

Prosecutorial Discretion

INTRODUCTION

Sara Sun Beale*

This symposium takes on the broad and important topic of prosecutorial discretion. Prosecutors in the United States wield enormous discretion at every stage of the criminal justice process, from the initial decision whether to bring charges to the decisions that conclude a case, including those relating to plea negotiations and sentencing.

This discretion is subject to relatively few checks. The present system operates in a fashion that is a far cry from the traditional adversarial trial-focused model, in which the defense challenges the prosecution's case in adversarial proceedings that culminate in a jury trial. Because only a tiny fraction of cases now go to trial, the traditional trial-related adversarial checks are absent in most cases.

Four of the articles in this symposium explore the effectiveness of various mechanisms intended to improve the performance of prosecutors and to hold them accountable. Two of the articles focus on the process of selecting prosecutors. Most states elect prosecutors, and Ronald Wright evaluates the effectiveness of this system of political accountability, drawing on new data measuring the electoral success of incumbent prosecutors as well as press accounts of the typical rhetoric in prosecutor election campaigns. In the federal system, U.S. Attorneys are appointed by the president with the advice and consent of the Senate, and Sara Beale uses the Bush Administration's firing of the U.S. Attorneys as the occasion for considering whether this system increases the likelihood that partisan politics will unduly influence federal prosecutions and should be replaced by a civil service merit appointment system. Two other articles consider structural or doctrinal changes that would alter incentives for prosecutors. Darryl Brown explores the political dynamics that promote legislative overcriminalization and give prosecutors excessive leverage, and he proposes a doctrinal solution, the revival of the merger doctrine, as one mechanism to respond to these problems. Stephanos Bibas, who characterizes prosecutorial discretion as a principal-agent problem, proposes compensation and rewards as a means to align prosecutors' incentives with the interests of voters, victims, and defendants.

The final two articles propose the creation of new ethical and professional duties to address the chronic problem of the wrongful conviction of factually innocent defendants. Robert Mosteller focuses on cases involving defendants who are innocent of the crime charged, but who have some past or present involvement

* Charles L.B. Lowndes Professor, Duke Law School, Durham, N.C.

in crime, and who stand accused only by informants whose testimony has been secured by the prosecutor's powerful promises of freedom in exchange for their incriminating testimony. Bruce Green and Ellen Yaroshefsky take up the question how prosecutors should exercise discretion when, after criminal proceedings have ended, new information casts doubt on a convicted defendant's guilt.