumption, this reduces the gains to the interest groups relative to where there were no protections.[160]

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.[161] 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

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[159] *See* Khanna, *supra* note 35, Part V (discussing a similar argument in the context of expenditures at different trial and appeal levels).

[160] Assume that if there were no constraints interest groups would expend resources in the amount of $100 in legislative lobbying and $100 in enforcement lobbying resulting in a gain of $250 to the groups (a net gain of $50). When we impose pro-defendant constraints what we do is to make the costs of rent-seeking higher in the criminal enforcement context and drive some of the lobbying in that sphere into some other activity (e.g., lobbying for legislation). By assumption, this reduces the gains to the interest groups (the pre-constraint equilibrium produced the highest net gain to the groups) relative to where there were no protections. Thus, now we may have $150 spent on legislative lobbying and $50 in enforcement lobbying providing a gain of $205. In other words, the abuse defendants suffer (i.e., the wealth extracted) in total should be less than without the protections (i.e., $205 versus $225). Whether this amount should be reduced further, how, and at what cost is outside the scope of this paper. *See* Stuntz, *supra* note 14, at 75 – 76 (discussing how the constitution should be restructured to prevent abuses to criminal defendants). *See also* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1891-95 (2000) (discussing how prosecutorial discretion undermines the goals of criminalization). Our point is that just because procedural protections force a shift in lobbying activity to a different level of government (i.e., from enforcement to legislation) does not mean that the harm to society is the same – it is still less than when the constraints were absent. Further, some of the procedural protections and constitutional law doctrines are targeted at making rent-seeking in the legislative process more difficult (e.g., void-for-vagueness and penalty restrictions). Penalty restrictions work to impair rent-seeking because "…the cost that enforcers can impose on defendants is less and because the cost to the enforcement system of carrying out the threat is greater." Friedman, *supra* note 18, at 268.

[161] *See* Duncan *v.* Louisiana, 391 U.S. 145, 156 (1968) (arguing that "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, n. 14 (1992) (arguing that because the new breed of prosecutors is less accountable to society and his peers, the jury may stand as the as the only effective check on the prosecutorial power.)

individuals in the law enforcement process. [162] 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 also provides some insight into the original function of challenges to the jury's composition, including the controversial problem of peremptory challenges. Challenges may be put to either the whole array of jurors or to individual jurors. Blackstone explains that

> challenges to the array are at once an exception to the whole panel, … and they may be made upon account of partiality or some default in the sheriff, or his under-officer who arrayed the panel. . . Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array.[163]

In other words, the fundamental common law rationale for permitting challenges to the whole jury is the suspicion, no doubt grounded on evidence, that the sheriff chose the jurors in order to maximize his chances of obtaining a conviction. Challenges to the *whole array* were apparently permitted to prevent the sheriff from implementing a selective enforcement policy.

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. [164] Peremptory challenges were granted only to the defendant.[165] Although peremptory challenges have come under attack more recently as a form of invidious discrimination, the original purpose is somewhat easier to see in the context of a rent-seeking model.[166] One could view the peremptory, in this analysis, as giving the defendant a zone of unquestioned authority in the choice of jurors, so 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 always fall back on his peremptory challenges. To the extent that this obstruction stood in

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[162] An alternative explanation for the unanimity requirement – that it reduces false convictions may not be terribly convincing. *See* Feddersen & Pesendorfer, *supra* note 64 *(*arguing that under plausible assumptions the unanimity requirement may result in an increase in false convictions relative to a supermajority vote requirement).

[163] *See* BLACKSTONE, COMMENTARIES, *supra* note 24, at 359.

[164] *See id.*, at 361 – 63.

[165] *See id.*, at 362.

[166] *See* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140 (1994) (holding that the Equal Protection Clause prohibits gender discrimination in the use of peremptory challenges); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding the prosecutor's peremptory challenges based solely on race were unconstitutional under the Equal Protection Clause.)

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.[167]

If, as we have argued, constraining rent-seeking costs provides the core justification for procedural protections then it becomes important to consider how this justification squares with some details of legal doctrine. We consider this in the next Part.

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[167] In addition, *when* the right to a jury trial is available may be consistent with a rent-seeking approach as well. Jury trials are available as of right for most criminal cases except those that carry trivial or fairly small penalties. *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) (holding that "there is a category of petty crimes or offenses which is not subject to the 6th Amendment jury trial provisions"). This is consistent with rent-seeking because trials that carry very small or trivial penalties may not be particularly attractive means with which to extract wealth for prosecutors. The threat the prosecutor can generate with paltry penalties is quite small and hence so is the concern with rent-seeking relative to where penalties are larger. *See* Friedman, *supra* note 18, at 268. For such small sanctions the costs of the jury trial are probably not justified by any reduction in rent-seeking (which is probably small in this context).

Further, alternative explanations for the right to a jury trial do not appear to provide as complete a picture as they might if they considered concerns with rent-seeking. One potential explanation for the right to a jury trial is that society values the expression of the popular will as reflected in a jury decision. *See* Spaziano v. Florida, 468 U.S. 447, (1984) (Stevens, J. dissenting in part) (arguing that the right to have an authentic representation of the community's views on the determination that must precede a deprivation of liberty supports the constitutional entitlement to a trial by jury). If this were the only purpose behind the right to a jury trial we would expect all jury decisions to be unreviewable. However, this is not the case because the law permits jury convictions to be appealed but not jury acquittals. *See* Kepner v. United States., 195 U.S. 100 (1903). *See also* Steinglass, *supra* note 35, at 354 – 55 (1998).

Another potential explanation for the right to a jury trial is that it either reduces erroneous decisions relative to bench trials or is less likely to falsely convict relative to bench trials. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 6-7 (1971). This argument is not particularly convincing because it is a little difficult to believe that jury trials are likely to be more accurate (i.e., less error prone) than bench trials. One doubts there is any empirical evidence to support this result and our legal system also seems to suggest that jury trials may be more prone to errors than bench trials. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 126-27 (1986) (stating that "[w]e are thus led to the conclusion that jurors may not always be able to follow the law as it is intended to be."). Much of the law of evidence seems to try to protect the jury from misperceptions and bias, whereas we seem less concerned with these matters for bench trials. *See, e.g.,* FED. R. EVID. 103(C), 403. This suggests bench trials are probably more accurate than jury trials overall or at least not less accurate as a general matter.

It may be, however, that we believe juries are less likely to falsely convict compared to bench trials. It is not entirely clear why we would believe this if we think bench trials are generally more accurate. Perhaps the argument is that judges are more biased against defendants than a jury of the defendant's peers as judges tend to be in quite a different socio—economic strata as compared to most defendants. *See* HANS & VIDMAR, *supra* (noting that "[f]or criminal trials the pattern disagreement shows that the jury was usually more lenient toward the defendant than was the judge."); Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1340 (2000). There may be some empirical evidence supporting the differing rates of false convictions (or maybe tied to it). *See generally* KALVEN & ZEISEL, *supra.* Perhaps this is true, but when phrased this way it appears more consistent with concerns about rent-seeking. This is because this suggests that judges as a group may discriminate (i.e., use the criminal process) against criminal defendants as a group. If so, then this justification squares well with a rent-seeking approach. Also even if jury trials result in fewer false convictions and more false acquittals than bench trials the issue is raised about whether the asymmetry is desirable. It may be too severe on traditional error cost grounds for the same reason that the reasonable doubt standard may be too severe on traditional error cost grounds.

VII. APPLICATIONS OF POSITIVE THEORY

We have focused on three major types of procedural protections: the reasonable doubt standard, the double jeopardy rule, and the right to a jury trial. We have also discussed "penalty restrictions", such as rules against cruel and unusual punishment, ex post facto punishment, and bills of attainder. However, we have been concerned so far with explaining broad institutional features. In this Part we extend the argument by taking a more detailed look at the case law associated with some of these pro-defendant protections. Since criminal procedure is a vast area of the law, we will provide only a sketchy analysis here. We claim that the theory developed in this paper provides a good positive theory 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. [168] Not only does the overall structure of Double Jeopardy seem to reflect rent-seeking concerns, but also some of the different aspects of Double Jeopardy seem to reflect this concern as well.[169] We focus on three aspects to highlight how Double Jeopardy displays concerns with controlling abuse of the criminal process by prosecutors in addition to being concerned with the number and types of errors.

One aspect of Double Jeopardy that has attracted some attention is the treatment of appeal rights. In *Kepner* v. *U.S.*, the Supreme Court held that appeal rights are asymmetric,[170] in the sense that the defense generally can appeal any conviction, but the prosecution's right to appeal acquittals is severely limited. [171] On its face, this rule seems like it might reduce the number of false convictions and increase the number of false acquittals relative to symmetric appeal rights because it denies the prosecution the ability to correct false acquittals at the trial

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[168] *See* Benton v. Maryland, 395 U.S. 784, 796 (1969) (noting that the rationale for double jeopardy includes the policy against allowing multiple prosecutions that will enhance the possibility that the innocent may be found guilty).

[169] *See* Stith, *supra* note 35.

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

[171] *See* 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); Stith, *supra* note 35, at 13, 18.

level, while also denying the prosecution the ability to turn correct acquittals into false convictions through the appeals and retrial process.[172] However, prior analysis reveals that, on closer inspection, this is not necessarily the case.[173] This is because not only are the above mentioned effects possible, but also so are some countervailing effects. For example, by giving the prosecution only one shot at obtaining a conviction (i.e., the initial trial) we may provide the prosecution with an incentive to increase spending in the initial trial relative to spending in the initial trial under a symmetric appeals rights regime.[174] This may lead, all else equal, to an increase in the number of convictions (and perhaps false convictions) in the initial trial relative to symmetric appeal rights.[175] Thus, the effects of asymmetric appeal rights on false convictions may not be very clear or significant.[176] Similar arguments suggest that false acquittal effects are likely to be small and probably ambiguous.[177] The overall result is that it is not at all clear whether false convictions or false acquittals are actually reduced or increased (much) as result of asymmetric appeal rights. [178]

In light of this, it seems doubtful that traditional error-cost arguments are a sufficient basis for asymmetric appeal rights. However, if we add concerns with rent-seeking and self-interested prosecutors then a stronger rationale for asymmetric appeal rights emerges.[179] 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. [180] Given the unanimity requirement and the jury's composition after the defendant's challenges, the *Kepner* rule

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[172] *See* Khanna, *supra* note 35, at 29 – 30.

[173] *See id.,* at 22 - 53.

[174] *See id.,* at 22 – 47.

[175] *See id.*

[176] Note that given that there are few acquittals (both in symmetric and asymmetric appeal rights jurisdictions) and that where the prosecutor is allowed to appeal they do so infrequently, one suspects that the false convictions reducing or increasing effects are likely to be small because few resources are being saved by prohibiting the few prosecutorial appeals that might arise under symmetric appeal rights. *See id.,* at 33 n. 120, 39 – 40.

[177] *See id.,* at 47 – 48. Under asymmetric appeal rights at least two effects on false acquittals are possible. First, we might *increase* false acquittals because the prosecution cannot appeal erroneous acquittals. Symmetric appeal rights would permit some of these incorrect acquittals to be appealed and presumably corrected. Second, we might *decrease* false acquittals because if the prosecution does spend more in the initial trial under asymmetric appeal rights then acquittals obtained in these hard-fought initial trials are more likely to be correct ones, relative to acquittals obtained under symmetric appeal rights regimes. Although the net effects depends on many factors, the crucial point is that false acquittals might not unambiguously increase. *See id.*

[178] Thus, it may be difficult to say, as a general matter, which effect will dominate. *See id.,* at 52 – 53.

[179] *See id.,* at 68 – 70.

[180] *Cf.* Westen & Drubel, *supra* note 35, at 122 – 55 (discussing the role of jury nullification in the context of asymmetric appeal rights).

increases the difficulty facing any prosecutor who mounts a selective enforcement campaign.

Justice Holmes's dissent in *Kepner* is instructive largely because it focused on the wrong theory for asymmetric appeal rights. Holmes argued that the majority's decision in *Kepner* made no sense if understood as a rule preventing retrials, because some retrials would occur following a successful *defense* appeal of a conviction. [181] However, this is an incomplete and inadequate rationale for the decision in *Kepner*. The theory we advance provides a superior rationale for the outcome in *Kepner*. Under our theory the Double Jeopardy rule is not designed for the sole purpose of controlling or preventing retrials. Its purpose is to prevent prosecutors from successfully implementing a selective or targeted enforcement policy. A regime in which prosecutors could appeal acquittals *ad infinitum* would be much more vulnerable to selective enforcement pressures than one where they could not.[182]

Another area of Double Jeopardy that appears to evince some concern with prosecutorial abuse is the treatment of mistrials.[183] 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 very likely and may then try to have a mistrial declared by the court to try to get another shot at the defendant.[184] If we permitted the prosecution to do this and bring another trial then the prosecution would have tremendous potential to abuse the process by having mistrials declared whenever the prosecution thought it might not win the initial trial. This may increase the incentive to engage in selective enforcement and induce considerable rent-seeking behavior.[185]

The law appears to reflect these concerns in the way in which 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 greatly 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. [186] This is consistent with our approach because if the

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[181] *See* Kepner v. United States, 195 U.S. 100, 134-35 (Holmes, J., dissenting) (1903).

[182] *See* Lockhart v. Nelsen, 488 U.S. 33, 42 (1988); Ashe v. Swenson, 397 U.S. 82, 91 (1978); United States v. Scott, 437 U.S. 82, 91 (1978). This is similar to the argument in *supra* note 138.

[183] *See* Steinglass, *supra* note 35, at 359.

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

[185] This concern is very similar to that discussed in the context of asymmetric appeal rights. At the same time if we never permitted the prosecution to bring another trial after a mistrial we would give the defendant a great deal of strategic power to inject matters that might lead to a mistrial when a conviction appears likely. *See generally* Vikramaditya S. Khanna, *The Mystery of Mistrials* (Draft 2001).

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

defense is seeking a mistrial the chances are that the prosecution is not likely to be using the mistrial process to seek another trial to go after the defendant *relative* to where the prosecution initiates the mistrial over defense objections.[187] An exception to this is 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.[188] This is also consistent with our rent-seeking approach because in such cases the prospect for abuse in a second trial is fairly high relative to where the prosecutor did not induce the defense's motion for a mistrial.[189]

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.[190] This is generally consistent with our approach because the prospects for prosecutorial

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[187] See Schulhofer, *supra* note 184, at 468-69.

[188] *See* Arizona v. Washington, 434 U.S. 497, 508 (1978); *See also* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 53 (1995). In *Oregon v. Kennedy*, the Supreme Court held that the prosecutor must intend to provoke a mistrial motion in order for the defendant to be free from reprosecution. *See Kennedy*, *supra* note 186, at 679. In *Kennedy*, the prosecutor asked a witness whether he did not do business with the defendant because he was a crook and the Court found this to be bad faith conduct on the part of the prosecution, but not enough to invoke the reprosecution exception. *See id. See* 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 "the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, 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").

[189] *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 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. In *Commonwealth v. Warfield*, the Supreme Court of Pennsylvania found the requisite proof of prosecutorial intent in order to justify an application of double jeopardy. *See* Commonwealth v. Warfield, 227 A.2d 177 (Pa. 1967). Defendant was indicted for murder and voluntary manslaughter. *See id.*, at 178. The trial judge suppressed the defendant's confession on constitutional grounds. *See id.*, at 178. However, the District Attorney revealed in his opening statement that the defendant had made a confession to the police. *See id.*, at 178. Subsequently, the defendant moved for a mistrial. *See id.*, at 179. The District Attorney admitted that he sought to induce the defendant to seek a mistrial so that the Supreme Court of Pennsylvania would rule on the suppression of the confession. *See id.*, at 178 – 79. The court found that, under the double jeopardy clause, the defendant could not be tried again for first-degree murder. *See id.*, at 180 – 81. However, the court's ruling did not preclude the Commonwealth from trying the defendant for second-degree murder or voluntary manslaughter. *See id.*, at 181.

[190] *See* Steinglass, *supra* note 35, at 360. *See also* Arizona v. Washington, *supra* note 188, at 505; WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE 1176-80 (3d ed. 2000).

abuse of the mistrial process are greater when the prosecution seeks a mistrial over defense objections, as compared to when the defense seeks or supports a mistrial.[191] In addition, the factors that go to showing whether a "manifest necessity" is present largely appear to ascertain whether the prosecutor was trying to abuse the criminal process or get a mistrial in order to avoid a loss in the initial trial. [192] For example, a hung jury leading to a mistrial does not present the same specter of potential prosecutorial abuse as might the injection of prejudicial error by the prosecutor to obtain a mistrial.[193] In the former case the prosecution is often granted another trial while the latter case will normally not result in another trial. [194] 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.[195] These factors are all consistent with a constraining rent-seeking approach.[196]

Finally, consider the on-going debate about whether Double Jeopardy protections should apply to nominally "civil" suits brought by government agencies that otherwise appear "punitive".[197] The courts have generally not permitted Double Jeopardy protections to apply to nominally "civil" suits, however, if it can be shown that the "civil" suit is in reality a form of "punishment" then Double Jeopardy protections may apply.[198] The courts seem to rely in some measure on the following factors to determine if a "civil" suit is in reality "punishment":

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable to it;

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[191] *See* Schulhofer, *supra* note 184, at 468-69**.** *See also* DRESSLER, *supra* note 4, at §32.02.

[192] *See* Schulhofer, *supra* note 184, at 468-69.

[193] *See* Steinglass, *supra* note 35, at 361.

[194] *See* Schulhofer, *supra* note 184, at 487.

[195] *See* DRESSLER, *supra* note 4, at 607.

[196] *See* Schulhofer, *supra* note 184, at 454 (noting that "…reprosecution may be barred even though no adjudication results from the first proceeding. The doctrine thus provides more meaningful protection against the danger of governmental harassment and the burden of repeated trials…"). Schulhofer also makes the point that "A number of courts have barred retrial even when mistrial was triggered by absence of the defendant, impermissible cross-examination, or persistently objectionable behavior by defense counsel." *See* Schulhofer, *supra* note 184, at 484.

[197] *See generally* Cheh, *infra* note 281. *See also* Mann, *infra* note 281, at 1869-73.

[198] *See* United States v. Halper, 490 U.S. 435, 449 (1989); U.S. v. Ward, 448 U.S. 242, 248-249 (1980).

> and (7) whether it appears excessive in relation to the alternative purpose assigned to it.[199]

Many of these factors appear to be correlated with concerns about rent-seeking. For example, consider the concern with the magnitude of the sanction (7) or whether it involves an affirmative disability (1). As the civil sanction becomes larger in magnitude (either in terms of monetary or non-monetary sanctions) then the ability of the prosecutor to extract wealth increases.[200] This is because the prosecutor has a bigger threat to hold over the defendant as sanction severity increases. The other factors may also represent concerns with reducing rent-seeking and appear consistent with our approach.[201] Double Jeopardy, however, is not the only area of criminal procedure that appears to reflect rent-seeking concerns. [202]

B. Ex Post Facto Clause

The ex post facto clause bars retroactive application of certain changes in the criminal law. [203] The standard justifications for this rule are that it provides notice to defendants about what is illegal and the sanction for it, as well as constraining the government from passing arbitrary or vindictive legislation against a particular defendant.[204] The prohibition is only concerned with matters that amount to "punishment"[205] and applies more frequently in the context of legislative decisions as compared to judicial decisions. [206]

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[199] Hudson v. United States, 522 U.S. 93, 99 (1997); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 - 169 (1963).

[200] *See* Friedman, *supra* note 18, at 268.

[201] Some of the other factors (e.g., scienter, historically regarded as punishment) may work as proxies for the kind of stigma associated with the particular civil wrong. *See* Cheh, *infra* note 281, at 1352-54. If the wrong appears like what most people consider criminal then the stigma may be quite high thereby giving the prosecutor greater ability to extract wealth. The fourth and fifth factors suggest that one important purpose for the doctrine in this area is to discourage enforcement agents from substituting civil enforcement for criminal enforcement in order to evade the procedural protections that come along with criminal enforcement. *See id.* at 1345, 1354-57, 1394.

[202] We should note that we are not claiming that every aspect of Double Jeopardy case law (which is not generally considered a model of clarity and consistency) matches up with a rent-seeking theory. *See* Albernaz v. United States, 450 U.S. 333, 343 (1981) (noting that the Double Jeopardy decisional law is "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"). However, we do suggest that some important parts of Double Jeopardy seem to display a concern with rent-seeking. Second, simply because Double Jeopardy may address concerns of prosecutorial abuse does necessarily mean that it is the best place to address those concerns. Many of these concerns, especially the mistrial context, might be better addressed under other parts of the Constitution (e.g., Due Process), but we do not make any comment on that issue at this time. *See* Akhil Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1809 (1997).

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

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

[205] The term "punishment" is not the same as the label "criminal". Sometimes an act labeled "civil" by the legislature will nonetheless 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

Traditionally the ex post facto rule applies in the four contexts set out in *Calder* v. *Bull*.[207] These are: (1) when the legislature creates a new criminal law it may not be applied retroactively to behavior that was not criminal at the time it occurred; (2) when the legislature removes elements from the definition of a crime or otherwise increases the severity of a crime (making it a more serious crime than when it occurred) these changes may not be applied retroactively; (3) when the legislature increases the punishment for a particular crime then this change may not be applied retroactively; and (4) when the legislature changes the rules of evidence or changes the requirements for testimony relative to what they were when the act occurred then the changes may not be applied retroactively.[208] Contexts (2) and (3) are often considered as one.[209]

Context (1) is seldom brought into question in modern times but it still represents the quintessential instance of the ex post facto prohibition.[210] It represents an obvious instance of where the government and the prosecutor are abusing their discretion and targeting a particular defendant probably in response to some perceived political, or other, gain they may receive. [211] This seems to fit easily within our approach to procedural protections – constraining the costs associated with abuse of discretion.

Contexts (2) and (3) seem to still arise in some form in modern times.[212] They also represent instances, like Context (1), where the concern with

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

[206] This is because the prohibition appears in Art. I of the U.S. Constitution, which deals with legislative power and not in Art. III, which deals with judicial power. *See* LAFAVE & SCOTT, *supra* note 204, at 97 - 100.

[207] *See* Calder v. Bull, 3 U.S. 386 (1978).

[208] *See id.* at 390.

[209] *See* LAFAVE & SCOTT, *supra* note 204, at 97 n.3*;* NOWAK & ROTUNDA, *supra* note 203, at 428.

[210] *See* LAFAVE & SCOTT, *supra* note 204, at 98.

[211] *See* David Friedman, *Making Sense of English Law Enforcement in the 18th Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475 (1995).

[212] Dobbert v. Florida, 432 U.S. 282 (1977) Malloy v. South Carolina, 237 U.S. 180 (1915); Hernandez v. State, 43 Ariz. 424 (1934); Lindsey v. Washington, 301 U.S. 397 (1937). The ex post facto prohibition will also be violated if a statute eliminated a former element of the offense or took away a defense that was formerly available. *See* Beazell v. Ohio, 269 U.S. 167 (1925); Kring v. Missouri, 107 U.S. 221 (1882) (noting that "the new Constitution of Missouri does take away what, [by] the law of the State when the crime was committed, was a good defence to the charge of murder in the first degree."); Thompson v. Utah, 170 U.S. 343 (1898) (arguing that "the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is ex post facto in its application to felonies committed before the Territory became a State, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offence, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.").

prosecutors abusing their discretion and engaging in selective enforcement is significant.[213] Thus, these contexts also fit with our approach.

A related issue is what happens when the government passes a law that changes something related to parole requirements or privileges.[214] In this context the courts have adopted something of a sliding scale approach. In certain cases the changes, when applied retroactively, may violate the ex post facto clause, whereas in other cases the changes may not violate the clause even when applied retroactively.[215] We think our theory provides the best explanation for these cases.

Consider a fairly recent US Supreme Court decision – *California Dept. of Corrections* v. *Morales*.[216] *Morales* involved a case where the California State government changed the rule (contained in a statute) on reconsideration hearings for prisoners who had their first attempt at obtaining parole rejected. [217] The old rules provided for annual reconsideration for such inmates and the new rules provided for the parole board to defer hearings for up to 3 years if the board "finds that it is not reasonable to expect that parole would be granted… during the following two years and states the basis for its findings". [218] In other words the new rule changed the statutory scheme and granted *additional power and discretion* to the parole board. The Court held that this rule, when applied retroactively, did not violate ex post facto because there was only a remote likelihood of obtaining parole in those cases where the new rule applied (i.e., the new rule required parole board to believe that there was no reasonable chance to receive parole before deferring the hearings).[219] Thus, there was only a speculative possibility of really extending the prison term through this new rule (as there was little chance parole would be granted even if an earlier hearing had

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[213] In the older cases any change (whether to increase or decrease the punishment) might have violated ex post facto if applied retroactively. *See* In Re Tyson, 13 Colo. 482 (1889); Commonwealth v. McDonough, 95 Mass 581 (1866). However, now that has changed so that a decrease in punishment is unlikely to violate ex post facto. *See* U.S. v. Stewart, 1993 U.S. App. Lexis 17634, *10, 1993 WL 265147, **3 (10th Cir. 1993) (noting that "the framers of the Ex Post Facto Clause intended it to preclude only increased punishment for preexisting criminal conduct"). *See also* Miller v. Florida, 428 U.S. 423, 430 (1987). The older cases are consistent with our approach because they deter potential defendants from lobbying to increase sentences for other groups and from lobbying to decrease sentences for themselves. The more recent cases, however, seem to provide for asymmetric protection. *See* U.S. v. Stewart, *supra*. That is, they protect against lobbying that increases sentences for a particular group, but do not stop parties from lobbying against decreases in sentences for themselves. This may be desirable because either this form of rent-seeking is addressed elsewhere (say in anti-corruption statutes) or because a rule that banned ex post facto decreases in sentences may not stop lobbying much as the defendant would simply shift their efforts to lobbying the prosecutor not to bring a case – a matter that cannot be reviewed in court.

[214] *See* 16A Am. Jur. 2d, Constitutional Law §643.

[215] *See* Garner v. Jones, 120 S.Ct. 1362 (2000); California Dept. of Corrections v. Morales, 514 U.S. 499 (1995); Weaver v. Graham, 450 U.S. 24 (1981).

[216] *See* California Dept. of Corrections v. Morales, 514 U.S. 499 (1995).

[217] *See Morales, supra* note 216, at 501.

[218] *See id.* at 503.

[219] *See id.* at 513.

occurred).[220] This suggests little room for abuse of discretion or increase in discretion because the Parole board would probably have denied parole anyway so that delaying the hearings was not likely to significantly increase the risk of the defendant spending a longer period of time in jail.[221] Given this small risk the concerns behind the ex post facto clause did not seem triggered.

This approach matches nicely with ours, which is a concern with the potential for rent-seeking activities following from an increase in prosecutorial / parole board discretion. In *Morales* although there was what appeared to be an increase in discretion it was fairly well constrained. This is because the board could only defer hearings for those prisoners that had no reasonable chance of parole. If a prisoner had little chance of parole anyway then the scope for abusing discretion should be quite limited and the concerns with rent-seeking more muted.[222]

Context (4) involves instances where changes in the standard of proof and rules of evidence are applied retroactively. This is prohibited by the ex post facto clause.[223] One of the older English cases establishing this point involved a case where the defendant had convinced a co-conspirator in treason to flee the country.[224] The English Parliament responded by reducing the number of witnesses needed to convict for treason, which the court held to violate the ex post facto prohibition.[225] This case fits neatly into our approach as it involves an instance where the legislature changes the law in order to target a particular defendant.

More recent case law has adopted a more nuanced approach. For example, the new case law distinguishes between rules that affect witness competency and rules that change the quantum of evidence needed to convict

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[220] *See id.* at 509, 514. The Parole board was required to provide reasons for its decisions too. *See Morales*, *supra* note 216, at 511.

[221] *See id.* at 512.

[222] The US Supreme Court has recently upheld the *Morales* decision in Garner v. Jones, 120 S.Ct. 1362 (2000). The facts in *Garner* are similar to *Morales* in that the parole board was able to delay hearings on parole as a result of a regulatory amendment (not a statutory change as in *Morales*). *See Garner, supra,* at 1366 – 69. The Court remanded and required a finding on whether there was a "significant risk" under *Morales. See id.*, at 1370. There are some differences between *Garner* and *Morales.* In *Garner* the regulatory amendment applied to a broader class of prisoners than in *Morales* and in *Garner* the amendment did not, arguably, change the parole board's discretion – both before and after the amendment the parole board had complete discretion to grant parole by statute. *See id.*, at 1369 – 71. The change only helped guide that discretion. *See id.*, at 1369. In *Morales*, the statutory change did increase board discretion. *See Morales, supra* note 216, at 507. This difference may be a reason not to apply the ex post facto prohibition here (as there may not appear to be an increase in discretion on the facts of *Garner*). This seems the implicit approach of Justice Scalia in his concurrence. *See Garner, supra,* at 1371 (Scalia, J. concurring).

[223] *See* Walker v. State, 433 So. 2d 469 (Ala. 1983); Plachy v. State, 239 S.W. 979 (1922); Thompson v. Missouri, 171 U.S. 380 (1898); LAFAVE & SCOTT, *supra* note 204, at 97 – 101.

[224] *See* 9 T. MACAULAY, HISTORY OF ENGLAND, 31, 171-173 (1899).

[225] *See id.* at 270.

defendants. In *Carmell* v. *Texas*,[226] the US Supreme Court held that a change in the law regarding when uncorroborated testimony of sexual assault complainants would be admitted violates the ex post facto clause if applied retroactively.[227] Prior to the change in the law, Texas required that the testimony of sexual assault complainants be corroborated unless the complainant was under the age of 14.[228] After the defendant's alleged wrongdoing the law changed so that uncorroborated testimony of any complainant below 18 years of age would be acceptable. [229] There appeared to be no evidence that this change occurred in response to any particular defendant before the courts at the time. [230] The prosecution, however, attempted to use this law here because during the relevant time the complainant was between the ages of 14 and 18.[231] The court held that retroactively using this law violated the ex post facto prohibition because it reduced the quantum of evidence necessary to convict the defendant, which the majority compared to being as oppressive as changing the requirements for the offense. [232]

The dissent argued that the majority's decision ran counter to *Hopt* v. *Territory of Utah*,[233] where the Supreme Court held that a change in the law that permitted the prosecution to present the evidence of witnesses convicted of felonies was not a violation of ex post facto even if applied retroactively.[234] The dissent viewed the *Hopt* case as being indistinguishable from the case at hand and would not have barred the retroactive use of the law.[235] The majority addressed this issue by saying that the *Hopt* decision was about witness-competency statutes, whereas the *Carmell* case was about the quantum of evidence needed to convict the defendant. [236] Indeed, the *Hopt* decision itself made a distinction between the facts in that case and cases where the quantum of evidence required for conviction had changed.[237]

Can such a distinction be justified? We think this distinction may have some force under our approach. If our concern is with the ability of the prosecutor to use certain changes in the law of evidence to increase the chance of abuse of the criminal process then the *Hopt* and *Carmell* contexts present differing risks of this abuse.

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[226] *See* Carmell v. Texas, 120 S. Ct. 1620 (2000).
[227] *See id*. at 1643.
[228] *See id.* at 1624.
[229] *See id.* at 1625.
[230] *See Carmell, supra* note 226, at 1651 (Ginsburg, J., dissenting).
[231] *See Carmell, supra* note 226, at 1625.
[232] *See id.* at 1633.
[233] *See* Hopt v. Territory of Utah, 110 U.S. 574 (1884).
[234] *See id.* at 589.
[235] *See Carmell, supra* note 226, (Ginsburg, J., dissenting) at 1643, 1653, 1655.
[236] *See id.*, at 1639.
[237] *See Hopt, supra* note 233, at 590.

In *Hopt* the prosecution is being permitted to use testimony of those who have committed felonies.[238] Given that a witness's prior record may be used in court to challenge a witness's testimony it is not clear how permitting felons to testify greatly increases prosecutorial discretion.[239] The jury or the judge may already view a felon's testimony with some skepticism so, although there is some room for abuse, it seems unlikely that there would be great room for prosecutorial abuse across most cases relative to the *Carmell* context. [240]

In the *Carmell* context (a sexual assault), obtaining the testimony of the complainant is probably quite important to the case. Increasing the prosecutor's discretion with regard to this type of testimony (which may generally have greater credence and importance to a jury or judge than the testimony of a non-complainant felon) gives the prosecutor and other parties considerably greater room to use the system to their advantage.[241] Thus, the change in *Carmell* may make it significantly easier to convict (or credibly threaten to convict) a defendant, whereas the change in *Hopt* may only slightly increase this risk because the testimony of felons may not generally carry great weight in many cases.[242] In other words, the potential for abuse is greater (and hence the costs associated with rent-seeking higher) in the *Carmell* context compared to the *Hopt* context.[243]

C. Some Other Measures That Constrain Rent-Seeking

There are many other doctrines, in addition to those discussed so far, that constrain rent-seeking in the criminal law enforcement process. In this Part we address two of them briefly, void-for-vagueness doctrine and entrapment.

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[238] *See id.* at 587.

[239] *See id.* at 588.

[240] One could, of course, posit instances where such abuse may occur (e.g., the prosecution offering a felon, who is currently in jail, a reduced sanction in some manner for fabricating testimony), but one suspects that the risk is either not great or that the testimony would not be generally believed. *See* Joshua M. Levinson & Brian Lambert, *Twenty-Ninth Annual Review of Criminal Procedure*, 88 GEO. L.J. 1175 (2000) (discussing government's disclosure obligations). Note that the *Hopt* decision concerned a law that related to permitting all felons (even those not in jail and hence not subject to as much prosecutorial arm-twisting) so that the threat of prosecutor's using their power against this general group is not entirely persuasive. *See Hopt*, *supra* note 233, at 588. The facts of *Hopt* involved a felon in prison at the time, but the rule was not limited to those instances. *See id.* at 589.

[241] *See Carmell*, *supra* note 226, at 1640.

[242] *See id.*

[243] Note that we have only argued that the *potential* for abuse is greater in *Carmell* than *Hopt* not necessarily that *Hopt* was correctly decided – for that to be the case we would need to believe that the potential for abuse in *Hopt* was below the threshold, whatever it might be, that is needed to trigger ex post facto prohibitions. We make no comment on that at this stage except to argue that there is a difference in abuse potentials between the cases. Also we make no comment on where the threshold for triggering ex post facto prohibitions should / might be.

1. 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,[244] in the sense that they granted law enforcement agents broad discretion in deciding what is legal and what is not.[245] Such discretion gives enforcement agents wide power to extract wealth through the criminal law enforcement process. [246] This raises the specter of large rent-seeking costs.

More recently a new twist to the issue of vague statutes has arisen: what happens when the group against which selective enforcement may be used agrees to it or supports it? This is the situation that gave rise to the Supreme Court's decision in *Chicago* v. *Morales*.[247] The case developed after Chicago passed an ordinance that prevented "criminal street gang members from loitering with one another or with other persons in any public place." [248] The definition of loitering was quite broad – "[remaining] in any one place with no apparent purpose"[249] and police were required to ascertain whether some (at least one of two) persons who were "loitering" were gang members.[250] If so, the

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[244] *See* Connally v. General Constr. Co., 269 U.S. 385 (1926) (stating on the facts that "[t]he term 'current rate of wages' referred to minimum, maximum, and intermediate amounts, thus the term was too vague for appellee to know to which amount the statute referred. In addition, the term 'locality' had no precise meaning. Thus, the statute did not allow employers to know what the minimum wage was, and was therefore unconstitutionally vague"); Miller v. Schone, 276 U.S. 272 (1928) (noting that "the statute is void for vagueness and uncertainty. It contains no criterion whatever by which to determine who are the freeholders of the locality to whom is confided the power of invoking the axe of the Entomologist. Again, what is the 'locality' intended by the statute? No technical meaning attaches to the term").

[245] *See* Michael K. Browne, *Current Public Law and Policy Issues: Loitering Laws: Does Being "Tough On Crime" Justify the City of Minneapolis' Use Of a Vague and Broadly Constructed Ordinance, Which Criminalizes Out Thoughts in Violation of the First Amendment?*, 20 HAMLINE J. PUB. L. & POL. 147, 148 (1998) (arguing that "an officer's hunch becomes the basis for the suspected activity, and charges are brought against 'undesirable' individuals without probable cause that a criminal act has been performed. Somehow, officers and prosecutors systematically determine that minorities are the 'undesirables' and they perpetuate unconstitutional arrests based upon this faulty ordinance."); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1132 (2000) (noting that "as a matter of history and practical necessity, police and prosecutors are vested with broad latitude in their application of the penal code--to detain, interrogate, and arrest suspects, for instance, or to charge and prosecute defendants in the criminal process. Sometimes these discretionary powers are openly admitted, conspicuously employed, and, thereby, exposed to popular review.").

[246] *See* Lars Noah, *Administrative Arm-Twisting In the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 903 (1997) (arguing that "criminal defendants routinely plead guilty, typically in exchange for a reduction in charges or some concession by prosecutors in making sentencing recommendations. An accused may agree to plead guilty to a lesser-included offense or a smaller set of offenses charged in an indictment if the prosecutor agrees not to pursue other charges in the indictment. Indeed, defendants may avoid prosecution altogether by agreeing to participate in a pretrial 'diversion' program, such as drug rehabilitation for certain types of offenders.").

[247] *See* Chicago v. Morales, 527 U.S. 41 (1999).

[248] *Id.* at 45 – 46.

[249] *Id.* at 47 & n.2.

[250] *Id.* at 47 & n.2.

police could order them to leave the area. [251] The ordinance, arguably, had the support of the community in which it was most likely to be enforced, the high-crime urban neighborhoods of Chicago.[252] It was argued that these neighborhoods supported the ordinance in order to gain greater safety within their communities.[253] In spite of the community support, the Supreme Court held the ordinance unenforceable on vagueness grounds.[254] The Court's reasons included that the ordinance defined "loitering" and other matters in such a broad way that they were impossible to obey.[255]

In light of the broad grant of discretion to the police under Chicago's anti-gang ordinance it is obviously possible that the police could engage in selective enforcement.[256] The community may have consented to this risk in order to enhance its security.[257] The general question raised by *Morales* is whether a community should be allowed to make this trade off.

Some scholars have argued for an exception to the void-for-vagueness doctrine on the ground that selective enforcement or targeting is extremely unlikely in the *Morales* context.[258] Specifically, the use of an anti-gang ordinance to oppress a particular group, or transfer wealth from one group to another, is extremely unlikely in the *Morales* setting for two reasons. First, the ordinance, arguably, had a high degree of community support even within the neighborhoods most likely to be burdened by its enforcement.[259] Second, the costs of selective enforcement probably would have been internalized within the relevant communities.[260] Put another way, this case is unlike the example of selective law enforcement in the Jim-Crow South, which involved the use (or non-use) of force by a politically dominant group to oppress a politically marginal group. The communities that supported the anti-gang ordinance made an apparently conscious decision to trade off protection from police harassment in order to reduce the crime rate in their neighborhoods. The general implication

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[251] *Id.* at 47.

[252] *See Morales, supra* note 247, at 74 (Scalia, J., dissenting) (noting that "[m]any residents of the inner city felt that they were prisoners in their own homes...Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom they once enjoyed.").

[253] *See id.,* at 51, 74. *See also* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 197-213.

[254] *See Morales, supra* note 247, at 51.

[255] *See id.,* at 56 – 59.

[256] *See id.,* at 58 – 59.

[257] *See id.,* at 74 (Scalia, J., dissenting) (stating that "[t]he minor limitation upon the free state of nature that is the prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets").

[258] *See* Meares & Kahan, *supra* note 253.

[259] *See id.; Morales, supra* note 247, at 74 (Scalia, J., dissenting) (stating that "[t]he minor limitation upon the free state of nature that is the prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets").

[260] This seems implicit in Justice Scalia's approach. *See Morales, supra* note 247, at 74. For greater discussion see Brooks, *infra* note 262.

of this argument is that constitutional restraints on criminal law enforcement should be relaxed in settings where the risk of selective enforcement is minimal. For simplicity, we will refer to this as the internalization critique.

The framework of this paper provides an alternative to the internalization critique, as well as a justification for the Court's decision in *Morales*. The internalization critique misses an important feature of pro-defendant procedural protections. Not only do they dampen temptation for selective enforcement, or inter-group wealth expropriation, they also cut down the prospects for what we have termed "simple corruption." That is, procedural protections also have the function of reducing the opportunities for an individual enforcement agent to enrich himself by using his position to bully individuals who can be threatened with arbitrary arrest and punishment. This is potentially just as harmful as inter-group wealth extraction, because as long as it is possible for individuals to enrich themselves through the enforcement process, people will devote resources to acquiring positions as enforcement agents. Each position along the chain of enforcement (from the officer on the street to his immediate superiors, to prosecutors, to parole officers) could become a source of monopoly profits for the individuals who occupy them. [261] When this occurs on a large scale, consistency and impartiality in enforcement are unlikely to be observed.[262]

2. Entrapment

The fact that the entrapment defense is a relatively new common law doctrine probably has a lot to do with the expanding scope of criminal prohibitions.[263] The defense does not exist for common law crimes, such as

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[261] This is essentially the argument made in the context of a vertically fragmented enforcement scheme. *See supra text accompanying notes* 105 – 107.

[262] In addition to this argument it should be noted that the factual predicates of the case – that the minority dominated community supported this measure and hence was willing to trade off civil rights for enhanced safety – is a fairly contentious matter. First, there is significant debate over whether the community did actually support these measures. *See* Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000). The support seems to be equivocal. *See id.*, at 1233-35. Second, even if the community did support this measure it does not tell us too much about how much the community is willing to trade rights for safety. *See id.*, at 1262 (noting that "…if poor blacks are more supportive of the American legal system because they are less aware of the existence of race-based unfairness…, then a desire or willingness on their part to expand legal enforcement in poor urban communities is not a fully informed position for lawmakers to follow."). All it says is (assuming the community did support the measure) that the community preferred this mix of safety and civil rights over the current one. It does not tell us that this option would have been preferred over others that were not offered to the community. Indeed, it is possible that other alternatives could have been preferred by the community to the ordinance or the current state of affairs. Community support therefore only tells us so much. *See id.* at 1271. Finally, even if the community did support this ordinance over all others that does little to address concerns with the prosecutors' now enhanced power to extract wealth.

[263] *See* Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring) (noting that "[t]he increasing frequency of the assertion that defendant was trapped is doubtless due to the creation by statute of many new crimes, (e.g., sale and transportation of ...narcotics) and the correlative establishment of special enforcement bodies for the detection and punishment of offenders").

murder. [264] This is a sensible result because even those who commit murder as a result of inducement, cajolery, or solicitation are still likely to present a danger to society.[265] The defense is connected today largely with drug prosecutions and other victimless crimes.[266]

Our theory provides a rationale for the entrapment defense and for its relatively recent appearance in the law. Entrapment's recent appearance in connection with new prohibitions can be understood as a reaction to the rent-seeking hazards associated with expanding criminal prohibitions. The short list of common law crimes encompasses conduct that is uniformly considered undesirable.[267] It is possible, as we have argued, for enforcement agents to enforce them selectively, but there are many procedural protections in existence to constrain this incentive. Relatively new criminal prohibitions, on the other hand, often encompass conduct that is not uniformly considered undesirable, and may quite easily be made the basis for selective enforcement.[268] Consider, for example, the debates concerning the more severe punishments for crack cocaine, heavily used in minority neighborhoods, relative to powdered cocaine.[269] As a positive matter, then, we should expect to observe, and we have observed, the entrapment defense expanding in scope and gaining a stronger footing in criminal law doctrine as the scope of criminal prohibitions extends beyond basic common law crimes.

One rationale provided for the entrapment defense is that it enables courts to avoid becoming tainted by condoning inappropriate conduct, or "abhorrent

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[264] *See* LAFAVE & SCOTT, *supra* note 204, at 421 – 22; *See also* MODEL PENAL CODE §2.13 (noting that the defense of entrapment is unavailable when "causing or threatening bodily injury is an element of the offense").

[265] *See* MODEL PENAL CODE §2.13 Comment at 420 (1985) (noting that "one who can be persuaded to cause such injury presents a danger that the public cannot safely disregard").

[266] *See* Dana M. Todd, *In Defense of the Outrageous Government Conduct Defense in the Federal Courts*, 84 KY. L. REV. 415, 419 (1995); John F. Pries, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1872 (1999).

[267] These common-law crimes are *mala in se*, or morally wrong acts. These crimes are distinguished from *mala prohibita* crimes, which are acts made criminal by statute, but are not of themselves considered criminal. *See* BLACK'S LAW DICTIONARY 956 (6th ed. 1990). One argument in support of excluding the entrapment defense from conduct uniformly considered criminal is that, "from a moral perspective, it is wrong to punish those…who lack an opportunity to know and adhere to the law due to government conduct." John T. Parry, *Culpability, Mistake and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 5 – 6 (1997).

[268] *See Sorrells*, *supra* note 263, at 453 (Roberts, J., concurring) (noting that "efforts…to obtain arrests and convictions (of these crimes) have too often been marked by reprehensible methods."). *See also* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 970 (1999).

[269] *See* United States v. Anderson, 82 F.3d 436 (D.C. Cir 1996); United States v. Sanchez, 81 F. 3d 9 (1st Cir. 1996) (holding that increased sentencing for possession of crack rather that powdered cocaine was not unconstitutionally void for vagueness). *See also* Stuntz, *supra* note 76; Michael R. Bromwich, *Put a Stop to Savage Sentencing*, WASH. POST, Nov. 22, 1999, at A23 (discussing the unfairness of the disparity in sentencing).

transaction(s)".[270] The rationales could be expanded to include the claim that it discourages police officers from engaging in inappropriate conduct because it effectively denies them the reward (in terms of prosecutions) for engaging in such conduct.[271] This rationale has been criticized as inadequate on the ground that the purity of the courts, or of enforcement agents, has no particular value in itself.[272] If some impurity enhances the deterrent effect of the law, why not allow it?

We think our framework provides a stronger rationale for the entrapment defense. The function of the entrapment defense is not, in our view, to simply protect the purity of enforcement agents, but to dampen rent-seeking incentives at lower levels of the enforcement process. If enforcement agents are denied the fruit of entrapment efforts, the rewards from using the law enforcement process to target specific individuals or groups fall.

D. Some Empirical Evidence

In addition to providing a better rationale for pro-defendant criminal procedure doctrines, the rent-seeking framework of this paper is also corroborated by corruption evidence from several countries. We ran a regression of Transparency International's corruption index on several variables, including measures of key pro-defendant criminal procedural rules. The reasoning behind this exercise is that if pro-defendant criminal procedural rules reduce the incentives to use the criminal laws for inter-group wealth extraction and for personal enrichment, the degree of corruption should be lower in countries that have such procedural rules.

The key measures of pro-defendant rules used in the regression analysis are two: the existence of a rule prohibiting cruel and unusual punishment, and the existence of a reasonable-doubt standard. The results suggest that both types of pro-defendant protection are strongly negatively correlated with the degree of corruption. In other words, the presence of these protections is strongly correlated with lesser corruption.

Transparency International's corruption index provides a score ranging from 10 (least corrupt) to 1 (most corrupt) for roughly 80 countries. The index, which measures international perceptions of corruption (bribe-taking and bribe-

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[270] *Sorrells, supra* note 263, at 459 (Roberts, J., concurring).

[271] *See id.* at 448.

[272] The majorities in *Sorells* and *Sherman* used a subjective test in applying the entrapment defense (focusing on the defendant's predisposition for crime and mental state), rather than focusing on the action of government and law enforcement officials. *See Sorrells, supra* note 263, at 451; Sherman v. United States, 356 U.S. 369, 375 – 76 (1958). *See also* Jason R. Schulze, *United States v. Tucker: Can the Sixth Circuit Really Abolish the Outrageous Government Conduct Defense?*, 45 DEPAUL L. REV. 943 (1996).

paying), is based on a survey of business people and analysts.[273] Our measure for the existence of a reasonable-doubt standard is simply coding for whether the country has a common law system. In general, the reasonable-doubt standard seems to be a feature largely of common law legal regimes.[274] The cruel and unusual punishment measurement is reflected by two "dummy variables." One variable, Crupun3 takes the value one if the country either does not have a rule prohibiting cruel and unusual punishment, or does not abide by the rule if it has one. The other variable, Crupun2 takes the value one if the country has a rule prohibiting cruel and unusual punishment, but there are some concerns expressed about the state's compliance with its own rule.

We also included in the regression a measure of the ratio of government spending to gross domestic product (GDP). The purpose of this measure, labeled Ratio, is to capture the relative number of opportunities for corruption in a country. Presumably as this ratio increases, the number of enforcement agents increases relative to the size of the economy. For example, a country that has one licensing agent for every business will presumably have a large ratio of government spending to GDP. It happens, however, that this argument is inadequate because a country may choose to pay its licensing agents nothing (allowing them to make up the shortfall in bribes) and then the ratio of government spending to GDP may be relatively small. To take this into account we ran a second version of the regression, taking into account the relative rates of private and public sector pay.

The results in Table 1 are for a regression of the Corruption index (labeled CPI) on Ratio and the pro-defendant procedure variables. The results indicate that corruption is significantly lower where the reasonable-doubt rule is in effect, as measured by the common law variable.[275] Moreover, both measures of cruel

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[273] For information on the Corruption Perceptions Index, see <http://www.worldbank.org/html/prddr/trans/>. *See also* Johann Graf Lambsdorff, *Background Paper to the 2000 Corruption Perceptions Index* (September 2000).

[274] *See* CRAIG M. BRADLEY, CRIMINAL PROCEDURE: A WORLDWIDE STUDY xv-xxii (1999), for a discussion of the major differences in criminal procedure between common law and civil law systems. In civil law, or inquisitorial, systems (found in a majority of continental European countries) a "theoretically neutral judicial officer conducts the criminal investigation and a judge…determines guilt or innocence." *Id.* at xv. Common law systems (found in the United States, Great Britain and its former colonies) are based on a mistrust of the government, and "the defendant is endowed with a quiver of rights that he may launch against the government at various stages of the proceeding." *Id.* at xvi. The reasonable-doubt standard is one of the defendant's weapons against common law criminal systems. England, Wales, South Africa, and the United States all require that the defendant's guilt be shown beyond a reasonable doubt. *See id.* at 122, 349.

[275] The results in Table 1 were largely replicated in a second regression that includes a variable measuring the ratio of public sector wages to financial sector wages. In the second regression, the COMMLAW and CRUPUN2 coefficients remained roughly the same. The CRUPUN3 variable dropped to statistical insignificance, but this may largely be a byproduct of the sharp drop in observations because of missing wage date. We had only 42 observations for the second regression. The new variable PAFIN,

punishment constraints indicate that the failure to prohibit such punishment is positively correlated with corruption. The results indicate that moving from a regime in which there is a prohibition of cruel and unusual punishment (that is complied with) to one in which there is no such prohibition (Crupun3) reduces the Corruption index (i.e., increases corruption) by 3 points. This is quite a substantial drop given that the maximum score is 10. The existence of a common law system raises the Corruption index (i.e., reduces corruption) by 1.5 points.

Table 1

CPI	*Coef.*	*Std. Err.*	*t*	*P>|t|*
RATIO	.039	.022	1.800	0.076
CRUPUN3	-2.997	.513	-5.840	0.000
CRUPUN2	-2.104	.604	-3.482	0.001
COMMLAW	1.455	.471	3.090	0.003
CONS	4.986	.730	6.832	0.000

Number of obs = 75
R-squared = 0.458
Adj R-squared = 0.427

The substantial impact of the two variables measuring cruel punishment constraints and the common law variable were replicated in expanded regression models controlling for educational levels (percentage at primary level), religion (percent catholic, muslim), and economy type (socialist, mixed).[276] Although the coefficient for Crupun3 fell in absolute value from 3 to 2, it remained statistically significant and increased in proportion to the common law variable.

Interestingly, the results suggest that the cruel and unusual punishment measures have a much larger impact on corruption than the common-law measure (which proxies for the reasonable-doubt standard). This has interesting implications for the recent literature on common law protections and economic growth.[277] The results suggest that hard constraints on the state's freedom to

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which measures the ratio of public sector to financial sector wages, came in highly significant with a coefficient of 3.395 (t-statistic = 2.3).

We also ran the same regression with controls for education, religion, and economy type (socialist versus capitalist), and the coefficients on COMMLAW, CRUPUN2 and CRUPUN3 remain roughly the same.

[276] *See* Appendix.

[277] For greater discussion *see, e.g.*, Rafael LaPorta, Florencio Lopez-de-Silanes, Andrei Schleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113, 1151 – 52 (1998); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, University of Virginia School of Law, Legal Studies Working Paper Series, Working Paper 00-8, January 2000, available at

profit through punishment may be a more important restriction on corruption than the existence of common law rules.

VIII. CONCLUSION

The strong pro-defendant bias in Criminal Procedure is a stalwart of Anglo-American jurisprudence. This has often seemed perplexing because it may increase the incidence of criminal wrongdoing, whereas one of the primary reasons for declaring something "criminal" is to try to reduce its incidence.[278] Such an apparent contradiction has led to many attempts to justify this approach to the criminal process. Our paper provides a simple economic explanation for why such a strong pro-defendant bias may be justified – to constrain the costs associated with self-interested behavior by prosecutors and government agents - and finds that case law and certain empirical evidence is consistent with our theory.

We begin by sketching some of the more common criminal procedures and examining the traditional justifications given for them. In particular, we focus on the reasonable doubt standard of proof and the justification most commonly given for it – that we are more concerned with the costs associated with false convictions than with false acquittals. We find it highly unlikely that the traditional rationale provides a good justification for the pro-defendant bias in criminal procedure. This is because the assumptions it makes about the relative frequency and costs of false convictions and false acquittals are implausible in light of the empirical evidence.[279]

We provide another rationale for the strong pro-defendant bias in criminal procedure and argue that this provides a more complete justification for the extent of the pro-defendant bias in criminal procedure. We argue that the strong pro-defendant bias is justified as a means to constrain the costs associated with self-interested behavior by prosecutors and government agents. Absent some constraint on their behavior, prosecutors and other agents might be tempted to use the criminal process to benefit themselves. This prospect is likely to induce various groups in society to lobby prosecutors and other government officials for selective enforcement. The direct lobbying, counter-lobbying, and associated costs might be quite large. When these costs are combined with the deleterious effects on deterrence such lobbying could have, we find that the costs of

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<http://papers.ssrn.com/paper.taf?abstract_id=206809> (finding results consistent with the notion that the common law leads to greater economic growth relative to civil law systems in the period 1960 – 1992).

[278] *See* Marshall & Duff, *supra* note 3; Estrick, *supra* note 3; Hart, *supra* note 3. *See also* Coffee, *supra* note 3; Kadish, *supra* note 3; PACKER, *supra* note 3.

[279] *See supra* Part III.C.

unfettered prosecutorial behavior could plausibly be large enough to justify pro-defendant procedural protections.

After discussing why these constraints, as opposed to others one could imagine, are likely to be useful, we assess whether the Reasonable Doubt Standard, Double Jeopardy and the Right to Jury Trial reflect these concerns. We find there is much in broad contours in these areas that is consistent with our analysis. To test this further we also examine some of the more minute details of case law related to Double Jeopardy, Right to a Jury Trial, Ex Post Facto Prohibitions, Void-for-Vagueness Doctrine, Entrapment, and Penalty Restrictions. We find that our approach helps explain several details that are difficult to explain under traditional theories.

We then consider whether there is empirical evidence to support our approach and find indirect support in corruption data from several countries. [280] This suggests that approaching the area of Criminal Procedure from the perspective of constraining self-interested prosecutors is likely to provide important insights into our current scope of Criminal Procedure as well as insights about whether certain doctrines should be extended or not. Indeed, the analysis developed here could be applied to a myriad of current topics, including the extension of criminal procedural protections to civil suits brought by government agencies.[281]

In the end, the goal of our paper is to provide an economic theory that might provide some grounds for justifying and assessing American Criminal Procedure. We argue that attempting to constrain the costs associated with self-interested prosecutors or government agents using the criminal process to

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[280] *See supra* Part VII.D.

[281] The government may often bring civil suits or administrative proceedings against parties and similar fears of rent-seeking may arise in those contexts. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1797, 1862-63 (1992) (discussing the role of punitive civil sanctions). We do not, however, witness the same degree of pro-defendant protections in these areas. *See id.* at 1869-70. Our analysis does not examine whether these fields should have stronger pro-defendant procedures as that is a detailed and lengthy topic worthy of at least another paper. *See generally id.*; Mary M. Cheh, *Constitutional limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1997); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 67 GEO.WASH. L. REV. 1290, 1292 (1997). We would note at this point that there are some differences between government civil suits and criminal enforcement. First, the sanctions and stigma are often different in both contexts and this may play a role in determining how pro-defendant the procedures need to be in these different contexts. *See* Mann, *supra*, at 1809. Second, we may believe that the potential defendants in government civil cases (e.g., corporations) are able to lobby more effectively than the average defendant in the criminal context. This is because relatively few criminal defendants are wealthy enough to even litigate effectively, suggesting that the scope of their lobbying abilities are somewhat limited. *See* Stuntz, *supra* note 14, at 28 – 29. However, these are only preliminary thoughts – our current paper does not engage in the debate over whether government civil suits should be subject to heightened procedures. This is a matter left for future debate and analysis.

benefit themselves provides such a justification. Our approach also seems consistent with case law and with the empirical evidence we currently possess. In light of this, it would seem important to bring explicit consideration of our approach into the calculus when assessing current Criminal Procedure and discussing how, if at all, it should be changed.

Appendix

Below we report the results of expanded "corruption" regressions. The new variables below are EDU1 = percentage of population (25 and older in 1991) that has something less than a primary education only. This includes those who have no education at all or have completed primary school but have gone no further. (Source: Statistical Abstract of the World, 3d. ed., Annmarie Muth, ed., Gale Research (1997); RELC = percentage of the population who are Catholic, RELM = percentage of the population who are Muslim or Islamic (Source: Statistical Abstract, and where necessary supplemented from http://www.adherents.com/). ETM = dummy equal to one if economy is classified as mixed socialist-capitalist, ETS = dummy equal to one if economy is classified as socialist (Source: http://www.cia.gov/cia/publications/factbook/indexgeo.html).

Table A.1

CPI	*Coef.*	*t*	*Coef.*	*t*
RATIO	.045	1.611	.047	1.979
CRUPUN3	-1.866	-2.790	-2.498	-4.352
CRUPUN2	-1.736	-2.563	-2.128	-3.629
COMMLAW	1.184	2.047	.921	1.772
EDU1	-.028	-2.103		
RELC	-.009	-1.163	-.014	-2.028
RELM	-.006	-.551	-.012	-1.380
ETM	-.843	-1.394	-.430	-.815
ETS	-1.668	-2.194	-1.615	-2.423
CONS	4.986	6.832	5.813	7.355
Number	61		75	
R-squared	.535		.522	