LAW AND COURTS

NEWSLETTER OF THE LAW AND COURTS SECTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION

WINTER 2000

VOLUME 11 NO. 1

FROM THE SECTION CHAIR

Sheldon Goldman

University of Massachusetts at Amherst

Upon taking office as Section Chair, I received a hefty box of section records and dutifully poured through the many files including one on our Section's history. To my surprise I found that there was an institutional memory lapse as to our founding and first set of officers. Being a person who has great difficulty throwing things away, I consulted my files on our Section and have reconstructed a brief history of our founding that provides the foundation of my comments as to where we are today and the direction we are headed.

Close to eighteen years ago the Executive Council of the APSA gave the go-ahead to the establishment of sections within the association. Charles Johnson and Karen O'Connor took the initiative in taking the steps necessary to form a public law section. In the Spring of 1983, Charlie sent a questionnaire to all those self-identified as public law scholars within the APSA to determine whether there was sufficient interest in forming a section of our own. After receiving a large positive response, Charlie prepared a petition for the creation of a public law section and a set of by-laws that were circulated to the public law mailing list. With about 150 signatories in hand, Charlie and Karen submitted a request for the establishment of a Law, Courts and Judicial Process Section. During the 1983 annual meeting of the APSA, the APSA Executive Council gave its approval to the section and proposed by-laws. Anticipating this very outcome, Karen, who was the convener of the Law, Courts, and Judicial Behavior Subfield Group, appointed a nominations committee to recommend a slate of section officers.

The first nominating committee consisted of Karen O'Connor, M.C. Porter, Alan Tarr, and Susan Olson. The slate was presented to the Subfield Group meeting on Friday, September 2, 1983, at which time the section officially was established and officers were elected. Charles Johnson was elected Chair, Susette Talarico was elected Secretary Treasurer, and Executive Committee members elected were Lawrence Baum, Beverly B. Cook, Sheldon Goldman, Joel Grossman, and W. Wally Miles. Charlie agreed to also edit the newsletter until an editor could be recruited.

Thus began our section, celebrating its seventeenth birthday this Fall. Like teenagers, our Section has experienced a growth spurt in recent years as well as demonstrating an amazing appetite (intellectual), remarkable energy, and (to be expected?) some angst and orientation confusion. We have grown about six-fold since 1983 and we count among our ranks colleagues not only from Political Science but also from a variety of other law-related fields. And most gratifying, there are substantial numbers of student memberships. By any objective measure, our vital signs are wonderfully healthy. Thanks to the efforts of Charlie and Karen, we were one of the original four sections to be established by APSA. Today there are 35 sections and we are virtually tied (with public policy) as the third largest section.

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Instructions to Contributors

General Information

Law and Courts publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** is published three times a year in Winter, Spring, and Summer. Deadlines for submission of materials are: November 1 (Winter), March 1 (Spring), and July 1 (Summer). Contributions to **Law and Courts** should be sent to:

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Articles, Notes, and Commentary

We will be glad to consider brief articles and notes concerning matters of interest to readers of **Law and Courts**. Research findings, teaching innovations, or commentary on developments in the field are encouraged.

Footnote and reference style should follow that of the *American Political Science Review*. Please submit two copies of the manuscript; enclose a diskette containing the contents of the submission; provide a description of the disk's format (for example, DOS, MAC) and of the word processing package used (for example, WORD, Wordperfect). For manuscripts submitted via electronic mail, please use ASCII or Rich Text Format (RTF).

Symposia

Collections of related articles or notes are especially welcome. Please contact the Editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the Editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when posible. Finally, authors should notify *Helena Silverstein* at silversh@mail.lafayette.edu, of publication of manuscripts.

Our good fortune is a result of the efforts of past Section Chairs and officers (whose names are listed on the law and courts website), creative and dedicated newsletter editors, and the tireless and innovative editors of the Law and Politics Book Review starting with the late (and missed) Herb Jacob. The Review's continued success is an ongoing memorial to Herb's vision.

When Charlie Johnson queried colleagues in the Spring of 1983 as to what service they would most like the section to perform, most respondents mentioned a newsletter. The newsletter continues to remain a vital link among Section members and I would like to thank, on behalf of the Section, Cornell Clayton for the outstanding job he is doing. I am especially grateful to Cornell for agreeing to serve an additional three-year term as editor.

Another thank you must go to Howard Gillman for his work as moderator of the Law and Courts discussion list. With the mailing of Section news via the listserve to Section members, another vital communication link has been established.

The third vital communication link is the Section website maintained by Lee Epstein and her colleagues at Washington University. Our Section is in her debt not only for her work on the website but also for her tremendous efforts on behalf of the Section last year as Chair.

Richard Brisbin, Jr. is in his second year of a three-year term as editor of the Law and Politics Book Review. We are all appreciative of the superb job he is doing as we were of his predecessors Neal Tate and Herb Jacob. Neal initiated a precedent of serving one three-year term and Dick has indicated he will follow stare decisis. Mark Graber has agreed to chair the search committee for a new editor.

This section is blessed with many talented and generous members who have agreed to serve on Section committees. This is an integral part of our organizational and disciplinary life, particularly the awards committees that honor excellence in the field. Last year Lee Epstein noted with pride that not one person who was asked to serve on those committees refused. I am happy to report that with only one understandable exception (a retiring colleague), that has held true this year. This sense of professional duty and responsibility is both welcome and commendable. At the same time, there are no doubt a number of Section members who would serve on a committee given the opportunity. Appointments to awards committees and the nominating committee must be made in September for a variety of reasons not the least of which is that this is a requirement of the APSA Organized Section Committee. This gives the new Section Chair little time to determine who would be available and a sense of the volunteer population. Although the membership of the awards and nominating committees has been set for this year and is noted elsewhere in the newsletter, there are other committees that are formed during the course of the year. I would like to take this opportunity to invite volunteers particularly for those who have never served on a Section committee. I will maintain a file of volunteers from which I can draw upon as needed and turn that file over to my successor, Chair-Elect Neal Tate.

With the approval of the Executive Committee, I have established an Exploratory Committee on Relations with the Law and Society Association. This Committee, chaired by Malcolm Feeley, will seek to determine whether it is appropriate and feasible to develop institutional links between the Law and Courts Section and the Law and Society Association and if so, what shape those links ought to take. The Committee will report to the Executive Committee before its' meeting in San Francisco.

Finally, I would like to congratulate Lynn Mather for having been chosen as one of two candidates for the Presidency of the Law and Society Association and Austin Sarat for his recent presidency of LSA. Also, congratulations to Karen O'Connor for serving as President of the Southern Political Science Association. Lastly, belated congratulations to a former long-time Section member Bob Katzmann, for his appointment to the U.S. Court of Appeals for the Second Circuit. Bob is the first professional political scientist appointed to a federal court. If there are other similar extraordinary accomplishments by Section members please let me know for mention in a future column.

This should be reaching you at about the time of the holiday season and I would like to wish those reading this joyous holidays and a happy, healthy, and productive New Year.

SYMPOSIUM:
POLTIICS AND GOVERNMENT PROSECUTORS

Symposium Introduction

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This symposium is the by-product of a meeting, organized by Matthew Holden, Jr., of political scientists that convened last August at the Cosmos Club in Washington, D.C. for the purpose of considering the study of government lawyers. The participants began with the perspective that judges and courts are passive, requiring some other actor to bring matters to them. Government lawyers fulfill this role by providing important linkages and derive a significant amount of political power from it. The power to determine whether, when, and how to provide or act as this key linkage makes government lawyers important political actors. Given this understanding, the participants considered the question 'What are some of the broader questions on the subject worthy of study?' Several topics emerged from the discussion:

One area of inquiry concerns the power exercised by government lawyers. What are the sources of this power? Some part of the answer can no doubt be found by examining the relevant statutory and constitutional provisions. A better understanding might be had by looking beyond formal legal authority to the broad range of discretion that government lawyers possess and the norms or lack thereof, that governs the exercise of their discretion.

Another relevant area of investigation is that of goals of lawyers in government. It is generally assumed that the goal of prosecutors, for example, is to achieve the maximum sentence against a defendant. Of course, this may not be so. Rather, the goal(s) of government lawyers may not be stable from case to case, but depend upon such factors as case facts, whether the prosecutor has been elected or appointed, or to which branch of government they are accountable. Hidden goals, such as future political aspirations, may also influence decisions.

Even if the goals of government lawyers are known, understanding or predicting behavior entails an understanding of the context in which they operate. Does the office have an independent warrant for action, or is any action contingent upon permission from other government actors? Beyond direct supervision, the courts have also raised obstacles, created procedural requirements, and established absolute bars to certain behaviors. Concepts of governmental structure generally, such as the separation of powers (or differing notions of it), may alter the parameters of possible behaviors. Public opinion, in addition to influencing goals, may also exert an influence on behavior.

This Symposium brings together five scholarly essays that examine several aspects of prosecution and suggest approaches for understanding the politics of prosecution.

Unsettled Territory: An Overview of Research on The Legal Process

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Political Science bears the obligation of studying how politics works, that is - how authoritative collective decisions affect who gets what. Never was this calling better expressed than in the insistent question one of my finest graduate school professors, Herb Kaufman, posed: "What does this have to do with politics?" It is a question I always try to ask. This brief essay argues that our discipline generally, and our Law and Courts sub-field in particular, needs to ask it as well.

And if we indeed ask, "How much do we know about who gets what as a result of that part of the political process that falls within the boundaries of our sub-field?" the answer clearly is, "Not as much as we should."

Several simple and obvious tests of this assertion exist. Consider, for example, the validity of Matthew Holden's call for inquiries into the organization and exercise of power in his APSA Presidential address. He rightly notes that such inquires, by focusing on the exercise of discretion, offer great intellectual opportunities to Political Science.

One of these opportunities consists of what he calls the "Politics of Prosecution." It is an opportunity not yet seized. Or monitor news articles in the *New York Times* that deal with the operation of the legal process for a week and ask

how much research scholars have conducted on the decisions and decision-makers discussed. The case is not difficult to make.

Few in our section deny that the operation of the legal process constitutes an integral part of politics. Indeed, members of the discipline at large surely understand on some basic level that the operation of law and courts, as well as the actions of private attorneys, bail bondsmen, assistant prosecutors, prison officials, and others whose official duties are linked to courts shape, to a significant degree, who gets what in politics. But beyond general acknowledgment that, yes, civil litigation in trial courts, the actions of police and prosecutors, appellate court decisions – the list goes on – are part of politics, most political scientists know virtually nothing about the politics that takes place there beyond perhaps some understanding of the U.S. Supreme Court's decision-making dynamics and role in shaping policy.

This is hardly the place to summarize the state of knowledge in political science about the operation of law and courts. But a broad overview of what we have studied and not studied, focusing on the American political system (while recognizing that some in our section study the operation of law in other countries), might help remind us of how much that is important remains unstudied.

I initially thought such a summary might aptly be titled "Unexplored Territory," a vast region rich in important knowledge necessary to understand politics largely undiscovered by political scientists. I still find the geographic analogy useful, but upon reflection it became clear to me that the notion of "Unsettled Territory" better described the current state of research. As in the American West during the first half of the nineteenth century, thanks to the feats of a small band of explorers, the general contours of what exists there are known. For example, our most renowned explorer, the late Herbert Jacob, produced books examining crime and justice in cities, urban criminal courts, the reform of criminal justice, the use of bankruptcy courts, the transformation of divorce law, and several books that broadly surveyed the legal process in the United States. Others of us have inquired further into these (and other) topics, conducting research, for example, on federal prosecutors, criminal court communities, divorce lawyers, civil litigation, and the structure of the legal profession. However, while this research provides a rough map of this region of the political landscape, most of it remains unsettled, barely populated by working researchers who earn their living there.

Pursuing this geographic analogy further, what can we say about the population of this region? Immediately, one must acknowledge a notable exception to the lack of settlement. There is one major, highly developed urban center devoted to the study of the United States Supreme Court. This "primate city" (as comparative politics scholars would call it), where nearly the entire population of the law and courts section works, contains two uneasily coexisting but distinct neighborhoods. One examines Supreme Court doctrine, housing traditional scholars who teach Constitutional Law. The other applies quantitative techniques to answer the question, "Why do Supreme Court Justices decide as they do?" Several small suburbs, growing slowly, can be found on the outskirts. One consists of a community of scholars who look at the impact of Supreme Court decisions. Another looks at other appellate court decision-making, including U.S. Courts of Appeals and state Supreme Courts.

Nearly all of the rest of the territory has been explored briefly by scholars like Jacob who studied one of the many previously uninvestigated topics found in the hinterlands, published, and moved on. There are a few isolated, small settlements, of course, where a band of researchers stayed for awhile and researched the same phenomena. Some of these settlements, looking at such topics as civil courts, divorce cases, and tort litigation, now may even be growing slowly. But others that looked at state criminal trial courts, lower state criminal courts, federal prosecution, state attorneys general, the U.S. Department of Justice, and local police are shrinking in size, in danger of becoming ghost towns. (At the 2000 APSA convention, for example, I discovered no papers dealing with state criminal courts, a topic that some years ago was the focus of several full panels.) With few exceptions, judicial biographers ignore the vast corps of judges who have not served on the U.S. Supreme Court. We know very little about the career paths of state and federal prosecutors, lower state and federal judges, and even state supreme court justices. Only limited research on judicial elections and campaign finance has been conducted. As Holden argues, few examine how prosecutors make their decisions on whom to charge with what (including death eligible crimes).

And some topics remain virtually unresearched. County sheriffs, who in most places combine significant law enforcement duties with direct election by a voting constituency, have not been studied at all. The revolution in sentencing statutes and practices has produced an explosion in prison populations disproportionately composed of minorities. Yet this unquestionably significant development in who gets what is mostly invisible to our discipline.

These observations hardly break new ground. A number of long-time members of the Law and Courts section, including Martin Shapiro, have understood that our preoccupation with judicial behavior and the United States Supreme Court leaves unstudied much of significance in politics that rightly falls within the purview of those who study law and courts. Nevertheless, mere recognition of the incompleteness of our

understanding has produced little change in the scope of our efforts or the adequacy of our knowledge.

Perhaps the time has come to undertake efforts to address our sub-field's shortcomings. Of course, most established scholars who have settled elsewhere will not (and should not) abandon their current research emphases. No one should expect a massive migration from research on the Supreme Court, and it would be naive and fruitless to suggest that this should take place. But the opportunities beckon. The amount of quantitative data on state and federal case dispositions is growing. Indeed, sociologists are exploiting it and publishing their results in that discipline's leading journals, and there is no reason why political scientists cannot join in this research. Established survey techniques can be applied to the study voting in judicial elections. The same techniques used to examine the effect of legislative candidates' background and campaign financing on election outcomes can be applied to the study of judicial elections. And qualitative research methods already used to study the decisions of civil attorneys and prosecutors can be applied to more fully describe the politics of prosecution and law enforcement.

Graduate students and scholars respond to the advice and suggestions of established researchers, and directing more of them to dwell in the unsettled territory of our sub-field will benefit the discipline and young academics alike. Some more established scholars who have conducted research in the past and moved on can return. Others who have settled in the vicinity, including those who study state elections or political careers, can make side trips or a short move to apply established research techniques and theories to decision-makers in the legal process.

Finally, members of the Law and Courts section can make the case to funding agencies, journal editors, and article reviewers that much is to be gained by settling researchers in the under- and un-studied regions of our territory. Because so much of it is barely studied, it is imperative that we help funding agencies, journal editors, and especially article reviewers understand the difference between exploration and verification. Much exploration, mapping, discovery, and description must be undertaken before more systematic verification of the hypotheses generated by such preliminary activity can occur. Systematic quantitative testing of hypotheses is not appropriate when important topics have not been previously studied. It makes no sense to reject articles dealing with unstudied aspects of the operation of the legal process for publication on the grounds that they are insufficiently rigorous, atheoretical, or lacking in sophisticated quantitative analysis.

If we can begin to do these things, we will provide our discipline (and society) with a better understanding of politics.

Coming up with good ideas for research poses no challenge: What role do State Attorneys General play in litigation on tobacco and guns and in consumer fraud actions? How do state prosecutors decide whom to charge with a capital offense? To what extent are we moving toward a national system of criminal justice as the scope of federal criminal law and the interaction of U.S. attorneys with local law enforcement expands? The research opportunities in our "unsettled territory" are too rich and too important to our understanding of politics to ignore.

Assistant U.S. Attorney Careerism and the Possibility of Prosecutorial Agenda-Setting

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The exercise of prosecutorial discretion has always been problematic in the United States. Unlike countries such as Germany, France, or Japan which rely on careerist prosecutors subject to hierarchical review and oversight (Langbein 1979; Frase 1990; Johnson 1998), American prosecutors traditionally have experienced little if any direct institutional control over their decisionmaking (Davis 1969; Rabin 1972; Eisenstein 1978; Perry 1998). One is left to wonder what factors, and which institutions, are most likely to affect federal prosecutors' decisions to accept or decline – i.e., refuse to prosecute – particular categories of cases such as drug crimes, immigration offenses, and environmental crimes. The recent "federalization" of criminal law, coupled with increasingly severe sanctions due to Federal Sentencing Guidelines and mandatory minimums, only reinforces the need to determine which institutions play a guiding role in federal prosecutorial agenda-setting.

This empirical question begets a normative inquiry: To whom should federal prosecutors be accountable? Some might suggest that United States Attorneys should be responsive to local political interests and values. After all, the American national prosecutorial system has remained decentralized – with the Department of Justice traditionally having at best a loose control over the ninety-four United States Attorneys Offices located throughout the country – due not only to cultural distrust of centralized political authority, but also to the recognition that different regions confront different types of crimes and have differing political values. Obscenity prosecutions may be a top priority in Provo, Utah, but not in Portland, Oregon. Under this view, centralized actors such as the Department of Justice and Congress should adopt a

hands-off approach, allowing prosecutorial agendas to be set locally by each respective U.S. Attorney. Others, however, may argue that to the political victor goes the spoils, and we must presume that when Congress, or the President, or a new Attorney General announces a national prosecutorial priority, U.S. Attorneys will accommodate them. That is, U.S. Attorneys should be politically responsive, but responsive to national rather than local forces. Indeed one of the ostensible justifications for a pronounced federal presence in crime fighting is the need to enforce nationally-recognized values against recalcitrant localities (such as civil rights prosecutions in the South or Selective Service prosecutions in the San Francisco area during the Vietnam war).

But whether one believes that U.S. Attorneys should be responsive to local or national priorities, an additional concern remains: the willingness of the approximately 4,600 Assistant U.S. Attorneys who handle the day-to-day work of federal criminal prosecution to conform to these priorities. As with any complex organization, one cannot assume that the directives from leadership will necessarily be obeyed by subordinates. This is especially true of American lawyers, whose professional culture soundly rejects attempts at hierarchical oversight and conformity to pre-articulated guidelines (Carter 1974). Many scholars have suggested that federal prosecutors will choose cases based partially on their own self-interest – that is, cases that they either enjoy prosecuting or those that make them more marketable to future private-sector employers (Rabin 1972; Eisenstein 1978; Perry 1998; Stuntz 1999) – and it is thus possible that Assistants, rather than U.S. Attorneys or the Department, play a dominant role in determining which types of crimes are actually prosecuted. My research and interviews of federal prosecutors suggest that a growing trend of careerism among Assistant U.S. Attorneys may impede the ability of both the Department and U.S. Attorneys to implement their agendas, raising questions about the potential for political accountability in a fragmented institutional environment.

The Trend Towards Careerism

Writing in 1978, James Eisenstein argued that a serious problem facing U.S. Attorneys' Offices was the fact that Assistant U.S. Attorneys largely were inexperienced because they tended to stay at their jobs for only two to four years before leaving for higher-paying jobs in the private sector (Eisenstein 1978). But much has changed since that time.

Almost every one of the twenty-five federal prosecutors with whom I spoke agreed that Assistants increasingly are becoming careerist employees, with the possible exception of those Assistants in the largest cities such as New York and Los Angeles (where the discrepancy between public and private sector salaries are the most pronounced). As one U.S. Attorney from a large metropolitan area commented, "eighty to ninety percent of my Assistants are careerists. I find myself giving out twenty, twenty-five, even thirty-year veteran pins… the average tenure time for people in my Fraud Division is twelve years." Data collected from the Department of Justice confirm this trend. One Department official noted that in the 1980s the mix of careerists to short-term Assistants was about 50-50, but this changed in the 1990s with careerism increasing as annual turnover rates in Offices nationwide declined from approximately 6% to approximately 2%. Finally, my research of Assistants who ultimately did leave their government positions found that more recent Assistants had longer lengths of tenure. By conducting a ten-state search of the Martindale-Hubble legal directory, I found that the median tenure time for Assistant U.S. Attorneys who had left their positions increased from roughly three years in the 1960s to six years in the 1980s to just over eight years by the mid 1990s.

What explains the tendency of Assistants to stay at their jobs longer? Assistants today enjoy quasi-civil service employment protection, and it is very difficult for U.S. Attorneys to remove them. Assistants cannot be removed except by the Deputy Attorney General, with an intermediary hearing held by the Executive Office of United States Attorneys (a division within the Department). Although these procedural rights prevent political patronage firings of Assistants as was common practice in the 1960s, many U.S. Attorneys feel that they have far less control over their subordinates. One U.S. Attorney I spoke with noted that "it's no question that since political firings were eliminated, Assistants stay longer…. To fire an Assistant today is hard. You can't really fire anyone short of an extreme dereliction of duty." Another U.S. Attorney agreed, lamenting that "you can't even really fire bad Assistants." Additionally, the increased tenure of Assistants also can be attributed to substantial increases in salary and benefits, coupled with a concomitant decrease in the appeal of large law-firm practice.

The Consequences of Careerism

According to my interviewees, growing Assistant careerism had several consequences, some of them disadvantageous. To their credit, careerist Assistants are more familiar with the legal areas in which they practice, a strong benefit given the growing complexity of federal criminal law. Also, having a group of experienced Assistants decreases the need for U.S. Attorneys to rely on Department assistance. But many interviewees complained of "deadwood" Assistants.1 One U.S. Attorney noted that,

> "some Assistants don't like to try complex white collar cases, because it will involve long work hours. In some senses, the spoils system worked better, because

you could reward good behavior and punish bad behavior. Now U.S. Attorneys have to spend as much time moving the Office in the right direction as they do in getting the cases prosecuted. When you have '9-to-5ers' in the Office, eventually the real industrious Assistants begin to slack as well."

A U.S. Attorney under the Bush administration agreed, noting that "the first year I was on the Attorney General's Advisory Counsel, we would talk about the problem of retention. Four years later, we were talking about the problems of motivating careerists." Lacking the need to impress future private sector employees with victories in complex cases, and lacking the need to impress the U.S. Attorney by working overtime, some Assistants may choose instead to prosecute what one federal prosecutor referred to as "quick and dirty cases" such as drug or immigration offenses in which Assistants usually can force a plea bargain with comparative ease.

A second, more frequently mentioned problem was Assistant dogmatism. Because Assistants usually have more prosecutorial experience than do U.S. Attorneys, some Assistants tend to look on U.S. Attorneys as "mere" political appointees. As one Assistant commented, "U.S. Attorneys shouldn't come in and try to steer the Office. The Assistants are the professionals – they know how best to meet the demands of justice. U.S. Attorneys need to realize that we've been through multiple administrations. Leave us alone and let us do our jobs." It is probably true that Assistants will have superior information about the facts of particular cases they are prosecuting than will their U.S. Attorney. Also, Assistants likely will have superior information as to whether a given case is "winnable" inasmuch as they have had more interaction with juries, judges, and the local defense bar. But while "winnability" is often a crucial criterion in deciding whether to take a particular case, it is not as important in deciding what types of criminal *categories* an Office should emphasize. Assistants' attitudes are understandable given that many have seen both Department and U.S. Attorneys' *priorities de jour* come and go. One also can understand why some Assistants are loathe to change their practice areas to accommodate new priorities. Yet the fact remains that decisions about what types of criminal categories to prioritize – health care fraud, obscenity, immigration cases – are essentially political choices which ultimately require some measure of political accountability and political responsiveness (Perry 1998).

Admittedly, U.S. Attorneys have more tools at their disposal to control Assistants than just the threat of termination. U.S. Attorneys can try to shape Assistants' behavior by restructuring Office hierarchies, by creating and enforcing Office-wide declination policies, by offering (or threatening) to reassign Assistants to other case-areas, or by holding out the promise of media attention or possible salary bonuses. Certainly these incentives can work, and no doubt they often do. But they obviously do not work sufficiently well for either the Department officials or the various U.S. Attorneys with whom I spoke. One Reagan administration U.S. Attorney noted that when it came to implementing Department directives, "the real conflict was to try to get the Assistant to go along with them, because many of the Assistants knew they were going to outlast the Attorney General." This view was echoed by a U.S. Attorney for the Clinton Administration: "We have seen a move towards more cohesiveness between U.S. Attorneys and the higher-ups at Justice. The real tension oftentimes isn't between the Offices and Main Justice, but rather Main Justice and the U.S. Attorneys on the one hand and careerist Assistants on the other."

Prosecution is political in that it authoritatively allocates resources and values. Unlike its European counterparts, the American federal prosecutorial system was designed to promote political responsiveness rather than strict adherence to the uniform application of criminal law. Whether one favors a nationally-oriented system under which the Department sets priorities, or a decentralized approach under which U.S. Attorneys respond to local political and cultural values, increased attention should be focused on the ways in which prosecutorial priorities are shaped by Assistant U.S. Attorneys and the changing institutional structures of U.S. Attorneys' Offices.

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Notes

1 All Assistants I know personally are attorneys of the highest dedication and caliber. Nonetheless, the "deadwood" problem was mentioned by a large percentage of my interviewees and as such demands consideration. Further, Rabin found similar problems in that some prosecutors he studied did not wish to take labor-intensive criminal prosecutions (Rabin, 1972).

The Decision to Prosecute as a Policy Process: State Attorneys General & Organizational Politics

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In 1992, one state's attorney general's office had over 150 active cases brought under the state's wage and hours laws. In 1999, there were fewer than 15 active files under the same attorney general. Why? The answer is simple, but if the examination is confined to the attorney general's office, not at all obvious. The state's labor commissioner – an appointee of the governor – has the sole power to initiate wage and hour complaints. A Republican governor replaced a Democratic governor and the new labor commissioner gave a much lower priority to wage and hour cases. As a result, the number of complaints dropped considerably.

This example demonstrates that the decision to prosecute is not made in isolation. Understanding the process by which a government lawyer brings a case to trial requires consideration of numerous influences. A simple model of the process would suggest that numerous political factors and questions of legal feasibility could affect the decision to prosecute. These factors may influence the ability to prosecute, which in turn affects policy outcomes, namely the cases actually brought before a court and whether these cases are successful. However, the process is not unidirectional. Rather, success, or lack thereof, may ultimately affect the decision to prosecute future cases.

There are numerous approaches to studying processes such as the one outlined above. The policies studies literature is vast, allowing an examination from a variety of perspectives, and can hardly be adequately examined in this paper. Pressman and Wildavsky (1979) argued that implementing policies through organizations could be studied by examining "clearance points."1 These are defined decision points that must be cleared in the affirmative in order for a policy to be implemented. By looking at the number of clearance points necessary for a government lawyer to decide to bring a case and pursue this case to a successful conclusion, one can better understand the often-complex environment of the legal policy process.

Environmental Influences on the Decision to Prosecute

With regard to a state's attorney general's office, the decision to bring a suit depends on where the ultimate authority for the lawsuit lies. The more actors with the authority to veto a decision to bring a case, the more clearance points involved in the process, the more difficult it will be to reach the decision to bring a case. Literature on "agenda setting" argues that issues reach the systemic agenda when an issue that is commonly perceived by members of the political community as meriting public attention and that is within the jurisdiction of existing governmental authority. Once part of this agenda, some issues will have the importance to gain the active and serious consideration of authoritative decision-makers (Cobb and Elder 1983). However, different authoritative decision-makers may have different views of which matters merit public attention. Thus, a first step in understanding a decision to prosecute is to understand which actors possess a veto power and how they perceive the issue at hand.

The need for the consent or acquiescence of other governmental actors – potentially both state and federal – may add numerous clearance points. Within the office, policy dispute may exist between different department of between the political management and legal staff. Internal clearance points are endemic to many types of legal organizations, including the United States Department of Justice. However, the potential additional clearance points from outside the attorney general's office are especially acute at the state level.

While most students of government are familiar with the concept of divided government, state government may have an even more serious hurdle, the divided executive. At the state level, most attorneys general are elected and owe no special allegiance to the governor. To be sure, often the interests coincide, but often these two offices may be controlled by different political parties and have divergent agendas. Much has been written about the problems of control over the federal executive, where the president is at least titular head of the executive and the cabinet officials serve at the president's pleasure.2 These well-documented problems of bureaucratic control are exacerbated when heads of the various state offices have separate and distinct constitutional mandates. Fundamental to the decision to prosecute is understanding the number of parties that may be able to veto this decision. At the state level, the decision to prosecute is likely to have multiple clearance points both from inside and outside the attorney general's office.

In some cases an issue may be deemed appropriate for action by the relevant political actors, but may simply not be legally possible. Resistance to prosecution may result from their perception of a lack of legal basis to bring a suit. A perception that the attorney general should "do something" is not always matched by the ability of that office to pursue a case successfully. Generally, problems will not be placed on an agenda unless there is some technology believed capable of solving the problem (Peters 1999). Thus, prosecutor will be less likely to bring a case if the outcome appears uncertain. In the case of the decision to prosecute, the possibility of a legal solution may be as important as political agreement.

Organizational Communication and the Ability to Prosecute

Once the decision to prosecute has been reached, there is still no guarantee that the government lawyer will have the wherewithal to prosecute the case successfully. Like the decision to prosecute, the ability to prosecute requires the support of other actors. The political actors initially may agree with the decision to prosecute. However, they may not necessarily understand the nature of the process or the requirements of successfully pursuing an action. Reaching an agreement about resources necessary for the prosecution can also be an area of dispute. Different actors within a larger political system may "see" problems differently. Convincing other actors to support a case brought by an attorney general may add numerous clearance points a case can be pursued successfully.

Herbert Simon (1976, 294) argues that information is not the scarce commodity in organizations, attention is. The more complex an organization, the greater the number of demands on decision-makers. Ones' position within a hierarchy regulates access to decisions and information (March and Olsen 1979). Those at the top of a hierarchy may have the most demands on their attention. While government lawyers may focus on a problem and the most viable solutions, the attorney general or cabinet secretary may simply not have the expertise, or may have too many demands on their time, to pay sufficient attention. Yet it is these higher officials who may ultimately be responsible for allocating the necessary budget and the resources. When the number of actors necessary to pursue a lawsuit increases, the number of clearance points will increase, making potential conflict over policy more likely. The pertinent organizational question is whether individuals who have the necessary information have the same view of the problem as those individuals with the power to implement the solution. Different views of the problem may create insurmountable clearance points to the ability to prosecute a case.

In the case of the state attorney general's office, the gap between knowledge and power can manifest itself in a failure to allocate sufficient staff to successfully pursue a case. This may result for several reasons: the decision-makers misunderstand the nature of the case; one of the actors responsible for allocating resources is less enthusiastic about pursuing the case; or, perhaps most importantly, other equally important or more politically salient issues require the same resources. With demands to cut government, it is difficult for an attorney general's office to commit large amounts of resources to pursue new problems, since this would entail beggaring old issues that may be of equal or greater salience.

An example of this type of issue is the lawsuits brought by states against large tobacco companies to recoup Medicaid and Medicare costs expended treating smokers. Such suits would entail significant commitment of existing resources (especially in smaller states) or commitment of a vast array of new resources with no guarantee of success. Numerous clearance points for such litigation exists. Actors with vested interests in current resource allocations are unlikely to favor giving up resources for this undertaking, even if they are in general agreement with the goals of the litigation.

Interestingly, in order to pursue the tobacco litigation cases, a sort of legal privatization occurred. States contracted with private law firms experienced in this type of lawsuit. Since the potential for large damages generates the potential for large legal fees, private firms were willing to assume most of the cost associated with the pursuit of these cases in return for fees if successful. In most cases, however, the financial incentive for privatization is not present. As such, the government lawyer will be competing with many other actors for scarce resources. Thus, failure to successfully prosecute may result more from a failure of an organization to allocate resources to the problem.

Learning from History: the Impact of Outcomes

Organizations learn from past experiences (March and Olsen 1979). Persistent success or failure will influence the political environment and the assessment of legal factors in the decision to prosecute future similar cases. Negative feedback will make decision-makers less likely to allocate resources to what may be perceived as a hopeless cause. The government lawyer's assessment of whether there is a legal basis on which to proceed will be strongly influenced by whether the courts were receptive previously to similar cases. This reduces the uncertainty inherent in bringing a case. Government lawyers are less likely to decide to prosecute in an environment of uncertainty (Albonetti 1979). Simply, actors are more likely to back winners than losers, and past performance does influences their assessment of the likelihood of future success.

Conclusion: Evaluating and Comparing Government Legal Organizations

A decision to prosecute and success at trial entails more than a good argument by the government lawyer directly involved. A team effort by the entire legal organization and other actors in the political system is necessary. A trial lawyer may be ultimately responsible for whether the decision to prosecute is made or sucessfully concluded. However, the failure to bring a case or pursue it to a successful conclusion often lies in the broader organization or political system. The goal of this article has been to suggest that the tools provided by policy studies will allow scholars to examine the success or failure of legal organization in a broad context while more accurately addressing issues of causation.

In addition, by understanding the sources of authority and the allocation of resources, as well as outcomes in cases, a study of government lawyers can better explain differences in the performance of legal organizations. This is true whether they are comparing the different units within one organization, across different states, between state and federal organization or even across countries. Evaluating performance alone does not offer an in depth comparison. One attorney general's office may outperform a second office based on results, but if the second office faces more clearance points, a perceived "failure" may in fact be something of a triumph given the broader institutional context. Looking at results offers limited insights into the functioning of a legal organization and the government lawyer. Understanding why these results occurrs gives a much more complete picture of the workings of the government lawyer and government legal organization.

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1 Similar concepts have been used by others and are usually termed "veto points." See generally, Immergut (1990).

2 See Aberbach and Rockman (2000), esp. Chapter 2.

Prosecutors in Politics: Party Politics By Other Means

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Let me begin with the words of former Supreme Court Justice Robert Jackson:

> "One of the great difficulties of the position of prosecutor is that he must pick his cases. If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."1

Delivered to a group of U.S. attorneys in 1940, these remarks were quoted nearly a half-century later by Justice Antonin Scalia in *Morrison v. Olson*, a case challenging the independent prosecutor provision of the 1978 Ethics in Government Act. Dissenting from the majority opinion upholding the provision, Scalia added his own thoughts to Jackson's:

> "…The primary check against prosecutorial abuse is a political one…If the federal prosecutor "picks people they think they should prosecute, rather than cases that need to be prosecuted," if they amass more resources against a particular prominent individual, or against political protestors…or a particular political party, than the gravity of the alleged offense…seems to warrant, the unfairness will come home to roost in the Oval Office."2

The independent counsel law produced two presidential crises in the two decades in which it existed. More important, it spawned a new phenomenon in American politics – the introduction of the prosecutorial figure into the partisan political arena.

I use the term prosecutorial figure for a reason. Although these individuals may have other titles — special counsel, independent counsel, outside counsel, etc. – their function has been that of a prosecutor. They have conducted special grand jury investigations; they have spearheaded regular grand jury investigations; they have appeared in Congress, summoned to examine allegations of misconduct. These individuals and their investigations have had a dramatic impact on American politics.

My purpose is to explore this phenomenon of political prosecutors by discussing the factors that have caused and nurtured it, the effect it has on the political system, and the prospects that it will become a regular feature of the political landscape.

Genesis

During the past two decades, investigations of prominent national political figures have become so frequent that public opinion has grown to accept them as just another feature of the Washington landscape. How does one explain this epidemic of investigations? Are political figures more corrupt than in the past?

I doubt that there are many serious observers of American politics who believe that the level of corruption in American politics is on the rise. This is certainly true if one takes as the basic form of political corruption, the "hand in the cookie jar" crime – politicians using public office to line their own pockets with public funds.

Over roughly the past quarter century, there has been a tremendous increase in laws and regulations governing the actions of public officeholders and former officeholders. In a narrow sense they have clearly played a part in the "prosecutor in politics" phenomenon by simply expanding the list of proscribed actions. But, in fact, these laws and regulations are most significant for the new awareness of public integrity issues they represent.

This awareness was a child of Watergate. It led to a new aggressiveness toward politics and politicians on the part of the media. Ambitious reporters, editors, news executives all saw great value in reporting, indeed, uncovering news of official wrongdoing. This, in turn, bred an inherent skepticism in the media about the activities and intentions of officeholders. An unwritten but pervasive rule evolved among journalists that discouraged writing about high-minded or otherwise exemplary conduct in politics, and encouraged stories of apparent corruption, base motives, and stupidity. Political heroism disappeared. And scoundrels and connivers, fools and fanatics multiplied.

Moreover, with the advent of cable television and then the Internet, it has become more and more difficult to adhere to rules of journalism affecting fundamental reporting principles. Once widely-accepted rules regarding basic journalistic practices like verifying sources started to crumble as the pressure not to be "beaten" on stories and the pressure to capture "scoops" became much more intense.

Dovetailing with this development is another: the tools for publicly disseminating politically-charged accusations, once in the hands of a few, are now readily available. This means that individuals and groups not necessarily or formally connected with any party organization can still generate media attention on politically explosive rumors and accusations. In this connection, they are able to act with relative anonymity and, untouched by media scrutiny, advance rumors and accusations to a point where they reach "critical mass" – a point where the accusation has been heard so often by so many members of the press that it gains credibility and, therefore, must be addressed by the target of the accusation, once again adding to its credibility. The effect is to lower public regard for politics and politicians. In other words, in the eye of public opinion, politicians have become extremely questionable and, therefore, vulnerable figures.

Just as Watergate gave birth to a generation of investigative journalists, it also produced a new area of specialization for lawyers. Prosecutors began to look upon pursuing public integrity cases in much the way journalists viewed uncovering official misconduct. The legal heroes of the years immediately following Watergate were named Cox, Jaworski, and Sirica, and the image they projected was that of a righteous but judicious prosecutor.

But this image began to undergo a major transformation as investigations of officeholders became more numerous, especially following passage of The Ethics in Government Act with its independent counsel provision. A new growth industry emerged in Washington, totally at odds with the public spiritedness that lay behind the new law. Call it "The Prosecution/Defense of Important Politicians Industry".

It is an extremely lucrative profession. Important politicians have very deep pockets because they can establish legal defense funds to which their friends and political supporters can contribute.3 President Clinton's attorney, Bob Bennett, (who was also Dan Rostenkowski's attorney) works for about $500 an hour. Joining a high-profile investigation on the

defense side means plugging into a very hefty revenue stream for several years.

How does a lawyer wind up representing this sort of client? The best way is to start by working for the other side – the prosecution. Initiating or participating in the investigation and prosecution of a prominent officeholder means that when the time comes to join or head back to the private sector, i.e. the law firm, one has rare, highly marketable experience under one's belt.

Ironically, the community of eligible investigators has grown increasingly small. Membership in this community generally requires a track record, either as a prosecutor, a jurist, or as counsel for one of the two houses of Congress. The law school professor with nothing but a judicial interest in the outcome of events is no longer an option.

People who fit this description often have strong affiliations with a political party. Sometimes these affiliations are based on the fact that one has worked with or on behalf of people with party ties. Sometimes it is based on ideological associations. Sometimes it is both. In any case, these associations form the basis for the professional and political life of these individuals. In Washington, these associations are like family. In short, they foster deep practical and emotional attachments. Placing these attachments at risk is thus something to be avoided.

Yet that is precisely what these individuals confront when they are picked to investigate a high-level official. Their side — their associates – wants an investigation with the right political results. Thus, the "prosecutor" is under great personal pressure to lead the investigation toward this objective. In this atmosphere, neutrality and judiciousness are vices; bias and prejudice become virtues.

New laws and ethical rules, a more aggressive journalistic focus on these matters, and public skepticism toward public officeholders have all contributed greatly to the advent of prosecutors in politics. Still, these factors have all been secondary, yielding the lead role to a 20-year struggle for power between Democrats and Republicans in a system of ongoing divided government.

When Ronald Reagan took office, Congressional Democrats saw in the independent counsel an officer who they could use to undermine the credibility and effectiveness of a Republican White House, thus giving their party a better chance of reclaiming the Executive branch. A series of independent counsel investigations culminating in Lawrence Walsh's Iran-Contra grand jury led to the resignation of several Administration officials. But the main targets, Reagan and George Bush, escaped intact.

Just as the Walsh investigation was reaching its climax, a new front opened, the contest for the House of Representatives. Led by Georgia Congressman Newt Gingrich, a small group of Republican House members set out to exacerbate partisan animosity in that chamber. Gingrich leveled charges of corruption and illegality against Speaker Jim Wright, who had angered many House Republicans with his procedural decisions and his policymaking in Central America, and who had never cultivated anything more than thin support among House Democrats. Gingrich's allegations were subsequently investigated by the House Ethics Committee. Traditionally a mechanism for symbolic rather than real punishment of House members suspected of wrongdoing, the committee called in an outside investigator to examine the charges against Wright. The investigation's conclusions were enough to substantiate Gingrich's position.

Gingrich's plan was to take over the House by, in part, portraying Democratic leadership as corrupt. In the early 1990s, Gingrich was handed a gift when a series of scandals surfaced concerning Democratic oversight of several House institutions, primarily the so-called House bank and the House post office.

The scandals cost many House Democrats their seats in the 1992 elections. And they produced a grand jury investigation by the U.S. Attorney for the District of Columbia. Although many individuals were involved, the investigation had only one real target, House Ways and Means Committee Chairman Dan Rostenkowski. Republicans used Rostenkowski and the allegations against him as a symbol of entrenched and, therefore, corrupt Democratic power. In 1994, Rostenkowski was in the general election. And along with his defeat, came other Democratic losses enough to guarantee a Republican House for the first time since 1952.4

Two years earlier, Bill Clinton had defeated George Bush, much to the chagrin of Republicans who believed Clinton to be a usurper, much in the way Democrats thought Ronald Reagan unworthy of the office. Like Democrats with Reagan, many Republicans felt that Clinton had beguiled the American public and so set out to reveal the deception.

Demands for appointment of an independent counsel to investigate an assortment of alleged Clinton misdeeds, principally a savings-and-loan case called Whitewater, led Clinton to ask for an independent counsel. Since the independent counsel law had expired, the decision was left to Attorney General Janet Reno, who chose Robert Fiske, a former Federal prosecutor appointed by President Gerald Ford. Fiske's first task was to look into the death of Vince Foster, an event that, in some Washington circles, had assumed the narrative acrobatics and mystery of a Robert Ludlum novel.

Within six months, Fiske concluded that Foster had, in fact, committed suicide and that there was no evidence of political intrigue. In some GOP circles, this was a very unpopular conclusion. Soon, a three-judge panel replaced Fiske on the grounds that he and his investigation were at risk to charges of conflict-of-interest. So they put Ken Starr in Fiske's place.

Back in the House, Democrats were citing new Speaker Newt Gingrich for ethical and possible legal violations. After several losing skirmishes with Clinton, he found his public profile remarkably high for a Speaker and his public image remarkably low. When an outside House investigator concluded that Gingrich had abused Federal laws by using taxpayer dollars to fund an overtly partisan educational curriculum at a small college in Georgia, House Republicans decided that their leader was expendable. Impaled on an ethical petard he himself had help fashion for Jim Wright, Gingrich, an imaginative legislative intellect who became absorbed by political combat, bowed to pressure and left office.

Consequences

In their zeal for partisan advantage, politicians and strategists from both parties unleashed the "prosecutor in politics". Initially aimed to produce less corruption and more confidence in government under the Ethics in Government Act, prosecutorial politics has led to very little that is positive and a great deal that is negative. There are many reasons why people seek public office, but almost certainly none of these include a desire to go to prison or to spend a small fortune to avoid it. Nor do they include the prospect of attaining high office only to be evicted from it in the wake of a scandal. Novice office-seekers will take the recent history of political prosecutions at face value; as cases of politicians gone bad. They will not be discouraged from entering politics because they believe that "this couldn't happen to me". But the more experienced officeholder, the politician faced with an opportunity to move into a position of power and influence, will be thinking two and three times about whether this opportunity is worth the risk.

To list another example, prosecutors in politics undermine the durability of political institutions and values. Investigations have become like a masquerade where partisan politics wears the costume of judicial detachment and sobriety. But the costume is transparent. No one is fooled. Under these circumstances, it is not partisan politics that gains by borrowing the good reputation of the judicial branch, it is the judicial branch that loses.

Another example: investigations have been conducted and encouraged by people who would otherwise defend the fundamental importance of individual rights. Yet when it comes to investigating officeholders, the sensitivity for rights vanishes. Just because a person holds public office makes them no less entitled to the same protections of ordinary citizens.

Perhaps a more serious consequence of the prosecutors in politics phenomenon is the detrimental effect it has on public confidence in politics and government. People view politics as comical, as pathetic, as a sideshow, as anything but something to take seriously. This may be harmless in times of national calm and international peace. But when the next crisis emerges, will government and the people be able to establish a rapid and secure line of trust, confidence, and shared purpose?

Finally, political investigations tend to anesthetize the public to any consideration of public integrity issues**.** The sheer number of investigations; the relentless reporting of them; the political appropriation of them, have produced widespread public cynicism. People instinctively turn the volume down when the partisan racket becomes too loud. Overwhelmed and confused; unable to distinguish contrived from real offenses; unable to follow the Byzantine path and moral logic of political prosecutors, the public retreats from the nearly impossible job of reaching judgment in specific cases by passing judgment on all such cases. i.e. "They all do it, so what's so special about this case?" The upshot is that integrity issues of real importance are ignored.

Conclusion

The independent counsel provision has been allowed to expire. There is no desire on either side of the political aisle at the moment to bring it back. Does this signal an end to the era of political prosecutors? Has there been a tacit agreement between both parties to call off the dogs?

The answer to both questions is a very limited "yes". Justice Scalia was right in a sense – the ultimate check on prosecutorial excess is public opinion. In the case of the independent counsel, the public grew weary of political mischief-making and the politicians caught on.

But the independent counsel was really only a tool for partisan politics, and just one of several similar tools, at that. And the force behind this politicking – the intense desire to control governmental institutions – has not disappeared.

So perhaps a better way of asking the question is this: Does the bipartisan position on the status of the independent counsel suggest a durable contract to end this type of warfare or is it merely the lull at the end of a single battle?

Public disgust with investigative theatrics could lead to a cease-fire between the parties. But public disgust will

probably not be sufficient unless there are consequences at the polls. After all, the public has routinely expressed disenchantment with negative campaign advertising. But negative ads continue. Politicians who use negative ads do not suffer electorally. Contrary to Judge Scalia's optimism, people are not likely to rebel against one party because of perceived unfairness toward elected officials of another party. They may express disenchantment but it is likely to be passive disenchantment.

Relief from politically-tainted investigations will only occur when both parties somehow find the will and the way to signal each other that neither side will instigate or seek advantage from any legal or ethical controversies involving the other side. It is difficult to imagine the circumstances in which this might arise short of a national crisis. Politics has taken on the proportions of a feud where the forces for restraint are usually neutralized by the forces of conflict and escalation. So long as neither party has firm control of government apparatus and so long as both desire it equally, political competition will tend toward using all available means.

Notes

1 Morrison v. Olson, (1988), 487 USG 54, 101 L.Ed. 2d 569

2 Ibid., p. 569

3 One of the ironies of investigations involving notable public officeholders is that to conduct a meaningful defense requires huge sums of money, money usually raised through contributions from individuals and groups with a clear interest in issues over which the officeholder has considerable influence. In other words, investigations of official wrongdoing often create a conflict of interest more serious and more flagrant than the allegations in play.

4 In Congress, there are bridge-builders and wedge-builders. Bridge-builders create cross-party and multi-interest coalitions in order to pass legislation. Wedge-builders use legislative proposals to create clear party differences on issues in order to place the opposition party in a politically damaging position. It is more than a small irony that Dan Rostenkowski, one of most skillful bridge-builders in Congressional history, fell from power because the wedge-builders began to define the nature of politics in the U.S. House.

Lawyers in the Exercise of Power: Commentary from the Margins

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The current political science of law, whatever may be said of the specific interpretations and methodologies, is judge-oriented, and to some extent judge-bound. There is a logic to this. But broader possibilities are recognized in the field. (Gibson, 141; Shapiro, 114). The commonality in this symposium is a concern with the exercise of power by government lawyers acting as lawyers in roles other than judge. There is a major intellectual and practical need for work on "the politics of prosecution." James Eisenstein characterized this subject as "unsettled territory. Among early scholars of this unsettled territory, I would specifically take note of Goodnow (1905), Langeluttig (1927), Moley (1929), and Wallace (1930). Of course, there is a body of newer work as well in which the names of Nancy Baker (1992), Cornell Clayton (1992), Katy Harriger (1992), and Rebecca Mae Salokar (1992), take leading roles. There is still newer work emergent, particularly some new work on the Solicitor General, such as that by Richard Pacelle and by Christopher Zorn.

It would be desirable to discuss in detail the scope for research on the broad political and legal structures within which lawyers of power operate. In the interest of space, however, I will limit my comments to questions more directly pointed to the latent pressures on decision-making; the criteria and processes for decision-making; the applicability of the same criteria to civil litigation and to the advisory process; presumptive influences on lawyers; and the products of consequences of various forms of prosecutorial decision-making.

The Latent Pressure in Decision-Making?

What gets prosecutors moving? We may suppose there are two kinds of pressures, the latent pressures inherent in the institutional setting and the more active pressures that change from time to time. Prosecutors are pushed toward action by the offenses committed and reported. As a general rule, local prosecutors do not seem to go looking. They are more likely to wait for matters to come to them, principally by the actions of police. (United States Attorneys and State Attorneys General may be another matter.)

In criminal law the action is some "offense." Offenses may be some kind of ordinary crime (be it felony or misdemeanor) that generally does not bother the community very much if somebody is taking care of it. But there are also offenses that truly seem repellent. I call it repugnant deviancy. This includes

the action that "makes your skin crawl," as if you are told of somebody who punished a child by placing a hot iron against the child's skin.

There are times when behavior is deemed repugnant, though it is in the category of "crimes without victims." There was a time when this might have been the way to think about same-sex relationships. Clearly, social values and public policy have moved so that this is no longer correct. Sometimes formerly tolerated acts become repugnant, so that they are more than ordinary crimes. Indeed, one may wonder now if this is what is happening to spousal abuse in the United States, a subject on which Dianne White, a former prosecutor, is now working in political science at Brandeis. Organized crime or the conduct of commerce in defiance of the ordinary law, including defiance of the public control of physical violence, is still a different category. Finally, prosecutors sometimes have to come to terms with actions that become offenses if they are sacrilegious, if they undermine the body politic because they are seditious, because they violate the obligation of loyalty that the citizen has at some level. At base, prosecutorial discretion requires struggle with a permanent human problem, namely what is corrupt and when does corruption exist? The prosecutor is the social functionary designated to oppose corruption. There is no comparable function for public attention to the private sector, at least in the United States.

We can also say that there are latent pressures in the social identity of targets. I do not mean the persons whom some prosecutor will have been obliged to inform that he or she is a target in some investigation. I mean more generally the classes of persons and groups whom someone wants to get, even though the official power has not yet been invoked

The Criteria and Processes for Decision-Making?

Frank W. Miller, et. al. summarize a view of prosecutorial decision-making as grounded in four considerations, including: "the strength of the evidence, the suspect's background and characteristics, the costs and benefits of obtaining a conviction, and the attitude of the community toward the offense the suspect is believed to have committed," (Miller et. al., 795). George Cole covered some of the same ground, but gave more explicit emphasis to "exchanges" with other organizational entities in making the whole system work (Cole, 173-174). At the very least, the prosecutor is probably responsive to criteria of administration and of the necessity to work with other participants in the coercive machinery.

This tells us that, empirical research is surely needed into the extent to which prosecutors act in accord with judicial or quasi-judicial norms. Homer S. Cummings, who was Attorney General for six years under Franklin Delano Roosevelt, was praised by J.A. C. Grant as "the great humanitarian . . . still best known for proving the innocence of a confessed murderer he was called upon to prosecute" (Grant, 22; see also Swisher, 1939, xi.). At the least, it is an *important* empirical question as to whether prosecutors act on this basis a great deal of the time, just some of the time, or very little of the time. The ABA Journal, the National Law Journal, the law reviews and other sources report very little activity in the year 2000 that seems based on the Cummings model

Civil Litigation and the Advisory Process

The exercise of power by lawyers – the politics of "prosecution" in my broad sense—extends to the civil and advisory functions as well. We lose a lot by not recognizing that the criteria and relationships are, in very significant degree the same as in the criminal arena. The question of the strength of the evidence is, analytically, the same. The decision-maker has to conclude whether there is enough of a basis to warrant any further discussion. The term pejorative term "suspect" conjures up visions of some marauder sneaking down a dark alley. But the question could be equally put as: Does the person or the organization in question have some experience or pattern that catches our attention?

Very similar issues of costs and benefits arise. Imagine the decision by government attorneys to bring an environmental action, or to a file a complaint of discrimination in lending to buy a house, or to bring an antitrust suit. Is it worth it to the economy or the society? In the late 1930s, the Assistant Attorney General for Anti-trust was one Thurman Arnold and in the 1980s, under President Reagan, it was William F. Baxter. Arnold's concept of economic theory and sound public policy led him to favor vigorous action to break up large concentrations. Baxter's view was of the Chicago School. But they both acted on suppositions about costs and benefits to the economy and society in their actions. There is no logical difference between this concept as applied to economics and as applied to what the ordinary person calls crime.

Finally, the question of the 'attitude of the community' is virtually on all fours.

Moreover, the same criteria (set forth by Miller, et. al.) represent themselves as to advising the government client about what to do or what to avoid. This is shown in state attorneys' generals' treatment of freedom of religion decisions (Abraham & Benedetti, 795), of decisions with regard to abortion (Jones & Deardorff, 80-97), and of responses to Brown v. Board of Education and other decisions on racial segregation (Krislov, 1959, 75-92). It is also shown in the

decision-making about what the United States' brief should say in the *Bakke* appeal.

Presumptive Influences on Lawyers

If the criteria for decision-making are more or less commonly understood and articulated, there is a real question as to how the criteria are activated? We should expect study will show that prosecutors' offices are responsive to at least four sets of influences, some of which will have been internalized by prosecutors and some of which will be received only as external demands.

1. Lawyer relationships

Lawyers carry certain role definitions that are part of their formal schooling and training. Legal education is a process of resocialization. People acquire beliefs to which they hold firmly. The "law" is one of those. What the lawyer believes is reinforced by awareness that most of his or her professional associates in private practice will be sitting in judgment as lawyers. The prosecutor *is* a lawyer, and deals with other lawyers all the time, and has his/her respect and practical future tied up with what the Bar thinks. Their judgments will influence both the distribution of contempt and esteem and the opportunity for material gain.

2. Party/group relationships

As a political official in more limited sense, he probably is somewhat responsive to the standards of the specific political organization or clique with which he or she is associated, as well as to the general rules of the subculture of the politicians. These are the relationships that Janet Reno and Kenneth Starr equally were denying when they said their decisions were not political. These also are the relationships that lawyers are trained to believe should not interfere with their professional obligations.

3. Media and Other Pressures

Krislov made the point, four decades past, that we should better understand how public opinion is conveyed to public officials and translated into public action (Krislov, 1959, 76). David Pritchard has reported how conscious prosecutors are of what is reported, and that the likelihood of negotiating a case, rather than fighting it in court, diminishes with publicity. Newt Gingrich observed, experientally rather than from research, that an Independent Counsel almost cannot afford, after a vast amount of publicity and a vast expenditure, to quit without bringing somebody to trial (Gingrich, Oral Comment, 2000). In view of the increasing scope of public reporting, it is urgent that some capable person undertakes a study of publicity in the prosecutorial process and determine what its consequences are.

4. Inter-Organizational relationships

The "exchange" relationships in the local level criminal justice system (Cole, 171) were first pointed out to us by Moley (1929). These are inter-organizational relationships. There are many variations to be sought in agencies' disposition, strategies, and tactics as they work with and against each other. The maintenance of a comfortable jurisdiction is a key variable (Holden, 1966, 943-951). The FBI cooperated in the famous sting of Mayor Marion Barry of Washington, D. C., according to one agent, only because they were out-maneuvered by the United States Attorney for the District of Columbia. They were afraid to lose turf if they declined (Revell, 408-412). Similar inter-organizational disputes may be at play elsewhere. William B. Gould,, a former chair of the National Labor Relations Board, for example, accuses the Solicitor General of refusing to take account of the NLRB's views of how antitrust litigation against baseball owners should be handled, and of misrepresenting the situation when four justices asked about it at oral argument (Gould, 138-141).

These inter-organizational relationships also lead us to examine the intervention of political superiors, including Presidents. I briefly mention three such cases of presidential intervention, but must reserve discussion of them for another time. The cases are: (a) President Jefferson's active role in directing the prosecution of Aaron Burr on treason charges (Lomask, 1982, 225-238; Malone, 1974, 291-346; Warren, 301-315); (b) President Fillmore's direction to the U.S. District Attorney in 1851 in a case involving the killing of a white man from Maryland who went into Pennsylvania to retrieve his slave property (Katz, 1874; Robbins 1852, 1970); and President Hoover's active role encouraging the prosecution of Al Capone (Bergreen, 368). Is there an empirical theory of decision-making that expects a President not to intervene on important matters?

Consequences

My view is that we can move forward on the predicate that we are studying power, and that the politics of prosecution is the central exercise of power by lawyers, more important in total than that of judges even. Finally, a political science of law could profitably consider the consequences of various forms of prosecutorial decision-making. In each class of event that I have designated, what is the ascertainable social or political consequence of the official action that is taken? What does it have to do with the control or reduction of ordinary crime, with repugnant deviancy, or with organized crime? What are the consequences of corruption prosecutions to the political system? How is the exercise of power by lawyers related to faction, in the most extreme sense, and to the stability of the political order?

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The Participants
MATTHEW HOLDEN, JR. AND PAUL LAWRENCE
DEPARTMENT OF POLITICAL SCIENCE
UNIVERSITY OF VIRGINIA

The workshop from which this symposium grew was convened by Matthew Holden, Jr., Henry and Grace M. Doherty Professor of Government and Foreign Affirs at the University of Virginia, using research funds provided by the University of Virginia.Invitations were based upon respoinses to an earlier inquiry to the Law and Courts Listserve. The participants and some of their interests are as follows:

Yoav Dotan, Professor, Faculty of Law, Hebrew University. Currently working on government lawyers' decision-making in Israel.

James Eisenstein, Professor of Political Science and program director, Center for the Study of Public Policy, Institute for Policy Research and Evaluation, Penn State University

Katy Harriger, Professor of Political Science, Wake Forest University. Currently working on the differing conceptions of separation of powers and the respective effects they exert on government actors, particularly government lawyers. Past research has considered the debate between formalist and functionalist understandings of separation of powers and the relation to the Independent Counsel.

Matthew Hennigar, PhD Candidate, McGill University. Current Research examines the role of government litigation plays a pivotal role in Canadian politics, particularly since the adoption of the Charter of Rights and Freedoms in 1982 and subsequent explosion of rights-based judicial review.

Patrick Jones, U.S. Customs Service. Currently writing on "criminalization of the political process."

Paul Lawrence, Doctoral Candidate, University of Virginia. Research interests include "bargained regulation," which refers to the process in which government lawyers in regulatory agencies negotiate the substance of rules with the regulated.

Lynn Mather, Nelson A. Rockefeller Professor of Government, Dartmouth College

Paul Mullen, J.D., University of Pittsburgh, former assistant attorney general in West Virginia.

Andrew Whitford, RWJF Scholar in Health Policy Research Program, School of Public Health, University of Michigan.

Edward Schwartz, Professor of Government, Harvard University. Current Research interests focus on how laws that govern trial procedures impact the balance of power between competing interests.

Jinney Smith, Northwestern University (ABD). Currently working on lawyers' role in advising legislators.

Stephen Wasby, Professor Emeritus of Political Science, University at Albany.

Matthew Holden, Jr., as the convener, appreciates the interest of all who participated and particularly acknowedges a long flow of communications with Stephen Wasby, Andrew Whitford, and Dianne White. A web-site is being created at the University of Virginia entitled "Conference on Lawyers n Government, with Paul Lawrence acting as the webmaster. For more information contact Holden at mh3q@virginia.edu or Lawrence at pl3w@virgnia.edu

ATTENTION TO AMERICAN STATES IN UNDERGRADUATE CLASSES: A COMMNETARY ON RECENT SURVEY RESULTS

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DEPARTMENT OF POLITICAL SCIENCE
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While it is common to think of our Congress, President, state legislature and/or governor as sources of the policies that affect our daily lives, it is clear that the final word on many issues of public policy is in the hands of state courts. These judicial actors provide an alternative vehicle for making public policy in the American states and a mechanism to protect individual rights and liberties beyond the protection afforded by the United States Constitution. A prominent scholar of American state courts recently observed, "With the power to resolve the vast proportion of the nation's legal disputes, and with recent shifts in federal-state relations, the ability of state courts to affect the distribution of wealth and power in the United States is at a zenith (Hall 1999, 115)." Moreover, members of state courts of last resort often are called upon to determine the constitutional fate of state legislation on a broad range of policy issues. As a result, many policies governing the daily lives of citizens are resolved by the votes of state supreme court justices, often making these actors the final arbiters of state public policy. The fact that the United States Supreme Court hears very few cases and that only a minuscule number of state supreme court decisions are reviewed by the Supreme Court also contributes to the finality of state supreme court decisions. For example, less than ten percent of the Supreme Court's 1998 docket was comprised of decisions appealed from state supreme courts. And during 1995-1998 the Supreme Court reviewed an average of fifteen state supreme court decisions per year, which is only a small fraction of the number of disputes resolved by state supreme courts each year.2

It is hard to deny the growing importance of state courts in policymaking. Yet, some of the most basic information about state courts, and in particular, state supreme courts remains elusive. It is the premise of this commentary that there is a substantial imbalance between the importance of state supreme courts in American politics and public policy, and the extent of our knowledge and understanding of how these institutions function, including how the justices make decisions. This paucity of research on state supreme courts has had detrimental consequences in our teaching of both undergraduate and graduate students. Too often in both research and teaching, discussions about the actors and processes in the American states are shortened or omitted in order to cover the federal government. Such omissions are often due to lack of research and information on these courts. To assess the extent of the gap in our teaching of American state courts, I conducted a survey of 125 randomly selected members of the Law and Courts section of the American Political Science Association.3 The mail survey was conducted during the months of February, March, and April 2000, and asked respondents four questions about the amount of attention they devoted to American state courts in various undergraduate courses. Respondents were also asked to provide the year they received their doctorate and the number of courses taught per semester. The response rate was fifty-nine percent.4 Of the seventy-one completed surveys, ninety percent of the respondents (N=64) teach political science courses, and in particular, judicial process. The number of respondents who said they taught civil liberties/constitutional law, and law and society courses was sixty-one respondents and twenty-six respondents, respectively.

Survey Results on Attention to American State Courts in Undergraduate Courses

Given that American state courts may not be appropriate topics for all undergraduate political science courses, I first asked how much time, generally, professors spend on American state courts in the political sciences courses they teach.5 The survey results presented in Table 1 indicate that most judicial scholars spend at least some time (between one and twenty-four percent) discussing American state courts in political science undergraduate courses. Another nine percent of the respondents spend between twenty-five and fifty percent of the semester on American state courts, whereas fifteen percent of the respondents do not spend any time on American state courts in the political sciences courses they teach.

Table 1. Amount of Time Spent on American State Courts all Undergraduate Political Science Courses

Survey Response	Frequency	Percent	Cumulative %
No Attention to American State Courts	11	15.56	15.56
Less than 25% of time Spent on American State Courts	51	75.56	91.11
Between 25-50% of time Spent on American State Courts	6	8.89	100.00
Number of survey respondents who teach these courses	68	100.00	

Table 1 paints a reasonably optimistic picture, but also raises an obvious question regarding which courses professors devote time to American state courts. The survey results presented in Tables 2, 3, and 4, are intended to help answer this question. Overall, the results suggest that students taking courses that are commonly cataloged as public law or judicial process courses receive relatively little exposure to American state courts. Of the respondents who teach constitutional law and civil liberties, sixty-four percent indicated that they do not spend any time on American state courts during the semester and another twenty-eight percent of the respondents said they spend less than twenty-five percent of class time on these lower state courts.

Table 2. Amount of Time Spent on American State Courts in Civil Liberties/Constitutional Law Undergraduate Courses

Survey Response	Frequency	Percent	Cumulative %
No Attention to American State Courts	39	63.9	63.9
Less than 25% of time Spent on American State Courts	17	27.9	91.8
Between 25-50% of time Spent on American State Courts	5	8.2	100.00
Number of survey respondents who teach these courses	61	100.00	

That professors spend any time on state courts in these classes actually is surprising given that the primary foci are decisions by the United States Supreme Court. Some of the cases reviewed by the Supreme Court, however, originate from state courts, which might explain the attention devoted to sub-national courts in these courses. In law and society courses, however, the topics often covered pertain to issues of public policy and the role the judicial system plays in daily life. Here, where we might expect greater attention to American state courts, the results were surprising. As Table 3 indicates a relatively high percentage of survey respondents said they spend little, if any, time talking about state judicial systems in this course. On the other hand, over thirty percent of the respondents said they spend a quarter or more of the semester on American state courts in law and society courses. Some of these respondents also offered written comments, noting that they view law and society courses as excellent opportunities to introduce students to the policy impact of court decisions, particularly decisions made by "backyard courts that are much less distant than the Supreme Court".

Table 3. Amount of Time Spent on American State Courts Law and Society Undergraduate Courses

Survey Response	Frequency	Percent	Cumulative %
No Attention to American State Courts	11	42.3	42.3
Less than 25% of time Spent on American State Courts	6	23.1	65.4
Between 25-50% of time Spent on American State Courts	7	26.9	92.3
Between 50-75% of time Spent on American State Courts	1	3.8	96.2
More than 75% of time spent on American State Courts	1	3.8	100.0
Number of survey respondents who teach these courses	26	100.00	

I also asked participants how much attention they devoted to American state courts in American judicial process. In this course, I expected the greatest amount of attention devoted to American state courts; yet, over half of the respondents indicated that they completely ignore American state courts when they teach the about the American legal system (e.g., judicial process course). Although, the survey also shows that fifty percent of the respondents said they spent at least some time on American state courts, only about twenty-five percent of these respondents said they spend a quarter or more of the semester on American state courts.

Table 4. Amount of Time Spent on American State Courts in Judicial Process Undergraduate Courses

Survey Response	Frequency	Percent	Cumulative %
No Attention to American State Courts	33	51.6	51.6
Less than 25% of time Spent on American State Courts	15	23.4	75.0
Between 25-50% of time Spent on American State Courts	10	15.6	90.6
Between 50-75% of time Spent on American State Courts	5	7.8	98.4
More than 75% of time spent on American State Courts	1	1.6	100.00
Number of survey respondents who teach these courses	64	100.00	

The survey results in Table 4 were somewhat disturbing, especially from the perspective of one who studies American state institutions and, in particular, courts.6 An obvious question is, *why is so little attention devoted to American state courts in undergraduate courses designed to teach students about the entire American legal system?* An understanding of the entire American legal system presumably requires an understanding of American state courts; yet more than half of the survey respondents solely focus on the federal court system. Some of the first discussions I had as a student of judicial politics involved some of the fundamental characteristics of the American legal system, such as its hierarchical and adversarial relationships, and the notion of concurrent jurisdiction. Moreover, I recall reading intense debates about the creation and evolution of the American Federal judicial system that emerged from numerous battles between state advocates and Federalists, and how the federal and state system arguably provides a compromise for differing interests. I also recall having informative discussions about plea-bargaining and methods of selection and retention that primarily focused on American state courts. My point is that these survey results, in my mind, raise an intriguing question; *how are students truly appreciating and understanding the meaning of these concepts, the structure of the American legal system, and the implications of judicial process and judicial decision without a discussion of both federal and state courts?*

In this section I offer one answer, though admittedly not the only or necessarily even the best. Perhaps one reason there is less attention devoted to teaching American state courts in undergraduate classes, especially in the courses where we would expect a lot more discussion about these courts, is due primarily to the deficiency in scholarly publications on American state courts. I suggested earlier that there is an imbalance between the importance of state supreme courts in American politics and the extent of our knowledge about these courts and this has implications for teaching. Indeed, there are several outstanding publications on American state courts, including books and journal articles. However, Brace, Hall, and Langer (2000) recently documented that there is considerably less published on American state courts than on the federal courts, and, in particular the United States Supreme Court. In many instances, there simply is not enough published information to provide adequate coverage of state court topics in the classroom. The survey results presented in Table 5 seem to support this contention. Many of the respondents indicated that most judicial process textbooks do not cover American state courts. One survey respondent commented that, "I spend as much time as I can on state courts in my *Courts* class; the problem is a serious lack of information on state courts in most judicial process texts…. I find it very frustrating." Another survey respondent noted that "locating textbooks on state courts is like finding a needle in a haystack….I simply don't have the time." Others observed that time spent on American state courts in judicial process courses is important, but they add that the importance of state courts is greater now than ten or so years ago.

Table 5 Proportion of Judicial Process Text Book that is Devoted to American State Courts

Survey Response	Frequency	Percent	Cumulative %
No Attention to American State Courts	26	40.6	40.6
Less than 25% of time Spent on American State Courts	15	23.4	64.1
Between 25-50% of time Spent on American State Courts	20	31.3	95.3
Between 50-75% of time Spent on American State Courts	2	3.1	98.4
More than 75% of time spent on American State Courts	1	1.6	100.00
Number of survey respondents who teach these courses	64	100.00	

Combined the statements above provide some anecdotal evidence of a connection between lack of publications and less attention to American state courts in judicial process courses. While the number of observations is admittedly small,

regression analysis is even more informative. Using the individual level data presented in Table 4, I employed OLS to test the following three hypotheses:

> H1: As the number of scholarly publications on American state courts in top journals increases at the time one's Ph.D. is received, the amount of attention devoted to American state courts in the classroom is expected to increase;
>
> H2: As the ratio of publications on federal courts to state courts increases since one received his/her Ph.D., the amount of attention devoted to American state courts in the classroom is expected to decrease; and
>
> H3: The amount of information on American state courts in judicial process books will be positively related to the amount of class time spent on American state courts in judicial process courses.

As the results presented in Table 6 show, there is significant empirical support for the three hypotheses above. Students of judicial politics who earned their degree when there were more publications on American state courts spend significantly more time in their judicial process courses teaching students about American state courts. The opposite is also true: a decrease in the number of publications on state courts is associated with a decrease in the amount of attention to these courts in the classroom. The results also demonstrate that when the number of publications on federal courts exceeds the number of publications on state courts, there is significantly less time spent on American state courts in judicial process courses.7 Moreover, when the textbook used in the class provided more coverage of American state courts, the professor also spends more time covering these courts in the classroom. Finally, the regression analysis controlled for the number of courses taught per semester; however, this variable was not statistically significant. Overall, the results demonstrate that research (i.e., publications) is directly linked to teaching. Both the absolute number of publications on American state courts and the relative number of publications on American state courts apparently is shaping the topics covered in undergraduate judicial courses and the amount of attention devoted to those topics.

Table 6. OLS Regression of Time Spent on American State Courts in Undergraduate Jud. Process Courses

Covariate	Coefficient	S.E.	t-statistic
# of Publications on American State Courts at Time Ph.D. was Received	.202	.088	2.28
Ratio of Publications on Fed. Courts to American State Courts since Ph.D.	-.005	.002	-2.72
Prop. of Book used in Jud. Process Course Devoted to American State Crts	.960	.052	18.44
Number of Courses Taught Per Semester (control variable)	.172	.121	1.43
Constant	.395	.160	2.44
Adjusted R-square	.87		
N = Number of survey respondents who teach these courses	64		

So what does this all mean? Overall, the survey results perhaps are not too surprising for those who study state judicial systems; however, the numbers should be unsettling to all. American state courts resolve over ninety-nine percent of the disputes in this country (Hall 1999). And most interactions that our students will have with the judicial system will occur at the state level, especially the high number of students who will continue their education to get a law degree. Moreover, to understand the workings of the United States Supreme Court, the hierarchical structure of the judicial system, and the role of federalism in the American legal system, at the very least, one must have a basic understanding of American state and local courts. In short, without even basic information about state supreme courts, we cannot advance a complete understanding of the American legal system. Perhaps we can do a better job at teaching students about the entire judicial system; armed with more information about sub-national courts and greater scholarly attention to these courts we can do a better job. One of the most important findings from this analysis is that the most significant reason for sparse attention to American state courts in the classroom is lack of published academic research on the subject. This finding is suggestive that there are too few books that pay attention to American state courts, and too few articles published on American state courts in the most influential journals. Quite simply, the results of this survey and the analysis identifies a growing, alarming gap between American state courts and the amount of scholarly attention to these courts in both the literature and the classroom. 8

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Notes

1 I am grateful to Paul Brace and Melinda Gann Hall for comments on an earlier version of this manuscript. All errors remain my responsibility.

2 The number and percentages of state supreme court cases on the Supreme Court's docket were tabulated from the Spaeth Supreme Court database.

3 The names were selected randomly from the official membership mailing list, which contained 740 members of the Law and Courts Section of the APSA. I included in the list from which I drew the random sample, only members who had received their Ph.D. and lived in the United States. I am grateful to Cornell Clayton and Lee Epstein for graciously providing the membership list and addresses for the sole purpose of this survey. I am also grateful to Bill Mishler and the department of political science at the University of Arizona for funding the survey.

4 Of the 125 mailed questionnaires, 4 were returned due to incorrect address.

5 A complete copy of the survey is available on the Internet at the following location: http://www.u.arizona.edu/~llanger/surveyhtml.htm

6 Of course, it is important to keep in mind that the random sample represents a small portion (about 15 percent) of those who teach judicial process courses in this profession.

7 I collected the number of publications on American state courts and American federal courts for the 1960-1999 time period counting only articles published in American Political Science Review, American Journal of Political Science, and Journal of Politics. I am grateful to Ashlyn Knersten for sharing her data on journal publications for validity checks (see Thomas R. Hensley and Ashlyn Knersten 1997. "Studying the Studies: An Assessment of Judicial Politics Research in Four Major Political Science Journals, 1960-1995." *Law and Courts Newsletter*; Winter 1996-1997).

8 This survey finding also is one of the fundamental premises of the Brace/Hall NSF Collaborative State Supreme Court Database Project as noted in Paul Brace and Melinda Gann Hall. 2000. "Comparing Courts Using the American States." *Judicature* 83 (March-April): 250-266.

BOOKS TO WATCH FOR

HELENA SILVERSTEIN
LAFAYETTE COLLEGE

New York University Press has announced that *Morality Imposed: The Rehnquist Court and the State of Liberty in America*, by **Stephen E. Gottlieb** (Albany Law School) is scheduled for release by the end of 2000. To what extent do jurists decide cases in accordance with their own preexisting philosophy of law, and what specific ideological assumptions account for their decisions? Stephen E. Gottlieb explores this question in this detailed study of the Rehnquist Court. *Morality Imposed* illustrates how, in contrast to previous courts which took their mandate to be a move toward a freer and/or happier society, the current court evidences little concern for this goal, focusing instead on thinly veiled moral judgments. Delineating a fault line between liberal and conservative justices on the Rehnquist Court, Gottlieb suggests that conservative justices have rejected the basic principles that informed post-New Deal individual rights jurisprudence and have substituted their own conceptions of moral character for these fundamental principles.

Regina G. Lawrence's (Portland State University) new book, *The Politics of Force: Media and the Construction of Police Brutality* (University of California Press, November 2000), examines the intense interaction that occurs between the media, the public, and the police when police brutality becomes front-page news. Lawrence demonstrates how these news events provide the raw materials for the perception of underlying problems in American society. Journalists, policy makers, and the public use such stories to define a problematic situation, and this problem-definition process gives the media a crucial role in our public policy debates. Analyzing coverage in the *New York Times* and the *Los Angeles Times* of more than five hundred incidents of police use of force from 1981 to 1991, the author reveals the structural and cultural forces that both shape the news and allow police to define most use-of-force incidents.

Continuity and Change on the United States Courts of Appeals, by **Donald R. Songer** (University of South Carolina),

Reginald S. Sheehan (Michigan State University), and **Susan B. Haire** (University of Georgia), was released in October 2000 by the University of Michigan Press. As the Supreme Court has the discretion to refuse most cases appealed to it, the Courts of Appeals are often the final option for litigants in the federal system. Unless overturned by the Supreme Court or, as in cases decided on the basis of statute, by congressional action, the rulings can have a significant impact on government policy. Presenting the first comprehensive examination of the shifting role of the Courts of Appeals, the authors investigate changes over time and present the first systematic analyses of those changes. Who are the judges? What are their decisional tendencies? What has been the role of regional and partisan politics? Who are the litigants? Who has won and who has lost throughout the twentieth century? Utilizing the database of the U.S. Courts of Appeals, the authors answer these and other questions by examining over 15,000 cases and exploring trends between 1925 and 1988.

Battered Women and Feminist Lawmaking, by **Elizabeth M. Schneider** (Brooklyn Law School), was published in October 2000 by Yale University Press. In this book, Schneider shows how we've moved from a society that believed in a husband's absolute right to "chastise" his wife to one that recognizes the criminality of domestic violence. She explains the often overlooked significance of feminist vision in this dramatic change; she gives us a history of the legal steps that have led us to this point; and she explains how domestic violence law has begun to drift from its roots in feminist legal advocacy, and the risks that drift might pose. While we live in a nation that now recognizes that violence against women is a serious harm, Schneider demonstrates that progress toward this achievement has been uneven, marked by significant setbacks, deep resistance, and subversion of the feminist ideas that first drove us toward change. Pointing the way toward future progress, Schneider argues that we must see clearly the ways domestic violence is linked with gender inequality and affirm the feminist vision of equality and freedom that has animated the fight for legal protection from domestic battery.

Peter Lang Publishing has recently published *The Real Clarence Thomas: Confirmation Veracity Meets Performance Reality* by **Christopher E. Smith** (Michigan State University) and **Joyce A. Baugh** (Central Michigan University). By comparing Thomas's sworn testimony before the Senate Judiciary Committee about his judicial philosophy with the content of his subsequent judicial opinions, Smith and Baugh pose the question whether sufficient evidence can exist to conclude that a judicial nominee was untruthful during confirmation hearings. They focus on the number, immediacy, and intensity of contradictions between a nominee's testimony and the later judicial opinions as providing the basis for concluding that a nominee lied. They suggest that impeachment proceedings should be considered when there are significant, immediate, and continuing contradictions between nomination testimony and judicial opinions.

Stephen M. Caliendo's (University of Missouri - St. Louis) new book, *Teachers Matter: The Trouble with Leaving Political Education to the Coaches*, is now available from Praeger. The book discusses the results of a comprehensive study of how students learn about American Government. The working premise is that while many political attitudes formed during adolescent socialization are open to change throughout one's life, latent attitudes that are not salient and, thus, are not challenged with new information provided by media or other communications are more likely to persist into adulthood. The book focuses on diffuse support for the United States Supreme Court, and argues that how students are taught about the Court in high school is likely to have a particularly lasting effect due to the Court's relative invisibility. Drawing from interviews with teachers, analysis of Government textbooks and student surveys, the findings suggest that teachers make a difference in how students perceive parts of the political system (particularly the Supreme Court). Putting the social sciences on the back burner may have important ramifications, as students are not asked to think critically about the American political system and their role within it.

University of California Press has just published *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism*. In this edited volume, **Robert A. Kagan** (University of California, Berkeley) and **Lee Axelrod** have collected 12 essays that address the following questions: In the global marketplace, are national systems of law and regulation converging, or does the American legal system remain distinctive? Do national differences in regulation result in significant differences in the costs of doing business and in environmental and consumer protection? The essays included in this volume explore these questions within the context of three specific areas: environmental regulation, legal rights and litigation, and product safety regulation.

Section News and Awards

Nominations For Lifetime Achievement Award

A Committee has been formed and nominations are being accepted for the Lifetime Achievement Award given by the Law and Courts Section.

The Lifetime Achievement Award is given every year to honor a distinguished career of scholarly achievement and service in the field of law and courts. Any political scientist who has been active in the field for at least 25 years or has reached the age of 65 years is eligible. Nominations may be made by any member of the Section and should consist of a statement outlining the contributions of the nominee and, if possible, the nominee's vitae.

THE DEADLINE FOR NOMINATIONS FOR THE 2001 AWARD IS JANUARY 1, 2001. This early deadline is necessary in order to enable the formation of a panel honoring the individual receiving the award and the listing of the panel in the APSA Preliminary Program.

Nomination materials should be sent to the Chair of the Committee who will forward them to other members. This year's committee is:

Doris Marie Provine
Tel: 315-443-2416
Chair, Lifetime Award Committee
1910 N. Ohio St.
Arlington, VA 22205
tel: 703-292-7280
fax: 703-292-9195
dprovine@nsf.gov

D. Provine AFTER December 20
mprovine@syr.edu
Dept. of Political Science,
100 Eggers Hall
Syracuse University
Syracuse, NY 13244-1090

Gary Jacobsohn
Gary.J.Jacobsohn@williams.edu

Bruce Murphy
murphyb@mail.lafayette.edu

Charles Johnson
cjohnson@tamu.edu

Jennifer Segal
JSegal@ussc.gov

Law and Society Association

While the vote for President of the United States is in doubt, the vote for President of the Law and Society Association is not. Congratulations to **Lynn Mather** (Dartmouth College) on her election and also to **Lee Epstein** (Washington University) and **Chuck Epp** (University of Kansas) for their election as trustees of the Association. This may be the first time that Law and Courts members have won election to these offices at the same time.

Sheldon Goldman
Chair, Law and Courts Section

The C. Herman Pritchett Award (book award)

The C. Herman Pritchett award is given annually for the best book on law and courts written by a political scientist and published the previous calendar year (i.e. copyright 2000 for the current competition). Case books and edited books are not eligible. Books may be nominated by publishers or by members of the Section. The award carries a cash prize of $250.

Authors of books that meet the criteria may wish to contact their publishers to alert them of the competition.

The deadline for nominations is February 1, 2001.

To be considered for the competition, a copy of the nominated book should be submitted to each member of the award committee along with a cover letter indicating that it is a nominee for the Law and Courts Section's C. Herman Pritchett Award.

The members of the committee are:

Professor Susan E. Lawrence
Chair, C. Herman Pritchett Award
Department of Political Science
Rutgers, The State University of New Jersey
Hickman Hall, D.C.
89 George Street
New Brunswick, NJ 08901-1411
Phone: (732) 932-8566
Fax: (732) 932-7170
Slawren@rci.rutgers.edu

Professor Virginia A. Hettinger
Indiana University
Department of Political Science
Woodburn Hall 210
Bloomington, IN 47405
Phone: 812-856-4709
vhetting@indiana.edu

Professor Ronald Kahn
Oberlin College
Department of Politics
Rice Hall, Rm. 216
Oberlin, Ohio 44074
Email: ronald.kahn@oberlin.edu
Phone: Office 440-775-8495
Department Office 440-775-8487
Fax: 440-775-8898 or 440-775-8886

The American Judicature Society Award

The American Judicature Society Award is given annually for the best paper on law and courts presented at the previous year's annual meetings of the American, Midwest, Northeastern, Southern, Southwestern, or Western Political Science Associations. Single- and co-authored papers, written by political scientists, are eligible. Papers may be nominated by any member of the Section. The award carries a cash prize of $100.

Next year's nomination deadline is February 1, 2001. To be considered or the competition, a copy of the nominated paper should be submitted
to each member of the award committee:

Michael McCann, Chair
American Judicature Society Award Committee
Department of Political Science
Box 353530
University of Washington
Seattle, WA 98195
mwmccann@u.washington.edu
Phone: (206) 543-2780
Fax: (206) 685-2146

Charles M. Cameron
Department of Political Science
Columbia University
New York, NY 10027
cmc1@columbia.edu
Phone: (212) 854-4302
Fax: (212) 222-0598

Susan E. Grogan
Department of Political Science
St. Mary's College of Maryland
18952 E. Fisher Rd.
St. Mary's City, MD 20686-3001
segrogan@osprey.smcm.edu
Phone: (301) 862-0205
Fax: (301) 862-0450

The McGraw-Hill Award

The McGraw-Hill is to be given annually for the best journal article on law and courts written by a political scientist and published the previous year. Articles published in all refereed journals and in law reviews are eligible but book reviews, review essays, and chapters published in edited volumes are not. Articles may be nominated by journal editors or by any member of the Section. The award carries a cash prize of $250.

The deadline for nominations is February 1, 2001. This is the first time that the Award is being made. To be considered for the competition, a copy of the nominated article should be submitted to each member of the award committee:

Sanford Levinson, Chair
McGraw-Hill Award Committee
School of Law
University of Texas
727 East Dean Keeton St.
Austin, Texas 78705-3224
SLevinson@mail.law.utexas.edu
Phone: (512) 232-1351
Fax: (512) 471-6988

Barbara L. Graham
Department of Political Science
347 SSB
University of Missouri-St. Louis
St. Louis, Missouri 63121
barbara.graham@umsl.edu
Phone: (314) 516-5854
Fax: (314) 516-5268

Kathy Moore
Department of Political Science
University of Connecticut
Storrs, Connecticut 06268
kmoore@uconnvm.uconn.edu
Fax: (860) 486-3347

The CQ Press Award

The CQ Press Award is given annually for the best paper on law and courts written by a graduate student. To be eligible the nominated paper must have been written by a full-time graduate student. Single- and co authored papers are eligible. In the case of co-authored papers, each author must have been a full-time graduate student at the time the paper was written. Papers may have been written for any purpose (e.g., seminars, scholarly meetings, potential publication in scholarly journals). This is not a thesis or dissertation competition. Papers may be nominated by faculty members or by the students themselves. The papers must have been written during the twelve months previous to the nomination deadline. The award carries a cash prize of $200.

Next year's nomination deadline is June 1, 2001. To be considered for the competition, a copy of the nominated paper should be submitted to
each member of the award committee:

James Foster, Chair
CQ Press Award Committee
Department of Political Science
Oregon State University
Social Science Hall 307
Corvallis, Oregon 97331-6206
james.foster@orst.edu
Phone: (541) 737-2811
Fax: (541) 737-2289

Joyce Baugh
Department of Political Science
Anspach Hall 247
Central Michigan University
Mt. Pleasant, MI 48859
Joyce.Baugh@cmich.edu
Phone: (517) 774-3442
Fax: (517) 774-1136

Gerard S. Gryski
Department of Political Science
Auburn University
Auburn, AL 36849
nyyanks@mail.auburn.edu
Phone: (334) 844-9644
Fax: (334) 844-5348

The Harcourt College Publishers Award

The Harcourt College Publishers Award is given annually for a book or journal article, 10 years or older, that has made a lasting impression on the field of law and courts. Only books and articles written by political scientists are eligible; a single-authored work produced by a winner of the Lifetime Achievement Award is not. Nominations may be made by any member of the Section and should consist of a statement outlining the nature of the contribution of the nominated work. The award carries a cash prize of $250.

Next year's deadline for nominations is February 1, 2001. To be considered for the competition, the name of the nominated book or article should be submitted to each member of the award committee:

Christine Harrington, Chair
Harcourt College Publishers Award
Director, Institute for Law and Society
New York University
Fuchsberg Hall, 305
249 Sullivan Street
New York, NY 10012
Christine.Harrington@NYU.edu
Phone: (212) 998-8536
Fax: (212) 995-4034

Keith J. Bybee
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Littauer Center G-8 (North Yard)
Harvard University
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Phone: (617) 496-5204
Fax: (617) 495-0438

David Yalof
Department of Political Science
University of Connecticut
Storrs, Connecticut 06268
yalof@uconnvm.uconn.edu
Phone: (860) 486-0416
Fax: (860) 486-3347

PROFESSSIONALIZATION SHORT COURSE

KEVIN T. MCGUIRE
DEPARTMENT OF POLITICAL SCIENCE
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

Late last fall, the Organized Section on Law & Courts decided to offer a short course on professional development at the 2000 Annual Meeting. The aim was to provide guidance to advanced graduate students and junior faculty on issues critical to new political scientists. Though uncertain of how much interest it might generate, Rorie Spill of the University of Northern Iowa and myself set about putting together a group of panelists who might share their collective wisdom on such subjects as interviewing and placement, developing a successful agenda for publishing and securing grants, and preparing for promotion and tenure. We were surprised and pleased—with both the impressive set of panelists who agreed to participate and the interest the program generated.

Among others, Ada Finifter of Michigan State University and Micheal Giles of Emory University provided insight into the operation of scholarly journals by discussing their experiences editing the American Political Science Review and the Journal of Politics, respectively. Describing the workings of university presses, Gerald Rosenberg of the University of Chicago explained how book manuscripts are considered for publication.

Similarly, as a former chair at Emory University, Thomas Walker highlighted how departments evaluate job applications, while recently placed junior scholars, such as Sara Benesh of the University of New Orleans and Timothy Johnson of the University of Minnesota described some of their experiences in interviewing and adjusting to a new academic position. From the National Science Foundation, Doris Marie Provine stressed the importance of competitive grants for research support. Lee Epstein of Washington University in St. Louis and Paul Wahlbeck of George Washington University offered thoughtful commentary on how best to prepare for the various audiences evaluating the junior scholar's credentials.

The short course, in my view, provided clear evidence that there is a substantial interest in professional socialization among new political scientists. Nearly 100 people participated in the program, an impressive turnout by the standards of most short courses, and those who attended were quite vocal in expressing both their enthusiasm for the program and their interest in having future opportunities to discuss their special professional needs.

APSA SMALL RESEARCH GRANT PROGRAM

APSA announces the Small Research Grant Program to support research in all fields of political science. The intent of these grants is to support the research of political scientists who are not employed at Ph.D. granting institutions and to help further the careers of these scholars. APSA welcomes proposals on significant problems in political science and would like to encourage scholars to submit proposals focusing on a significant element of the history of the political science discipline, profession, or the APSA, in celebration of the association's centennial in 2003. Applicants must be APSA members and political science faculty members at non-Ph.D. granting institutions, or political scientists not affiliated with an academic institution. Individual grants of up to $2500 may be used for such research activities as travel, administration and coding of instruments, research assistance, and the purchase of data sets.

For details, email: grants@apsanet.org, or write APSA Research Grants; American Political Science Association, 1527 New Hampshire Ave., NW ; Washington, DC 20036.

PROFFESIONALIZATION OPPORTUNITY: TEACHING CONSTITUTIONAL LAW TO UNDERGRADUATES

The Supreme Court Historical Society and the University of South Carolina Law School are pleased to announce the second "Teaching Constitutional History to Undergraduates" conference to be held Feb. 15-18, 2001, in Washington, D.C. The conference will feature speakers and discussions of topics including: the choice between competing canons, the incorporation of state constitutional histories into teaching about the U.S. Constitution, bringing relevant legislative histories into the teaching of particular constitutional provisions, and connecting constitutional history to the development of the American economy, among other relevant topics. A keynote address will be delivered by Kermit Hall at the Supreme Court; other invited speakers include: Michael Les Benedict, Cornell Clayton, Howard Gillman, Mark Graber, Sally Hadden, Herbert Johnson, Patricia Minter, Elizabeth Monroe, Wayne Moore, Douglas Reed, Howard Schweber, Melvin Urofsky, and others. In addition to enjoying paper presentations, attendees will take part in smallgroup discussions and make recommendations for ways to incorporate the speakers' comments into our teaching practices.

This promises to be a highly informative and valuable gathering for teachers of history, political science, or political philosophy who focus on the historical development of American constitutionalism. Space is limited, so if you are interested in attending please respond as soon as possible to program co-Chair Sally Hadden (513 E. Main Street, Bowling Green KY 42101). Please include your contact information, areas of interest, level of teaching experience (novice, intermediate, or senior), and whether you would be willing to submit a sample syllabus for distribution to the other conference attendees.

Costs: Registration (payable upon confirmation) costs $15 for graduate students, $25 for independent scholars, and $50 for scholars affiliated with a university. The hotel has arranged a special rate for conference attendees: $99 for singles or doubles, $109 for triples, and $119 for quads – reservations are required by January 25, 2001. Call 1-800-228-9290 and mention the conference. A limited number of subsidies, to cover registration fees, room and board, will be available for graduate students and entry level faculty members (persons applying for subsidy should indicate that fact with their registration materials.)

Questions may be addressed to: Sally Hadden (shadden@mailer.fsu.edu) or Howard Schweber (schweber@polisci.wisc.edu)

CONFERENCES, EVENTS AND CALLS FOR PAPERS

UPCOMING CONFERENCES

WINTER AND SPRING 2000-2001

CONFERENCE	DATE	LOCATION	CHAIR
SOUTHWESTERN POLI. SCIENCE ASSOC	MAR. 15-18	FORT WORTH, TX	BARBARA LUCK GRAHAM UNIV. OF MISSOURI-ST.LOUIS BARBARA.GRAHAM@USML.EDU
WESTERN POLITICAL SCIENCE ASSOC.	MAR. 15-17	LAS VEGAS, NV	HELENA SILVERSTEIN LAFAYETTE COLLEGE SILVERS@MAIL.LAFAYETTE.EDU
MIDWEST POLITICAL SCIENCE ASSOC.	APRIL 19-22	CHICAGO, IL	JEFFREY SEGAL SUNY STONY BROOK JEFF.SEGAL@SUNYSB.EDU
NEW ENGLAND POLITICAL SCIENCE ASSOC.	MAY 4-5	PORTSMOUTH, NH	THOMAS BURKE WELLESLEY COLLEGE TBURKE@WELLESLEY.EDU
LAW AND SOCIETY ASSOCIATION	JULY 4-7	BUDAPEST, HUNGARY	KIM LANE SCHEPPELE UNIV OF PENNSYLVANIA KIMLANE@LAW.UPENN.EDU
APSA	AUG 30 - SEP 2	SAN FRANCISCO, CA	LAW AND COURTS PAUL J. WAHLBECK, GEORGE WASHINGTON UNIV WAHLBECK@GWU.EDU CON LAW &JURISPRUDENCE NANCY MAVEELY TULANE UNIVERSITY NANCE@MAILHOST.TCS.TULANE.EDU

Law and Courts is the newsletter of the Law and Courts Section of the American Political Science Association.

Subscriptions to **Law and Courts** are free to members of the APSA's Law and Courts Section. Please contact the APSA to join the Section.

The deadline for submissions for the next issue of **Law and Courts** is April 1, 2001.

Law and Courts

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